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Chair

Mr. Garry Breitkreuz

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● (1535)

[*English*]

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)): I'd like to bring this meeting to order.

This is meeting 6 of the Standing Committee on Public Safety and National Security. We are continuing with our study of Bill C-3, an act to amend the Immigration and Refugee Protection Act on certificate and special advocate and to make a consequential amendment to another act.

We have a number of witnesses we'd like to welcome this afternoon. We have the law or bar association from Quebec. We have also the Canadian Bar Association and the Federation of Law Societies of Canada.

According to the information I have, you agreed among yourselves that the Canadian Bar Association would go first, then the Federation of Law Societies of Canada, and last of all the Barreau du Québec.

The usual practice at this committee is to allow approximately ten minutes for an opening statement from each of you. Then, of course, we go to rounds of questions and comments.

If you're ready to begin, please introduce yourselves briefly, and then go ahead with your presentation.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair.

My name is Tamra Thomson, and I am the director of legislation and law reform with the Canadian Bar Association. With me today is Maître Isabelle Dongier, member of our national citizenship and immigration law section and one of a team of several lawyers who created the submission you have before you today.

Perhaps it would be best to start with a brief distinction among the various groups that appear before you today. The Federation of Law Societies is the umbrella organization of the various regulators of the legal profession, the law societies. And the Barreau du Québec is indeed one of those regulatory bodies within the province of Quebec, regulating the lawyers within Quebec.

The Canadian Bar Association can be distinguished from our colleagues the regulators, for while we are lawyers and all members of a law society, the Canadian Bar Association is a professional association that speaks for lawyers. Among our primary objectives are to work toward improvement in the law and improvement in the administration of justice.

It is in that optic that we have prepared the submission we are presenting to you today, and we look forward to your questions.

Ms. Isabelle Dongier (Lawyer and Member, Citizenship and Immigration Law Section, Canadian Bar Association): Thank you, Mr. Chair.

It is an honour to be here today to contribute to your important work on Bill C-3.

The right to a fair hearing is a fundamental value at the heart of the administration of justice in Canada. It dates from the Magna Carta. It distinguishes us from dictatorships, autocracies, and oligarchies. It defines us as a true democracy that protects the rights of the individual against the power of the state. It is all about the end not justifying the means.

The Canadian Bar Association, like all Canadians, denounces terrorism, of course. The government has a legitimate duty to protect its citizens, but in doing so we must not undermine our most fundamental values.

The Supreme Court of Canada in Charkaoui told us that the protection of national security does not justify the absence of an independent challenge to the government's case. In our view, Bill C-3 in its current state does not meet the constitutional concerns raised by the Supreme Court in Charkaoui. It does not go as far as it can to ensure a fair hearing, to ensure the individual knows the case against him.

You've heard some of them this morning, but let me remind you of some examples of why this is. Bill C-3 does not allow the special advocate to properly question or challenge the evidence. It also preserves the situation whereby some secret evidence is not tested because it may not be disclosed to the judge and to the special advocate. It allows the government to rely on evidence obtained under torture. It does not spell out the relationship between the special advocate and the named person, nor does it sufficiently detail the special advocate's role. In addition, it does not guarantee adequate infrastructure support for the special advocates.

These and other issues are outlined in our written submissions, and we also suggest a number of changes to bring the law into charter compliance. This morning you heard Mr. Waldman and Professor Forcese, and you will note a lot of similarities between our respective positions. The CBA endorses their recommended changes.

We believe there must be an express obligation on the government to fully disclose its evidence to the judge and the special advocate, not just the information it seeks to rely on.

I would like to focus on two aspects of the relationship between the special advocate and the named person. First of all, the special advocate's role is to protect the interests of the named person, but for him to be able to realistically challenge the government's evidence in an informed way, he must be entitled, as of right, to communicate with the named person even after the disclosure of the secret evidence. As Mr. Waldman told you this morning, of course this would be subject to an obligation not to disclose the secret evidence. Second, while this advocate is not in a solicitor-client relationship with a named person, we believe he should not be compelled to reveal information disclosed by the person. There should be no suggestion that the special advocate is becoming an arm of the state against the named person.

Our submission includes a number of recommendations. In our view, they are all necessary to meet the constitutional imperatives outlined by the Supreme Court, and we ask you to recommend these changes to the House.

Thank you.

● (1545)

The Chair: As you've done your submission, we will now go to the Federation of Law Societies of Canada.

Mr. Michael W. Milani (Q.C., President, Federation of Law Society of Canada): Thank you, Mr. Chair.

My name is Michael Milani. I am from Regina, Saskatchewan, and I am here in my capacity as president of the Federation of Law Societies of Canada. With me is Ms. Frederica Wilson, our director of policy and public affairs.

As the name denotes, and as my friend Ms. Thomson indicated, the federation is the umbrella organization for the regulator of the 95,000 lawyers and 3,500 notaries from Quebec. We're required by law to govern the legal profession in the public interest. Each law society is responsible for governing its own members. And I want to make it clear to the committee that the federation and its law societies do not act in the interest of lawyers. They regulate lawyers, and they regulate lawyers in the public interest.

In that capacity, the federation and its members recognize the very difficult task of balancing national security concerns with the protection of civil and human rights. The need to protect the public from the threat of terrorism necessarily results in some limits on civil and human rights for citizens, permanent residents, and foreign nationals. We must be vigilant, vigilant about legislation that is too broad in scope or that unreasonably compromises those rights. Since the anti-terrorism steps taken in the wake of September 11, the federation has spoken on this on a number of occasions, advocating that proper steps be taken in order to ensure the protection of Canadians, but with as little harm done as possible to the important principles underlying the rule of law.

The fact that an individual may be deprived of his or her liberty on the basis of evidence that neither the individual nor the individual's counsel is permitted to answer unquestionably violates those rights and frankly offends all of our deepest notions of justice. The appointment of a special advocate is an attempt to address those concerns, and the federation supports the special advocate regime. It's important to recognize that the mere appointment of such an advocate will not eliminate the infringement of rights, and the process will not provide for what we as Canadians traditionally and typically consider a fair trial. For that reason, it is all the more important that there be a minimal impairment of those rights and that all necessary steps be taken to ensure that the special advocate can be as effective as possible in protecting the interests of the named individual.

This committee has a great responsibility and, in my respect for you, a tremendous opportunity to help create a system that ensures that the overall goal of protecting the security of Canada and its people from terrorism is met, while at the same time providing for a process that is more fair to the named person. The federation has a particular expertise in matters concerning the role of legal counsel in upholding the rule of law, in the administration of justice, and a particular understanding of the nature and importance of the relationship between counsel and the people they represent. For that reason, in my remarks I will focus on the special relationship between the special advocate and the person named in a security certificate.

It is implicit that the special advocate must be a lawyer, but we note that the bill does not say so. We would respectfully suggest that it is a very simple change to make and an appropriate one. We understand the need for secrecy, but we submit that in order to allow the relationship to work the bill should provide more clarity on the nature of the relationship between the special advocate and the named person. In other words, the bill is very clear that there is no solicitor-client relationship, but it doesn't go beyond that, it doesn't say what the relationship is, and it's necessary to make the system work that the bill do so.

Firstly, it should be made clear that any information provided to the special advocate by the named person is held in strict confidence. Confidence is one of the attributes of a solicitor-client relationship, but by taking that away, that requirement of strict confidence is gone unless it is expressed. Although the solicitor-client relationship will not exist by building in the importance of strict confidence, and remembering that lawyers will be governed by law societies even outside the solicitor-client relationship, there is a good and solid protection for proceeding in the way that's proposed. Because the bill removes the normal solicitor-client protections, it's necessary to build some back in, and the most primary one is that information will be received and retained in strict confidence.

