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Chair

Mr. Garry Breitkreuz

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● (1540)

[*English*]

The Chair (Mr. Garry Breitkreuz (Yorkton—Melville, CPC)): I'd like to bring this meeting to order. This is the Standing Committee on Public Safety and National Security, meeting number 8, and we are continuing our study of Bill C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act.

We really appreciate our witnesses coming on such very short notice. Some of you have made a great effort to be here. We appreciate it very much and we thank you.

I am not sure if you have discussed who would like to go first. You will go in the same order.

I'll ask you to introduce yourselves. We'll begin with Amnesty International Canada. Then we'll move to the Canadian Arab Federation, and the third presenter will be the Human Rights Watch representative, Ms. Julia Hall.

You each may have 10 minutes approximately. We're not going to bring the gavel down too quickly on you, but make your opening remarks, and then the usual practice at this committee is to go around and give every member an opportunity to make comments and ask questions.

Welcome once again. Please introduce yourselves, and you may begin.

Mr. Alex Neve (Secretary General, Amnesty International Canada): Thank you, Mr. Chair.

My name is Alex Neve, and I'm the secretary general of Amnesty International Canada. It's a pleasure to be here today. We do certainly appreciate the fact that the committee has opened up this extra opportunity for hearings, making it possible for us to appear.

Amnesty International first spoke out about concerns regarding Canada's immigration security certificate procedure back in 1997, in the case of Manickavasagam Suresh. At the time, we highlighted two separate but certainly interrelated and very serious human rights concerns, and 10 years later both of these issues of fair process and protection from torture remain very substantial and glaring problems.

Amnesty International approaches its review of Bill C-3 from three perspectives. First, does it lead to a process that meets international standards, such that individuals who are subjected to certificates will in fact be dealt with fairly? Second, is it a process that more widely stands to strengthen the protection of human rights in Canadian security laws and procedures? And third, recognizing the importance of the example Canada sets for the rest of the world, is this an approach that demonstrates leadership in the crucial global effort to ensure that human rights are not sacrificed to security?

That latter consideration, we urge, should be of real concern in your deliberations. The past six years, in the aftermath of September 11, have witnessed a global challenge to human rights standards. Crucial safeguards against torture, arbitrary detention, fair trials, and other vital human rights principles have been undermined. We very much need to look to Canada to stand firm for these critical human rights principles and make it clear that true, lasting security will be achieved only through scrupulous regard for these hard-won, universally binding standards.

Amnesty International developed principles that we believe should guide reform of the immigration security certificate process, which derive from Canada's international human rights obligations. It had been our intention to promote these principles in consultations we had expected would be conducted in advance of preparing this bill. Those consultations, unfortunately, never took place.

After outlining those principles, I will then highlight a number of the most problematic human rights shortcomings in Bill C-3's proposed special advocate model, and I will end with Amnesty International's key recommendation, that the special advocate model should be abandoned, and instead, measures should be put in place to make it possible for the individual's own lawyer to provide effective representation.

The overarching principles—there are nine of them—are as follows. I hope you will be able to have these later in writing. On short notice our brief wasn't able to be prepared in both languages, but it is available and is with the clerk, and he tells me it should be distributed to you in short order. In writing, they are elaborated more fully, but I want to signal the key concepts.

First, in no circumstances should any procedure lead to the removal or transfer of any individual from Canada to a country where there's a serious risk he or she would be tortured or subjected to cruel, inhuman, or degrading treatment.

Second, in no circumstances should any procedure lead to the removal of an individual if he or she would consequently escape facing justice for crimes.

Third, criminal proceedings should be launched in Canada when removal or transfer is not possible.

Fourth, immigration removals should not be disguised extraditions.

Fifth, immigration-based security procedures should provide the same rigorous standards of procedural fairness as are offered under Canadian criminal law.

Sixth, the right to full answer and defence must be scrupulously protected in any immigration-based security procedures.

Seventh, in no circumstances should evidence be withheld for the sole reason that to disclose it would be injurious to international relations. The Arar inquiry provides troubling examples of the extent to which concern about injuring international relations is used in a wholly inappropriate manner to justify withholding important evidence.

● (1545)

Eighth, in immigration-based security procedures, detention must be the last resort. Immigration detention should not be prolonged and can never be indefinite.

Finally, ninth, immigration detention is not and should not be treated the same as criminal detention.

The approach that is proposed under Bill C-3, unfortunately, does not meet these principles. In large part, of course, that is because the bill fails to incorporate provisions that deal with many of the very troubling shortcomings that are inherent in the security certificate system, such as deportations to torture, concerns about impunity, and issues related to detention.