● (1550)

Beyond the duty of confidentiality, we also respectfully submit that the special advocate must have the ability to speak with the named person, even after the special advocate has seen secret evidence. You've heard this comment from others before this committee, but I'm providing it to you through the lens of the legal profession and the lens of the regulators of the legal profession.

The special advocates will be lawyers who are skilled and experienced in dealing with sensitive information and with over-arching ethical and legal obligations in respect of such information. Similar systems have been used in other circumstances.

Our written submission speaks of the Security Intelligence Review Committee. There has been no suggestion that there was ever a breach of obligation or failure to respect that secrecy in the 20-odd years the system has been in place. Similar arrangements were made in the Arar commission of inquiry and in the Air India trial when dealing with secret evidence.

Without providing for the ability of the special advocate to continue to speak to the named person after hearing the secret evidence, the danger is that the special advocate will be in no better position than the trial judge in the case the Supreme Court considered, which led in part to the Supreme Court's decision.

It is evident that the bill was modelled on the United Kingdom legislation. That system has flaws. As recently as October 31 of this year, the House of Lords stated that merely having a special advocate system would not save the process. The system must be appropriate and effective.

The committee has heard testimony from departmental officials that these deficiencies in the bill can be addressed in the regulations. In our respectful submission, that is not the place for fundamental matters to be addressed, even assuming there could be a regulatory fix. It is essential that the language of the bill be clear and complete and that the fundamental importance of the special advocate, his or her independence, the duty of confidentiality, the right of the named individual to select the special advocate, and the need to allow that advocate to consult on an ongoing basis with the named individual be recognized. These ought to be in the legislation.

Ladies and gentlemen, Canada has been a leader in creating strong and effective anti-terrorism legislation, but against the canvas of due process and fair proceeding. Canada could learn from what others have done, but ought not to replicate their mistakes. The world is watching what Canada does here.

Thank you.

We would be pleased to answer questions when appropriate.

The Chair: Thank you.

And last of all, the Barreau du Québec.

[*Translation*]

Mr. Pierre Poupart (Lawyer, Member of the Committee on Human Rights and Member of the Committee on Criminal Law, Barreau du Québec): Good morning, my name is Pierre Poupart. I am a lawyer and member of the Quebec Bar. With me today are Mr. Langlais, an immigration lawyer, and Ms. Nicole Dufour, who is in charge of the Research and Legislation Service for the Barreau du Québec.

To begin with, I want to point out that the Barreau du Québec is a professional body whose primary mission is the protection of the public. It is an essential institution within a society such as ours, which is based on the rule of law. As such, it carries out its social responsibilities by standing up for fundamental values that are inherent in a free and democratic society, including equality under the law and respect for human rights.

The working group's report which, I hope, has been provided to Committee members, is the result of a lengthy period of reflection during which members of the Human Rights Committee of the Barreau du Québec, the Immigration and Citizenship Advisory Committee, and the Criminal Law Committee gave a great deal of thought, I have to say, to this issue for many months.

On February 23, 2007, in the Charkaoui ruling, the Supreme Court recognized the utility of the security objectives pursued through the security certificate process, specifying, however, that the latter should not be carried out at the expense of procedural fairness and principles of fundamental justice. On October 22, the Government of Canada tabled Bill C-3, which maintains the use of secret information while introducing a system of special advocates. The Barreau du Québec has concerns about the merits of such a solution, which does not seem to meet the requirements underlying the principles of procedural fairness and fundamental justice.

First of all, as regards continued use of secret information, a person subject to a security certificate will still be deprived of certain fundamental rights guaranteed under section 7 of the Canadian Charter of Rights and Freedoms, including disclosure of the evidence and the right to a fair hearing. Parliament seems to have decided to create the special advocate position to address the fundamental justice problem raised above.

Our first comment has to do with the fact that the special advocate will not necessarily be a member of a professional body that regulates the conduct of members of the legal profession. As regards the special advocate's role, the Bill talks about protecting the interests of the named person in specific circumstances. However, this central function, which is generally carried out by counsel, must be questioned. The special advocate, in particular, is retained and may be dismissed by the judge. Furthermore, as we pointed out, after seeing the secret information, the special advocate may no longer communicate with the person directly affected by it, except with the authorization of the judge. In our opinion, that process undermines the very essence of the duty of representation.

Finally, as laid out in subclause 85.1(3), the relationship between the special advocate and the named person is not that of a solicitor and client which we, as legal counsel, find extremely surprising. As a result, the special advocate does not seem to be bound by the same ethical obligations as a lawyer and there would be no mechanism for the Barreau du Québec to review anything that had been done by a special advocate. As a professional body whose primary responsibility is to protect the public, the Barreau du Québec is concerned about the protection given to a person subject to a security certificate under the current wording of this bill.

The solution we propose reconciles the demands of national security and the procedural rights guaranteed by the Canadian Charter of Rights and Freedoms. In that context, it is necessary to ensure that the evidence that is required is of adequate quality before an order is made regarding indefinite detention or deportation of the named person.

Many questions the current system as regards the content of the "evidence". We are essentially talking about allegations or information provided by intelligence services in a number of other countries. That intelligence or information may not conform to the standards of reliability that our own legal system considers appropriate, in both civil and criminal matters.

● (1555)

In these cases, the evidence involves information whose probative value is determined on the basis of "reasonable grounds to believe"; you may wish to refer to section 33 of the Act. Introducing information into evidence based on that evidentiary standard has serious consequences if the information cannot be verified, because some of it may have been obtained from a variety of sources, some of which are reliable and others not, not to mention the fact, as others pointed out earlier, that some of the information may have been obtained under torture or through other forms of coercion, perhaps less spectacular but no less efficient.

The consequences for individuals directly against whom this evidence is used may include removal to torture or, worse, be fatal. Under the circumstances, it is important that there be a reliable mechanism for assessing information, in order to offset the weaknesses of the evidentiary regime. In order to meet procedural standards, the level of rights protection must be equivalent to that applied in the criminal law—in other words, the right to retain counsel, which is recognized in the Canadian Constitution.

However, this right becomes meaningless if counsel is not able to adequately represent his or her client, which would most certainly be the case if the current structure were to be retained. Accordingly, the use of secret information or intelligence in the security certificate process is inconsistent with such values as justice and fairness.

The solution adopted must provide for a procedure that guarantees appropriate respect for rights in a manner that is equivalent to the process laid out for criminal matters. Furthermore, the process must allow a court of law to terminate proceedings where the evidence is insufficient or unreliable, and where continuing an unfair process would cause further injury and prejudicially affect the integrity of the legal system.

The court must have access to all the evidence to be used and have the power, after hearing the arguments, to determine which evidence will be disclosed, as well as the validity of that evidence, based on the evidentiary principles underlying the criminal law.

As Lord Hoffman said:

● (1600)

[*English*]

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

[*Translation*]

He was referring to similar legislation on another continent.

Having said that, we see this as an excellent opportunity not to allow ourselves to be motivated solely by fear which, although it may be the beginning of wisdom, must not drive the drafting of legislation in a free and democratic society. Section 7 of the Charter, if it means anything, is a clause that guarantees everyone the right to life, liberty and security of the person. If I am not mistaken, people who are not yet Canadian citizens certainly fall within the category of "everyone" and therefore have the right *mutatis mutandis* to protections which are just as rigourous as those guaranteed Canadian citizens.

[*English*]

The Chair: Thank you very much.

To our witnesses, the way we'll proceed is that we'll start with the official opposition, the Liberal Party, for seven minutes of comments and questions; then go to the Bloc Québecois; then to the NDP; and last of all, to the government, in the first round. Subsequent rounds will only be five minutes.

Mr. Dosanjh is going to go first.

Hon. Ujjal Dosanjh (Vancouver South, Lib.): I have just one question, and perhaps it may be a bit unfair.

We had a presentation this morning from Professor Forcese and Mr. Waldman. I'm not sure if all of you are familiar with their presentation. There are substantial similarities in all of the submissions made. Would you agree that if we essentially followed much of what they said, we would come close to dealing with most issues—not all, but most issues?

Ms. Isabelle Dongier: Thank you.

The Canadian Bar Association did provide very similar recommendations and criticisms of Bill C-3 in its submission, and our recommendations are similar to those of Mr. Waldman and Mr. Forcese.

Mr. Michael W. Milani: Sir, from the perspective of the Federation of Law Societies, they are very similar.

[*Translation*]

Mr. Pierre Poupart: What the Barreau would like to see, ideally, if the choice made by Parliament does not reflect what it sees as the ideal solution, would be for the lawyer—first of all, it would have to be a lawyer—to actually be counsel for the person named in the security certificate.

Of course, if another choice were to be made, the person called on to defend, as opposed to represent, the interests of the named person, would have to be in a position to do that *mutatis mutandis*, with the same rigour and commitment in terms of protecting that person's interests. Is it possible to create such a beast? We certainly hope so, if that is the choice made by the Canadian Parliament.

[*English*]

Hon. Ujjal Dosanjh: Let me understand that last point. You're saying that if we had a roster of eminent counsel appointed to the panel, appropriately picked in a rigorous fashion, with the participation of the Canadian Bar, and other independent bodies such as yours and the Department of Justice, and if the individual had the right to choose one among them, with the confidentiality guaranteed to the individual on the other side, since there is a lack of solicitor-client privilege, that would come close to what you just said.

[*Translation*]

Mr. Pierre Poupart: I don't know whether I'm speaking on behalf of the Barreau du Québec in making the comment I'm about to make, but it seems to me, on a personal level, that we don't have different categories of lawyers in Canada and that, insofar as the right to freely choose one's advocate or representative is a deeply-rooted value in the collective imagination and daily lives of citizens and persons living in Canada, even though they may not be citizens, I am not particularly enthusiastic about the idea of having a sort of council of elders among whom the person would have to choose.

Once again, if the idea of everyone being able to be represented by the advocate of his or her choice were to be rejected, clearly, the greater the need would be to ensure that the people among whom the litigant, whatever his origins or status in Canada, is to choose are of the highest quality, since the stakes are considerable. This is probably the worst mark of disgrace that any human being living in Canada could ever have against him.

● (1605)

[*English*]

Hon. Ujjal Dosanjh: Thank you.

The Chair: Ms. Barnes, did you wish to share the time?

Hon. Sue Barnes (London West, Lib.): How many minutes are left?

The Chair: About three.

Hon. Sue Barnes: Okay, sure.

For the record, I'd like your opinion, if you care to give it, of whether the bill as it currently stands would pass a constitutional challenge. I will ask each association to respond, if you care to.

Ms. Isabelle Dongier: Well, according to the CBA review, the bill does not pass the charter's test right now. It definitely needs to be amended, on various accounts.

Mrs. Frederica Wilson (Director, Policy and Public Affairs, Federation of Law Societies of Canada): I don't claim to be an expert in constitutional law, but I think there's a very serious question about whether it would pass. It does not provide the safeguards that the Supreme Court indicated would be required. Under the circumstances, one can assume it would have a rough ride.

[*Translation*]

Mr. Pierre Poupart: At the Barreau du Québec, our opinion is that, as currently drafted, this bill is not different enough from its predecessor to be considered constitutionally valid.

[*English*]

Hon. Sue Barnes: So we have a split.

Thank you very much. I am probably out of time.

The Chair: You have another minute and a half.

Hon. Sue Barnes: Good.

Would somebody address the resources you think you would need? It was raised earlier about one special advocate not being able to handle the workload. In your opinion, what physical resources and security-cleared personnel resources would enable a special advocate to do a proper job?

Ms. Isabelle Dongier: I have never done it myself, but what I hear from others is that those instances involve a huge amount of documentation that you have to review, and it is apparently impossible for only one human to handle it.

So as was discussed this morning by Messrs. Waldman and Forcese, if you are the only individual allowed to look at that evidence, and you cannot share it with anyone, it's an absolutely impossible task to ask of only one person. So definitely, the idea of having a couple of lawyers assigned to a case so they can both be security cleared and both allowed to review the evidence is one thing. And there is definitely a need for some minimal secretarial support for the handling of the documentation and paperwork.

A voice: You need a physical space.

● (1610)

Ms. Isabelle Dongier: Yes, you need physical space so you are able to sit somewhere and get organized and do a proper review of the documentation. There is also the ability to meet with witnesses or potential witnesses.

There are a number of needs that you cannot ask an individual to just volunteer from his own abilities. So it's mainly logistical support, administrative support, and another legal head with whom to share the review of the documentation. Research is also needed.

Hon. Sue Barnes: Would you consider security-cleared experts in different fields a support that's necessary?

Ms. Isabelle Dongier: Well, yes, most of the time, I believe, but it may depend on the case. Of course, if you don't have any background or educational support for the specific case, you'll have a lot more work to accomplish before you become efficient.

The Chair: Monsieur Ménard, you may begin your round.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Before I begin questioning the witnesses, Mr. Chairman, I just want to mention that I am a member of the Barreau du Québec, which I had the honour of leading, as President of the Bar, in 1986-1987. I can tell you that the Barreau du Québec has selected 14 lawyers who, to my knowledge, are among the most competent legal counsel out there, for the purposes of preparing its report. And it has selected one of the best among them to represent them, Mr. Pierre Poupart. I knew him very well while in practice, to the point where, when people come to me asking for advice, and thinking that I could be of help to them, I always refer them to Mr. Poupart.

To begin with, I would like to ask a series of brief questions, but just note that although this is only our second official meeting, in all the meetings we have had, pretty well the same flaws have been identified, and most of the time, the same solutions have been suggested.

Since we only have six minutes, my questions will be quite specific.

I noted the difference between the Canadian Bar Association and the other witnesses with respect to the lack of client-solicitor privilege for the special advocate.

You said:

[*English*]

He should not be compelled to divulge any information he gets.

[*Translation*]

I believe that the client-solicitor relationship goes further. That relationship means that counsel has an obligation not to disclose.

Do you agree with others that the special advocate should have such an obligation?

Mme Isabelle Dongier: Yes, absolutely.

Mr. Serge Ménard: Thank you.

Mr. Waldman and Mr. Forcese suggested the following solution this morning. If the government considers it to be extremely important or potentially dangerous that the special advocate could, having seen the secret evidence against the named person, inadvertently pass on information to him or her that he is not entitled to provide, the special advocate could, based on our proposal, be joined by a representative of the Canadian Security Intelligence Service for the purposes of a meeting with the named person, although the latter would also be bound by a type of professional privilege. Of course, he may not necessarily be a professional.

What do you think of that solution?

Mme Isabelle Dongier: We think it would be an acceptable solution. To a certain extent, it would ensure, if need be, that the special advocate will not disclose information that is still protected.

Having said that, one of the things that has been pointed to in a number of previous studies is the fact that special advocates have never disclosed evidence that they were not supposed to disclose. I think we have to trust individuals who are highly competent and dedicated professionals. I don't think it is absolutely necessary to have a watchdog sitting next to them, to ensure that they won't say too much.

● (1615)

Mr. Serge Ménard: [*Inaudible—Editor*] talk.

[*English*]

Mr. Michael W. Milani: Sir, if I may answer, the Federation of Law Societies of Canada does not believe that would provide a solution, for three reasons.

One is that, as my colleague has said, if the panel of lawyers is selected carefully, that concern should be minimized.

Secondly, there is the history of there never having been a concern under the models that have been in place so far.