The special advocates proposal itself, evidently intended to improve fairness, improves the system only marginally and in the end does little to ensure that fair trial rights are adequately protected.

The proposed amendments creating special advocates mirror closely the model that exists in the United Kingdom. As noted in the Supreme Court decision of Charkaoui, the British model has received significant criticism from U.K. parliamentary committees, U.K. courts, detainees and their advocates, and from special advocates themselves, some of whom have stepped down from their positions rather than continue to give what some have called a veneer of legality to a fundamentally flawed system.

I would like to quickly review some of the more glaring problems with the proposed system. The concerns are elaborated in greater detail in the written notes you will later receive.

First is the concern that special advocates do not have explicit right of access to all relevant information in the government's possession. This is further aggravated by the minister's power to withdraw information from the proceedings. The lack of a clearly expressed obligation on the government to disclose all relevant information has been a grave concern in the U.K., where special advocates have indicated that they have become aware of cases where important exculpatory information was not disclosed to them. If there is potentially exculpatory evidence, the minister must be obliged to disclose it and must not be allowed to withdraw it from the process.

Second, while Bill C-3 permits the appointment of a special advocate on a judicial review or on an appeal from a designated judge's decision, the proposed legislation provides no mechanism for the special advocate, him or herself, to commence a judicial review or an appeal where an issue arises in the context of in camera proceedings.

Third, Bill C-3 does not set out the criteria for the appointment of special advocates. Bill C-3 does not set out minimum qualifications for special advocates or suggest where they will be drawn from, leaving these to the discretion of the minister. The bill makes no provision for training, administrative support, or access to experts for the special advocates.

The U.K. House of Commons Constitutional Affairs Committee has severely criticized the lack of resources for special advocates in the U.K. once they have been appointed. For example, the lack of Arabic-speaking staff has resulted in situations where material that was withheld from the individual concerned was, after the fact, found to be public and available on the Internet and could have been disclosed to the individual to help mount a defence.

Fourth, the relationship between the named individual and the special advocate is fundamentally and inherently flawed. First, the individual plays only a very minimal role in appointing the special advocate, and second, the absence of a solicitor-client relationship undermines the trust necessary between the special advocate and the named individual.

With respect to appointment, it is the judge rather than the named individual who selects the special advocate, chosen from a list of persons established by the Minister of Justice. The judge may also terminate the special advocate. The named individual has only a restricted role in the selection process.

The appointment of the special advocate by a judge with little input from the individual may give the impression that the special advocate is not the advocate of the named individual, and the named individual may perceive the special advocate to actually be acting as an agent of the state.

● (1550)

The role of the special advocate is further undercut by the absence of solicitor-client privilege between the named individual and the special advocate. The proposed legislation is silent on the special advocate's duty of confidentiality and legal professional privilege. This ambiguity will put a chill on communications between the named individual and the special advocate.

The fifth and final concern Amnesty International has with respect to Bill C-3 relates to the restrictions placed on the special advocate's ability to communicate with the named individual or anyone else following the disclosure of secret information to the special advocate. Of course, it is possible for the special advocate to seek the judge's authorization to be allowed to communicate with outsiders, including the named individual. This provision is similar to that found in the U.K. special advocate model, where authorization from the judge allowing further communications has rarely been given, and is rarely sought because the questions the special advocate seeks to ask must be vetted first by the government.

This prohibition on communication with the named individual after disclosure of the secret evidence has been the subject of strong criticism in the U.K., not only from human rights bodies and the special advocates themselves, but by parliamentarians as well. The same criticisms apply to Bill C-3.

It is uncertain whether the special advocate can call witnesses to testify on behalf of the named individual. The limitation on the special advocate's ability to present other evidence on behalf of the named person, such as documentary evidence, is less ambiguous. This may be done only with the judge's authorization.

What is the solution? Obviously, there are amendments that could go some distance in meeting the concerns I have identified. It is disappointing that the bill does not include those sorts of enhancements, all of which are clearly apparent from the U.K. experience and on the public record. The question that arises is whether the special advocate model can be improved to such an extent that these serious flaws can be remedied. In Amnesty International's view, it cannot.

The improvements that are required, securing the real and perceived independence of special advocates, building a relationship of trust, ensuring confidentiality and privilege, and allowing an ongoing relationship throughout the course of the proceedings, would all, if enacted, essentially replicate the role the individual's own lawyer would and should play. Therefore, recognizing the fundamental importance of the solicitor-client relationship in any fair trial, as well as important rights associated with the choice of one's own counsel, all of which is of even greater importance in proceedings involving secrecy, Amnesty International urges that Bill C-3 be amended to focus instead on making it possible for the individual's own lawyer to effectively represent the person concerned.