But third and most importantly, the presence of someone else in the room will avoid full and frank disclosure and discussion. And I say, sir, with respect, that is not what we were trying to achieve here. So I, for one, and I speak for the federation, do not think that is a useful solution.

[*Translation*]

Mr. Serge Ménard: I understand and share your opinion, but I am happy that you have been able to confirm that for other members of the Committee.

I would like to ask another quick question. The French translation of "special advocate" is "*défenseur*". Do you feel that is appropriate?

Mme Isabelle Dongier: No, that term is completely inappropriate. Of course, the term "*défenseur*" suggests the act of defending someone. The Bill talks about protecting interests. "Special advocate" is a *sui generis* expression and it is impossible to know what it means until you read the legislation to determine what the role and powers of such an individual are. So, the translation is absolutely inadequate.

Mr. Serge Ménard: Indeed, the expression is used in other legislation, with respect to enquiries relating to CSIS. The term "special advocate" is used and is translated as "*avocat spécial*".

Mme Isabelle Dongier: Yes, exactly.

Mr. Serge Ménard: So, you agree with me that this term would be misleading for Francophones?

Ms. Isabelle Dongier: Absolutely.

Mr. Pierre Poupart: In any case, what is absolutely clear at this time, Mr. Ménard, is that the term "*défenseur*" is, at the very least, misleading as regards the current wording of the Bill. Furthermore, the only thing that is special about that advocate is probably the fact that he does not fit the role traditionally and culturally assigned to a lawyer, as reflected in the Canadian Charter of Rights and Freedoms, where it talks about the right to retain and instruct counsel.

So, we're talking about the right to retain the services of counsel, and not about some special, ethereal being created for the purposes of this legislation, who does not have all the necessary attributes to fully and properly represent an individual described as being a threat to national security.

Mr. Serge Ménard: There is something that is not addressed.

[*English*]

The Chair: Your time is up. Finish if off quickly.

[*Translation*]

Mr. Serge Ménard: All right.

There is something that is not addressed at all in the current legislation, but which seems implicit, and that is that an individual should be able to go and see his lawyer and the latter should be able to communicate with the special advocate, if need be. That would improve the system. But what would the relationship be with the special advocate once he had seen the secret evidence, given that he could decide on his own to go and see counsel for the named person?

Do you see yourself playing such a role? Supposing someone comes to see you… You, Mr. Poupart, for example, and you are in private practice. Someone comes to see you about this and you explain the process; but, because he trusts you, he would like you to come with him.

In such a circumstance, do you see yourself working with the special advocate?

Mr. Pierre Poupart: This is not a feeling only on the part of Pierre Poupart, barrister. The members of the Barreau du Québec's committee have always been deeply concerned about the role of counsel. Here I am talking about lawyers, as opposed to advocates. We felt that the role would be so completely emasculated that it could involve pretty well anything, except carrying out the usual duties, as we are required to do under our code of ethics.

[*English*]

The Chair: Thank you.

Ms. Priddy of the NDP, you may go next.

● (1620)

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

I want to begin by thanking each of your associations for sending representations today to share with us your opinions.

To set a bit of context—and I've done this before with each new group of witnesses—the NDP is probably the only party that currently doesn't support the legislation and supports looking at the Criminal Code model, as do at least one or two of the witnesses who spoke this morning, because we think it does undermine certain fundamental values in our system. That having been said, we will work to ensure that whatever happens here certainly does no harm.

There's nothing worse than a hypothetical law case; I understand that. Nevertheless, if a Canadian citizen were to be accused of a terrorist plot to blow up the Toronto subway, let's say, what would the process then be, and what would a potential penalty be?

It doesn't matter who answers. Would the bar association...?

Ms. Isabelle Dongier: This individual would be charged under the Criminal Code—

Ms. Penny Priddy: With what?

Ms. Isabelle Dongier: There are a number of charges under various categories of offences.

Then, if some evidence is to be protected or kept secret, the judge would have to review the evidence, balance the need for protection versus the inconveniences for the individual to access or not access the evidence, and then decide whether it can be disclosed or not. That's a different process, then, obviously.

Ms. Penny Priddy: I realize I'm asking a difficult question because there are no details to it, but what would be the range of penalties? If we assume this person is convicted of having this plot and having the materials to do so and having a plan in place and all of that, what would be the range of penalties that might exist?

[*Translation*]

Mr. Pierre Poupart: Committee members are obviously well acquainted with the provisions on terrorism, that can be found in sections 83.01 and following of the Criminal Code. It is clear that the sentences that can be imposed on such individuals vary from a term of imprisonment of 10 years up to life. Sentencing would be carried out on the basis of the usual criminal law criteria—in other words, based on the burden of proof, which is proof beyond a reasonable doubt. That is clearly not the case for individuals that the system purports to label as a "danger to public safety".

[*English*]

Ms. Penny Priddy: Thank you.

I think I know from what most of you have said, but I would like to see this on the record. I am asking each one of you to just answer yes or no. Do you support or oppose the security certificate process as proposed currently in Bill C-3?

Mr. Michael W. Milani: The federation opposes it.

Ms. Isabelle Dongier: The CBA opposes it and recommends major changes.

[*Translation*]

Mr. Pierre Poupart: The position of the Barreau du Québec is completely consistent with the one that has just been expressed. In other words, we are opposed.

[*English*]

Ms. Penny Priddy: *Oui, merci.*

Do I have some time left?

● (1625)

The Chair: You have about two minutes.

Ms. Penny Priddy: When the question was asked earlier—and I think it was asked of the CBA or answered by the CBA—about additional resources that might be needed by an individual who would choose to take on such a case, I didn't know if anybody else wanted to add to that, whether there were any other resources people had. People talked about an additional lawyer, some secretarial support, maybe some security people. I'm not sure that was the question asked.

Was there anything else anybody wanted to add to that, since it seems to be a good opportunity to have that message go to the minister, through the committee, of course?

[*Translation*]

Mr. Hugues Langlais (Lawyer, President of the Advisory Committee on Immigration and Citizenship, Barreau du Québec): If I could just add something, having dealt with cases of this type, I would say it is inevitable that one would be faced with a massive amount of information to process. One head could do some of that, but two, three or even four heads sharing the burden is preferable.

It would also be preferable to have access to a certain number of selected experts. Of course, it would depend on one's position, but given the position that has been articulated by the Barreau du Québec, an individual would find a lawyer, and the latter would take the necessary steps to retain the services of the experts he required, in keeping with the spirit of the proposal. It would then be up to the individual to find the resources, since this would obviously be quite costly.

The hope is that both parties would have the same weapons. If you are battling an army of 100, you want to have resources on your own side as well.

Thank you.

[*English*]

Ms. Penny Priddy: Thank you.

We can have one more, possibly. Go ahead.

Mr. Michael W. Milani: I was just going to add that the concept you're speaking of is very important. The federation would recommend, with respect, that the concept of adequate resources be built into the act itself and not left only to the regulations. Regulations may provide the detail, but the concept of an adequate system is so fundamental to this working fairly that our respectful submission is that it should be in the act itself.

Ms. Penny Priddy: I'll have to come back to that. Thank you.

The Chair: We have Mr. Mayes now from the government side.

Mr. Colin Mayes (Okanagan—Shuswap, CPC): Thank you, Mr. Chair.

One of the things I noticed as I looked through the bill and the issuance of the certificates under section 77 was that it talks about being reasonably informed of the case against, and it talks about the judge determining whether the certificate is reasonable, or adequate, as I would understand. To me that means there would be sufficient content in the claim that there's a reasonable determination that this person should be detained. Is that correct? Is that what the act says? Okay.

We might have a detainee who is not necessarily a wanted criminal or who does not necessarily have a past record of a conviction or who is not known to have committed acts that have violated human or international rights, but due to the documented association evidence, that person could be determined to be a threat to public safety and security. Would you agree with that?

So you have all of the documentation presented to the detainee and the advocate, and then this person might, for instance, get involved with organized crime. Perhaps they have been observed in their country of origin, where maybe their tax documents say they're a plumber, but they're living the lifestyle of a lawyer. So they suspect that this person is being supported by criminal activity in his association with those people in the country of origin, but he has never been convicted.

If they landed in Canada and this information was gleaned, there wouldn't be any substantial conviction or evidence against this person, because there hadn't been any in the country of origin, but it would not necessarily be desirable to introduce this person to Canadian society because they could pose a safety and security threat. How would you deal with that?

● (1630)

Mr. Michael W. Milani: Sir, I would say that the process is intended to allow the proper determination to be made by the judge hearing it. I would submit that what you're hearing from the federation and our colleagues today is that in order to ensure that that ultimate result is handled in the best possible way, protections need to be built in.

So in direct answer to your question, that will be a determination for the judge. What I believe you're hearing us say is that with some modification to the bill, the process of allowing the judge to do his or her job will be in place.

Mr. Pierre Poupart: Perhaps I may add at this moment....

[*Translation*]

I would just point out that the provision in subsection 77(2) of the Bill relies on a summary of the evidence, which would give the injured party an opportunity to be adequately informed of the case against him. Here, the assumption is that you have a summary of the evidence, evidence gleaned from a number of different sources, including the Canadian Security Intelligence Service.

Let's take another completely hypothetical example, which we haven't seen in the media for a number of years now. An individual, whom we will call Arar, for the purposes of our discussion, gave information under torture in a given country, and that information was used against another individual, here in Canada, with a view to deporting him. Are we talking here about information, evidence and intelligence that is credit-worthy, based on the test that appears further on in the legislation? That is the fundamental question we should be asking.

When you are dealing with real evidence, the question does not arise, because the Criminal Code explicitly states “beyond a reasonable doubt”. However, when you have information or intelligence obtained through association or in a variety of manners, including under torture, can you conclude that such information is truly credit-worthy and can be relied upon to arrive at the kind of conclusion that is sought here?

That is the caviat the Barreau du Québec feels is important—namely that the information obtained in that manner is not valid, or not sufficiently valid. So, as far as we are concerned, that simply is not enough to take steps to deport someone. We must not forget that there is a danger that we will be sending people back to a country where they will be subject to torture and capital punishment. For that reason, there is a need to be extremely cautious when assessing the evidence. Although such individuals may be considered undesirable, the burden of proof should be no less than what is acceptable in a free and democratic society.

[*English*]

Mr. Colin Mayes: To follow up on that, do you think that full disclosure is going to make certain that this is not going to happen anyway? I'm saying it might not be in the full disclosure that the evidence was taken through torture, implicating the detainee.

[*Translation*]

Mr. Pierre Poupart: Mr. Chairman, even when there has been disclosure of all the evidence and a standard of proof as rigourous as proof beyond a reasonable doubt has been applied, there have been miscarriages of justice that have resulted in absolutely horrendous human catastrophes. With all due respect, the very least that we should require, if we want to claim that someone is a danger to national security—which is already quite a significant charge, as I'm sure you will agree—is that the process reduce, to the greatest extent possible, the risks of stamping a human being with such a seal of infamy, without having taken all the necessary precautions to ensure that all the facts are known and that the individual in question has been properly represented. I see that as the very essence of a society that does not treat life, liberty and security of the person lightly.

● (1635)

[*English*]

The Chair: Thank you.

We'll now come back to the second round and begin with Mr. Cullen, please.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chair.

Thank you all for coming today.

I notice that there are some of you who are immigration citizenship lawyers, so I wanted to focus on that. When you look at security certificates and their history, they first came into existence in about 1976, and from 1991 until today there have been 28 security certificates issued. Of those, 19 individuals have been removed from Canada as a result of a security certificate.

You know how the security certificates work. They're termed a three-walled detention centre because the people can leave Canada at any point in time.

Have you done any research into the people who have actually gone back to their home countries? Or it could be a third-party country. Have they peacefully settled back into those countries? And for the ones who haven't and who argue that if they head back to their home country they'd be subjected to torture or jail or capital punishment, have you researched what the basis of those arguments is?

I raise it because of course they are free to leave at any point in time, and in my riding I have a large number of constituents who are dealing with immigration matters. People have come to my office who have maybe claimed refugee status, been denied, appealed, etc., and they're about to be removed and they set in process this risk assessment and argue that if they return to their home country they'd be tortured or murdered or whatever. And in some cases, frankly, the arguments aren't that plausible, but there is a process they go through.

If their country, the country they came from, is not prepared to accept them back, or if they do they'd be tortured or imprisoned or subject to capital punishment, do you have any idea of the profile of those people and why these countries would not want to have them back? Have you done any research into that?

Ms. Isabelle Dongier: No.

We cannot either quote statistics of how many of those who were deported or sent back home or went back home have been in fact detained or tortured or killed. I don't think anyone has access to or has compiled that type of information. Perhaps you could ask Amnesty International, but I don't think that anyone at the table has this information.

In regard to what you were mentioning about the risk review before deportation, the number of people who are in fact found at risk after having been denied refugee status is very low. The criteria that Immigration Canada is using to assess those cases are very strict, and a very small number of people are finally accepted in Canada and can stay at the end of that process. Most of them will in fact be deported.

Hon. Roy Cullen: The other factor is that people who go through that process typically arrive in Canada, claim refugee status, and in many cases they'd have a plausible rationale for that, so that if they were sent back they could be in jeopardy. It could be political jeopardy or what have you. But a terrorist or an alleged terrorist who's being detained under a security certificate, the ones who are currently detained at this point in time, still in Canada.... If they've gone back those issues have been dealt with, I guess, and hopefully they live the happy life they're after.

But for the ones who are currently being held under a security certificate, have you researched the arguments they presented as to why they could not go back to their own home country? I would suspect that typically they haven't arrived in Canada claiming refugee status. They probably come here.... But I don't know that for sure.

● (1640)

Ms. Isabelle Dongier: I think it's really a case-by-case situation.

Hon. Roy Cullen: Yes, but it's an important case-by-case situation, and I'm certainly going to make it my business to find out before we deal with this bill in clause-by-clause.

I just wondered, as immigration lawyers and as representing the bars, if you've done any independent research into that.

Ms. Isabelle Dongier: No, we haven't.

[*Translation*]

Mr. Hugues Langlais: I would like to add to that answer.

I have not done any particular research on that point. However, I want to stress that if the Canadian government, in its wisdom, and on the basis of its own analysis and research, arrives at the conclusion that a number of countries it has identified have committed crimes against humanity, practice torture, or that some representatives or members of the government participated, at some point, in crimes, torture or other forms of abuse, returning people currently in Canada to such countries, when Canada knows that they practice torture is already an answer to your question.

I can name two countries where Canada has already denounced certain members of the government for practising torture. I refer to Syria and Haiti.

[*English*]

The Chair: Your time is up, Mr. Cullen.

Hon. Roy Cullen: Okay.

The Chair: Monsieur Ménard, do you have any more questions?

Mr. Réal Ménard: Yes.

The Chair: Okay, Mr. Ménard.

[*Translation*]

Mr. Serge Ménard: You said nothing about the appeal process. Are you satisfied with the right of appeal provided for in the Bill?

Mr. Hugues Langlais: It is not a right of appeal; it is a principle of judicial review. Nowhere in the Immigration Act is an actual right of appeal granted, except for permanent residents. There is provision for referral to the Immigration Appeal Division. That is the only place in the Immigration Act where there is an actual right of appeal which has the effect of suspending the proceeding. Here, however, there is no right of appeal; instead, there is provision for a judicial review.