This is not an outlandish suggestion. The Canadian justice system has already recognized that the need to mount an effective defence in cases involving sensitive evidence, such as that of a national security nature, requires creative solutions to the issue of disclosure. One such solution that has been used involves security clearing defence counsel and giving them access to the evidence, coupled with a limited undertaking not to disclose aspects of that evidence to their client.

The most obvious precedence for such a model involving national security material can be found in criminal cases such as the recent Air India trial. In the Air India trial, the crown gave defence counsel limited interim disclosure to the relevant CSIS files, with an undertaking of confidentiality not to disclose the evidence to others, including their clients. Recognizing that it would have been too time consuming to then seek a judicial ruling for each document, the parties established their own system of negotiating which documents could in turn be disclosed to the accused.

The use of undertakings in Air India stemmed from earlier precedents dealing with informant privilege, third-party wiretaps, police intelligence records, and privileged documents. Ironically, given the very serious concerns about the nature of the justice system being pursued there, models used by the United States to deal with detainees in Guantanamo Bay present a partial example to consider.

Detainees brought before the flawed military commission process are appointed a military defence counsel to represent them, in addition to a civilian lawyer, both of whom have lawyer-client privilege. The military lawyer is able to see classified evidence but can be forbidden from sharing that information with the detainee and their civilian counsel.

● (1555)

The United States has used criminal law to try individuals for suspected terrorist activity. Ahmed Ressam was convicted of conspiring to blow up Los Angeles International Airport, and his trial was a criminal trial held publicly. On sentencing, Judge John C. Coughenour noted:

> We did not need to use a secret military tribunal, or detain the defendant indefinitely as an enemy combatant, or deny him the right to counsel, or invoke any proceedings beyond those guaranteed by or contrary to the United States Constitution.

In sum, the special advocate model should be withdrawn. Instead, Bill C-3 should propose a process for security clearing counsel for the individual named in an immigration security certificate, coupled with limited and necessary undertakings that counsel will not disclose some of the evidence he or she is given access to. As well, it is unfortunate that Bill C-3 does not attempt to deal with the related and very serious human rights concerns that arise in immigration security cases, including prohibiting returns to torture, ensuring individuals do not escape justice, removing injury to international relations as a ground for withholding evidence, and improving the provisions governing detention in immigration security cases.

Thank you.

The Chair: Thank you very much.

We will now move over to the Canadian Arab Federation. Please introduce yourselves and make your presentation.

Mr. Mohamed Boudjenane (Executive Director, Canadian Arab Federation): Thank you, Mr. Chairman.

My name is Mohamed Boudjenane. I am the executive director for the Canadian Arab Federation, and with me today is James Kafieh, our legal advisor.

[*Translation*]

Mr. Chairman, I'd like to thank committee members for inviting us here today. I think it is crucial and very important for committee members to hear from the communities most affected by this kind of bill, in particular the Arab and Muslim community of this country. Thank you for inviting us here.

[*English*]

The Canadian Arab Federation is the national voice for one of the two minority communities in Canada that have been most adversely impacted by post-9/11 stereotypes. This legislation not only fails to guard against the effects of those stereotypes, it unintentionally perpetrates them. For every time another Arab is detained under the regime, in the minds of many Canadians it reinforces the social stereotype that all Arabs are terrorists. That is a racist stereotype, of course.

Arabs in Canada are an incredibly diverse community. Contrary to the popular perception, most Arabs in Canada are Christian. Actually, today you have two in front of you. I'm originally from Morocco. I'm an Arab Muslim, and James Kalieh is a Canadian originally from Palestine who is a Christian.

Christian and Muslim Arab alike are peaceful and productive members of our society who embrace our democratic values. They are as concerned about safety and security as anyone else in Canada. Despite these facts, in the social reality of discrimination in the post-9/11 environment, Arabs face prejudice. “Travelling while Arab” is the current touchstone for racial profiling.

Why were all Arabs immediately perceived as terrorists following 9/11, whereas the Scottish/Irish were not following the Oklahoma bombing? The answer lies with the social reality of pre-existing discrimination and stereotypes.

Actually, there is an interesting study that was done in the United States by an Arab scholar who talked about the villain within the pop culture of America through movies, cartoons, and so on, and the Arab and the Muslim are always portrayed as someone you cannot trust and someone who is an outsider.