Howe would that judicial review work? The way judicial review usually works—and I'm sure many of you already know this—the judge hearing the case has to be informed of everything that has occurred. You have to present an accurate snapshot of the circumstances, as analyzed by the decision-maker. Can I give an affidavit to the advocate that has been appointed, so that he can tell me exactly what happened in the context of the judge's decision-making process? To ask the question is to answer it. That would be absolutely impossible, since a new case has now been opened. A new advocate would be appointed and you would have to start from scratch. It would be absolutely impossible to proceed even with a judicial review in the context of this bill, as currently worded.

Mr. Serge Ménard: Everything that is said is transcribed and can certainly be included in an appeal factum, as is the usual procedure.

Of course, when I questioned officials about this appeal, I asked them where they had taken their model. I am aware of certain appeal models, but I wasn't aware of this one. I have to admit that if I were a named person, I would be very concerned about asking someone who has told me I'm in the wrong to explain to me why I wouldn't win in front of a court of appeal. That is what is being asked here.

I think it's a great process for academics and that it might allow us to advance the state of the law, but I don't think it's very reassuring. I was told that this appeal process is the one already provided for in the Immigration Act, whereby the decision-maker determines that questions of general importance are involved and states those questions for consideration by his colleagues, I believe.

● (1645)

Mr. Hugues Langlais: Yes, exactly. That is the way it works, but it is not a right of appeal that will necessarily result in a stay. It's important to understand that steps are taken and the case is heard on appeal, but that does not result in a stay. That's the first point.

Secondly, I'd like to come back to what you said. There is no stenographer at the Federal Court; that service does not exist. If you want a stenographer, you have to hire one and the stenographer will take notes. However, there is no system of mechanical recording in the Federal Court.

Mr. Serge Ménard: Am I mistaken in thinking that if the appeal has been registered, that occurs once the Supreme Court has rendered a decision?

Mr. Hugues Langlais: The judge hears the case and determines whether the certificate is adequate or not. If he says it isn't, he may decide that a point of law warrants a debate on the principle. He can then certify…

Mr. Serge Ménard: I am going to interrupt you there.

I understand all of that, but it seems to me this process does not exist in the legislation.

Mr. Hugues Langlais: The process for certifying a question does exist in the legislation, yes.

Mr. Serge Ménard: I see.

Mr. Hugues Langlais: It already exists, but not necessarily in relation to the security certificate process, as we understand it.

Mr. Serge Ménard: What I'm saying is that the appeal process is introduced in Bill C-3. It was not in the legislation that Bill C-3 is amending.

Mr. Hugues Langlais: Yes, it is already in the legislation, Mr. Ménard.

Mr. Serge Ménard: With respect to decisions on security certificates?

Mr. Hugues Langlais: No, not with respect to security certificates. An additional element is being introduced here with respect to security certificates, but the actual appeal process already exists.

Mr. Serge Ménard: This was done to make it consistent with the Supreme Court ruling. Some time ago, I read and reread the Supreme Court's decision, and it seems to me that one of the criticisms was the lack of an appeal process in the current version of the Act.

Mr. Hugues Langlais: I'm not sure that was one of the criticisms, but I do know that the process provided for here already exists in… [*Technical difficulties-Editor*].

[*English*]

The Chair: Mr. Norlock, please.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you very much for appearing.

We've had the benefit of probably several hundred years' worth of people who have studied the law all their lives, and quite frankly, we benefit from that.

I am commencing to speak this way because I have a question that may, in and of itself, make you wonder why I say it the way I do, but there is a purpose.

One of the reasons we give to our children for protecting the most dastardly criminals, the worst possible people who exist as human beings, is that in protecting their rights, we somehow are able to protect our rights, because we too may end up, through no fault of our own, being unjustly accused. But when we tell that to our children, we tell them in terms of them being members of our society. In other words, we tell them as Canadians.

I have written down the question because I think sovereign nations have the intrinsic right to decide. I mean, if you're born in that country, you're automatically a citizen, but a sovereign nation has the right to determine who it bestows the privilege of citizenship upon.

I think that when average Canadians who don't have the benefit of years and years of jurisprudence education look upon the world and the need for their government to protect them, and realize that you cannot be the guardian of every single one of the billions of people on earth, they need some clarification and some assurance. That's where I see myself coming from as a legislator. I need to walk back to my constituency and assure those people that yes, we are protecting you.

There are a lot of devious people in this world who get the impression that all you have to do is put your big toe on Canadian soil and mister, you have every benefit this country has to offer, bar no expense. How do you tell the person who carries a lunch pail into a factory every day and works hard and pays taxes that all of a sudden, somebody who the government or an agent of the government who we would hope would act in the best interests of every Canadian.... This might be a devious person who wants to be a Canadian. They say, “Put his butt on a plane and send him back to where he came from”. There is a right way to come to my country and there is a wrong way to come to my country.

In order to meet our international obligations and our obligations as citizens of the world, we say that just in case there's been a mistake here and that the agents of the government have done something wrong, we'll set up a process that will review this person's —as I would rudely put it—carcass being on our soil.

I say those things because the average person out there hears all these esoteric arguments, and I have to be able to go back to that person and sell this. One of the things I'm going to get back is that this is just the legal industry trying to create another level and all these assistants. By the way, I do think a lawyer needs to have some assistance with some of these files, because we see some in our office.

I was just in the House a while ago, and we were talking about the economy and single mothers. These are funds that we're not going to be able to use for our own citizens who are born here.

Tell me what right we have as a sovereign nation to decide who is a citizen and who is not. When you answer that, can you also tell me how western democracies, such as France and Germany, handle these situations?

● (1650)

Mr. Michael W. Milani: If I can respond in a general way first, the question you pose is a very good one, because you're right: that is a question that is in the minds of many people, and sometimes they articulate it, and sometimes they do not.

Perhaps one model you could follow is to remind people of what happened when our grandparents came to this country. My ethnic background is Italian. In 1905, when my grandfather came to work on the railway, I expect that there were some people here who held views that weren't consistent with opening our arms to people to come to Canada. The Canadian government at the time, and the Canadian people broadly, wanted to do the right thing, which was to have a respectful country in which all were welcomed in appropriate circumstances.

I would say to you that perhaps you might consider, if you get those questions from your constituents, having them think about their own family backgrounds: the Ukrainians coming to Saskatchewan, the Italians coming to Thunder Bay. This country is full of examples of when leaning too far in the other direction didn't achieve anyone's best results.

Mr. Rick Norlock: I appreciate that. In 1865 my relatives came from the Kashub area of Poland.

Anyway, we're not talking about the average immigrant; we're talking about somebody the state says has not come to Canada through the legal immigration process, or they have, but because there are several hundred thousand people per year coming in.... All of a sudden we've discovered something about this person that puts not just some doubt, but serious, significant doubt.

It could be a person who surreptitiously sneaks in. And we're not just talking about terrorists. It could be people in organized crime, or espionage agents. They've come into our country, not on an airplane, but all of a sudden their body is on our soil. We listen, and we say, well, you know.... Of course they're going to say they're going to be tortured if they go back, because they don't want to go back.

I'm not talking about your relatives who have come here. They went to the consulate or the embassy, filled out the papers, and they came across. That's the average. As Mr. Cullen said, we're talking about 28 people over a period of 30 or 40 years. We're going to spend a heck of a pile of resources making sure that....

As I said, and I go back to when I started this statement, I understand the concept, but it's not as easily articulated as you've mentioned. Your relatives probably came across through the right process: the immigration process. There's a difference here, I think.

● (1655)

Mrs. Frederica Wilson: I would just add to Mr. Milani's answer to say that we're not talking—and I'm not addressing myself primarily to the resource question but to the process question—about the government or a sovereign nation having an inability to decide who should be allowed into the country; we're talking about having procedures that respect the rule of law, to make those determinations in difficult circumstances.

In fact Canada does have the right to make that determination. What we're arguing for here is that it does so in accordance with due process, in a way that does as little damage as possible to the fundamental underpinnings of our legal system, which we have great reason to be proud of in Canada. To deviate from it too much will tarnish our reputation and tarnish our faith in a system of justice, which makes mistakes, as one of my colleagues from Quebec said, even when there is due process.

We should have a goal to minimize those errors. They may have terrible consequences, they may have them only occasionally, but would any one of us feel comfortable about being responsible for their having denied somebody due process?

The Chair: We're over the time allowed, but if you have a brief response, go ahead.

[*Translation*]

Mr. Hugues Langlais: In order to give an appropriate answer to the question you raise, we would have to go back to 1982, when a document entitled "The Constitution Act, 1982", incorporated the Canadian Charter of Rights and Freedoms, was enacted. The answer is right there: it uses the term "*chacun*" or "everyone", in English. Therefore, it applies to everyone living in Canada.

You cannot have different legal systems for people living in Canada. There is one legal system, and if we want to exclude people, then we need to name the people that are excluded. Then we can say that those people are not entitled to constitutional protections and guarantees. But, in that case, we have to officially state, for all the world to hear, that Canada is refusing to provide certain guarantees to certain people. Let's not bury our head in the sand. Either this document is valid or it isn't. It has been in effect since 1982, and I believe it has a certain force which, unfortunately, is binding.

[*English*]

Ms. Isabelle Dongier: I would like to say briefly that I guess one way you can reassure your constituents is by realizing that our immigration act contains a number of provisions that allow us to get rid of those people we don't want to keep in the territory.

You can be declared inadmissible for various reasons—very minor criminality, very serious criminality, medical reasons, or if you gave some false information in the course of your arrival in Canada. All those reasons can be used to send you out of Canada. Therefore, we have very useful tools in the act. Our officers are using them every day, don't worry. There are lots of people who are either refused admission when they arrive from abroad at the border, or at the airports. They are sent back because we discover something in their history that we don't like and we don't want to let them in.

There are people who are never able to even board a plane, because of a criminal background. We do protect the country and we do use a large number of resources to do that.

The specific situation we're talking about today in the Bill C-3 context is in situations where we don't want to put on the table all the evidence we have against these people, because we want for various reasons to keep it secret. That's when it becomes more difficult to meet the requirements of the charter that would still give the person a fair hearing, which is one of the fundamental values we were talking about earlier. We're not ready to get rid of that value. That's what I think the legal community is telling you.

In spite of the cost and in spite of the efforts, it's something Canadians are attached to because it's applicable to them, to their neighbours, to their daughters or sons. That's something we're not ready to get rid of, in spite of the special mechanisms it may require.

● (1700)

[*Translation*]

Mr. Pierre Poupart: I would just like to take two minutes, if you don't mind.

What you could say to your constituents—and I don't believe that there is a single human being in Canada who would not understand this—is exactly what the Supreme Court stated in the Oakes case, shortly after the adoption of the Canadian Charter of Rights and Freedoms. You will find the relevant passage in the report of the working group that has been provided to you. It talks about the presumption of innocence under the criminal law but, in my opinion, the same comments apply analogously to a situation such as the one that arises with security certificates:

> An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other [...]

[*English*]

The Chair: Excuse me for a moment. Please slow down.

[*Translation*]

Mr. Pierre Poupart: I did not want to take too much time. I will say it slowly.

I'll start over again, very slowly, because it is truly a magnificent statement. In my humble opinion, it deserves your support.

> An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the State proves an accused' guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community, until proven otherwise [beyond a reasonable doubt].

That applies analogously to a situation which is certainly much more likely to result in disastrous consequences for an individual who is to be branded a danger to national security when, in fact, even for the most minor offence of shoplifting, the presumption of innocence, which flows directly from our conception of human dignity, requires that this be proven beyond a reasonable doubt. As lawyers, we are deeply convinced that this government, this legislative assembly, could find a way to ensure that the burden of proof be raised to reflect principles which are at least as evocative as those associated with the standard of proof beyond a reasonable doubt.

[*English*]

The Chair: Okay.

You were way over. You should have had a seven-minute round there.

Ms. Brown, please.

I didn't want to cut off the witnesses.

Ms. Bonnie Brown (Oakville, Lib.): Thank you, Mr. Chair.

I must say I agree with most of what the witnesses said this morning and again this afternoon. It's a great pleasure to have you here, because you are confirming the doubts we have about the charter soundness of this bill. I agree with the detail of your work a great deal.

But I must say I'm surprised the Canadian Bar Association, sprinkled through its work, talks about "evidence", when this is really an administrative process not attached to the Criminal Code and not requiring the standards of evidence required by the Canada Evidence Act.

We heard this morning the pseudo evidence presented is often a series of narrative reports written by different people and summarized later, or one could say cherry-picked, with parts deleted by another writer. So it's almost as if a series of writers put this together. Let's say an agent in Damascus writes something about a person and that's passed on and then an agent in Paris writes something else and then an agent in Saudi Arabia writes something else, etc. It was described to us as a series of reports.

So it would seem to me that rather than using the word "evidence", which gives credence to the process, which makes Canadians believe there's something meaty there when maybe there isn't, we might be better to use words like "the narrative about this person", or "the reportage about this person", or something like that, because the word "evidence" has connotations in Canada.

Would you agree with me, Ms. Dongier?

● (1705)

Ms. Isabelle Dongier: I think when we use the word "evidence" in our submission, we are not referring at all to the summary itself. We are talking about.... It can be documents, it can be testimony, it can be other kinds of information CSIS would have obtained in the course of its inquiries to reach the opinion that a person is involved in terrorist acts.

Ms. Bonnie Brown: Well, we're told that it's less documentary than it is reportage or the writing of an agent abroad.

Ms. Isabelle Dongier: It can be all kinds of things, you know.

You're going to have reports from officials abroad who've done inquiries or who have met with witnesses. It's going to be a wide range of different type of evidence.

Now, there are also situations in which a very remote source of information is bringing—

Ms. Bonnie Brown: Yes, and based upon that idea, what would you think, in the way of resources available to the special advocates, about including not necessarily full-time staff, but at least the ability to pay for and get what I call geopolitical information about a country where the events took place or in cases in which the reportage, the narrative, was written by some agent who may not have been a Canadian agent?

With regard to your list of wants and needs for this office of the special advocate or this group of special advocates, it seems to me they need a lot more than one other lawyer and a secretary to work with. It seems to me they need experts in a variety of fields. You might end up needing financial experts, because it may not always be terrorism.

Ms. Isabelle Dongier: Absolutely.

Ms. Bonnie Brown: It may be financial shenanigans, but international in nature.

Ms. Isabelle Dongier: Yes, there may definitely be circumstances in which, according to the facts of the case or the profile of the case, you're going to need to do extensive research on various topics.

Ms. Bonnie Brown: Yes.

Okay, I have one more question on your thing about overextended detention. There's a little bit of a farce when the government pretends it's going to deport somebody, but knows it's not going to deport them because there's capital punishment or torture in that country.

For how long do you think the government should be able to play that game without either moving on to charges under the Criminal Code or to release? We have somebody who's now been in detention for seven and a half years. Is that too long, in your view? Should it be shorter? Should we put a limit of let's say four years on this kind of detention in a prison?

Ms. Isabelle Dongier: I don't think there is a magic number of years to take as a specific reference.

Our recommendation would be that once it is determined that this person cannot be removed—cannot be sent back home—for various reasons, then we cannot just say that we have another couple of years to keep this person in detention or that we should not detain her any longer. At that stage, once it is determined that we cannot send that person back, you have to handle her differently. You have to put her back into the regular system of the Criminal Code.

● (1710)

Ms. Bonnie Brown: Thank you very much, Mr. Chair.

The Chair: Okay.

You may have one short question, Mr. Dosanjh. Mr. Dosanjh is the last person on my list.

Hon. Ujjal Dosanjh: Thank you.

It's really not a question—maybe it is.

I was struck by Mr. Norlock's question or commentary and I was struck by some of the eloquent responses from Ms. Wilson and others.

I think the trouble that we have sometimes on this issue is the kind of trouble Mr. Norlock was talking about, and that trouble arises because some Canadians believe that if you are a non-citizen or a permanent resident or an alien, you should be treated less fairly if you're to be thrown out of the country or restrictions are to be imposed upon you. That's unarticulated; it's below the surface when we do that. It could be my relative; it could be your distant cousin from 200 years ago, Mr. Norlock; it could be anyone.

I think the best we can do is place ourselves in the shoes of that person and ask ourselves what we would like to have afforded to us by way of protection if we were accused wrongly, because you always have to presume that the person is innocent until we are able to establish some guilt—not guilt beyond a reasonable doubt, obviously, in this case, but some guilt.

In that sense, I just want to say that as an immigrant I am perhaps more conscious of these issues than my sons would be, because they were born and raised here.

I just wanted to put the great difficulty of this issue on the table, and I want to thank the panellists for making a great contribution.

Thank you.

The Chair: I would like to thank you as well.

We have no more speakers on the list. Before we dispense, I want to tell the members of the committee that we agreed we'd have our key witnesses here this week so you can draft your amendments. If you have any amendments, try to have those in as soon as possible to the clerk so we can go to clause-by-clause next Thursday.

Ms. Priddy.

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

We will be ready to go to clause-by-clause by next Thursday.

I see the list that you provided to Ms. Barnes of the people who applied to come and were unable to be—

The Chair: Didn't you get a list? The lists are here. They're available to you.

Ms. Penny Priddy: I've borrowed Ms. Barnes', so it's okay. I've seen it now.

The Chair: You can get your own list.

Ms. Penny Priddy: I wasn't aware of that.

Some of the people on it, I have no idea who they are, but I certainly know who some of the organizations are. I would be interested to know from other people on the committee—I've had a couple of conversations with folks—whether people are prepared to spend any more time hearing additional witnesses from this list, people who have been involved in this issue for a very long time.

I may be the only one.

The Chair: Ms. Priddy, I realize you're new to the committee—

Ms. Penny Priddy: I understand that.

The Chair: —but many of the people on this list have already been witnesses.

Ms. Penny Priddy: Yes, I understand that as well.

The Chair: This is not the first round, so that's why you may not hear anybody else anxious to have extra meetings. I offer this as a point of information.

Ms. Penny Priddy: I am aware of that. I am aware of the fact that people testified before.

The Chair: And the record is available for you to read.

Ms. Penny Priddy: No, no. I have the record, thank you very much. But because they had applied a second time to be heard on this Bill C-3, because this is different from what came forward.... You know, this is another set of hearings, if you will, or committee meetings.

Since I don't see anybody from the Liberals or the Bloc or the Conservatives who has the same interest I do, I will take that as no interest on anybody's part but mine.

The Chair: Thank you again to the witnesses. I appreciate very much your coming here. I think you have had quite a good opportunity to explain your positions, and I appreciate your presence.

This meeting stands—

● (1715)

Ms. Bonnie Brown: I would like to ask the researchers to do something for us.

We've had five legal groups here today, groups that are very familiar with the details of all this, and four of them have suggested to us that they do not feel that the bill as written would meet a charter challenge. As a matter of fact, probably the most experienced person in this field has suggested that he knows of at least three groups that will take the government to court, all the way to the Supreme Court, in a charter challenge if this bill goes through as written.

I've been here 13 years and I have never heard that said at a committee meeting before, that the bill is so bad or has so many flaws—not all bad, but it has certain flaws—that if corrected, could spare the state a charter challenge case.

I want to ask our researchers to see if they can find out the last time a government—it doesn't have to be this government, any government of Canada—had to defend against a charter challenge through all the courts, from the lower courts to the upper courts, and how much it cost. We should be able to find that out from the finance department.

The Chair: Ms. Brown, with all due respect, that's research that you'd have to do. That's really not the job of our research staff.

Ms. Bonnie Brown: This is the public safety committee.

The Chair: Yes, and you are a member of it.

Ms. Bonnie Brown: It's tied to the elements of justice and the courts. I don't see why our researchers couldn't find that out for us.

The Chair: Do you have a comment on this, Mr. MacKenzie?

Mr. Dave MacKenzie (Oxford, CPC): One of the reasons we're doing this is because people have challenged the legislation and it has gone to the Supreme Court. That was legislation that developed over, I think I heard, 1979 to last week, that kind of thing.

I think your question would cover almost any case that ever got to the Supreme Court on a challenge of the charter, would fit the criteria. I think that would be a pretty onerous task.

Ms. Bonnie Brown: I don't want 25 cases, but couldn't we just find out what it cost the government to defend against the last charter challenge on this particular piece of legislation, because the reason we're doing this is because it failed to pass at the Supreme Court?

Mr. Dave MacKenzie: That's why we have a Supreme Court.

The Chair: Just as a little aside, the meeting has been adjourned, so if the witnesses wish to leave, they may do so.

Ms. Bonnie Brown: I had my hand up before you—

The Chair: Ms. Barnes.

Hon. Sue Barnes: I think both of our hands were up.

I wanted to say, I would have no problem sitting on a Tuesday morning, as we did today—if any of these witnesses can be contacted—to hear some more. We weren't aware of these people when we chose our witness list, as I understand.

The Chair: Well, we will have another meeting on future business of the committee. I'm not sure why you didn't say anything when Ms. Priddy—

Hon. Sue Barnes: I did, and you didn't see me.

The Chair: I surely didn't, and neither did Ms. Priddy—and she was looking for support.

Hon. Sue Barnes: Jesus, do you think I'm lying to you, Chair?

The Chair: Ms. Brown.

Ms. Bonnie Brown: I raised this because I think we have a responsibility to know what it might cost if one of these groups challenges it. Probably some of the groups are the ones who won the last time and caused this whole thing to be revised. If we can predict that they're going to do it, I think it puts a different colouration on our examination of any amendments that might come forward, because I'm sure some of the amendments will reflect the suggestions of these people.

The Chair: You have research staff, as a political party. I don't think it's fair for our staff to do that, unless this committee gives direction to them to do that, and it would take a special meeting to do that. I just don't think that—

Ms. Bonnie Brown: Okay.

Well, maybe I could hear from the researchers; maybe it isn't as onerous as you think. You're not a researcher, nor am I. Let's just take the last case that overturned—

Mr. Philip Rosen (Committee Researcher): Whenever we try to get the cost of litigation, it's very, very difficult, because litigation is not necessarily costed in a way that can be provided to you simply. Remember, there are three cases. There have been numerous, numerous proceedings before the Federal Court of Appeal and, ultimately, the Supreme Court of Canada.

I think it will probably be impossible—though we can certainly try—to get an answer to this question in time for next Thursday, but the simplest way of doing it would be for a member to put a question on the order paper for the Minister of Justice, the Department of Justice, and they will provide it to you within 45 days, or whatever it is.

I know we have tried in the past to get the cost of litigation for the Correctional Service, for example. In one case I think it took us six or eight months, and we still didn't get a complete answer.

● (1720)

Ms. Bonnie Brown: Thank you.

That's the reality we're facing; I didn't know that.

The Chair: It's not the appropriate vehicle. I just sense that it's not —

Ms. Bonnie Brown: They didn't agree with you that it wasn't the appropriate vehicle, but have explained the reality of the situation that they can't get the information, which is interesting in itself, Mr. Chair.

The Chair: We're adjourned.

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