The reality is that Timothy McVeigh was just like us and the 9/11 hijackers were different from us. As I said, this is a perception promoted by certain stereotypes pre-existing in our society.

Arabs are a community at risk. Arabs in Canada live in a society where stereotypes have been reduced to a simple equation—Arabs equal Muslims and Muslims equal terrorists. This type of legislation, unfortunately, is sending a major message to what we have now within our public discourse. The public discourse mainly refers to our opinion leaders, politicians, our media, and people who have a certain impact on the perception of the public. And since 9/11, of course, the media are using headlines like “barbaric”, “uncivilized”, “non-compliance with our values as Canadians” when whey refer to Arab and Muslim.

The opinion leaders and certain politicians, and I remember Mr. Harper recently, after the so-called 17 alleged terrorists in Toronto... when he stood and said “us against them”. Well, we all know that the majority of those kids who were arrested were all Canadian citizens and were all born here in Canada. This type of message sends a clear signal, it has a strong impact on Joe Schmo on the street, and it has a major impact on the perception.

The stereotype and this piece of legislation also give carte blanche to our security officials and agencies to basically racially profile and harass and discriminate against members of our communities. The Canadian Arab Federation has files of cases of people being detained, questioned at the border, and racially profiled by security officials on a regular basis.

We still have cars from CSIS and the RCMP parked in front of mosques in Toronto, Montreal, and other big cities, spying on people, blackmailing members of the community, and asking them, “If you don't spy on your fellow worshipper, you might not have access to your Canadian citizenship”, or “Maybe the application you have to bring your family here will be delayed”. This is the reality, and we have cases and cases of this type of....

On our campuses and universities, Arab women are being attacked. Muslim women are being harassed, and we all know the big debate now in Quebec around the so-called *les accommodements raisonnables*, where the description of Arab and Muslim is quite negative.

The other impact, of course, is this big sense of marginalization and of being ostracized as a member of this community. Arab Canadians and Muslims now feel like outsiders. They feel as though they are now the enemy within. This has a clear impact on the way they behave in society. It has a big impact on the way they engage with the civil society. I'll give you a couple of examples.

● (1600)

Recently, the Canadian Labour Congress released a study about the rate of unemployment in Canada among racialized minority groups. Arabs and west Asians have the highest unemployment rate in Canada now, in spite of the fact that it is one of the most educated immigrant populations of this country.

The situation now, where we have many organizations that used to fundraise to help people in the Middle East or in other parts of the world, Africa or South Asia, is limited. Anyone who is now raising funds or trying to put together some initiatives to help this part of the world is considered as someone who may be helping a terrorist organization in the Middle East. This has had a major impact on the way we behave as citizens of this country.

We are not able to organize anymore, to express our voice or our opinions on a regular basis. One of the examples I can give you is that last week an Arab, or actually a Muslim-born Canadian.... He is suing Air Canada with the Canadian Human Rights Commission because he was racially profiled. He was stopped and was blocked from taking a plane. The only reason, he thinks, is either because he is a Muslim or because he was very critical of the Bush administration. He is a cartoonist.

So we are now questioning our own freedom of expression in this country when we've been targeted by this piece of legislation.

Finally, I think this is creating a major impact on other racialized minority groups and immigrants in this country. Yesterday, Statistics Canada released new numbers about the new face of Canada, telling us that now one in five Canadians is born outside.

Canada is a country of immigrants. We need immigrants. We have always been portrayed as a land of opportunity, as a land of diversity, but the reality is that we are creating now, with this piece of legislation, a two-tiered legal system: one for immigrants, and we're telling them, if you come to Canada and we perceive you as a threat, you can be detained indefinitely; and one for Canadian citizens. This is not part of our values as a fair and democratic society.

Our recommendation is straightforward. I'm not going to repeat the main argument. Alex Neve spoke about it, and I'm sure Madame Hall will also talk about that. We think there is no room for this piece of legislation in our society. We think we have enough ammunition within our legal system to go after criminals—and a terrorist is a criminal. We arrested and detained those so-called 17 in Toronto recently without using the security certificate, or even Bill C-36. There is enough ammunition, as I said, in our legal system to make sure criminals are detained, arrested, and punished.

I want to conclude by saying that it's interesting, but at some time we said in Canada that it's important to sacrifice some of our civil liberties and human rights to make sure we are secure and safe in this country. The reality is that we are willing to sacrifice the civil liberties and human rights of a certain group in our society. This is not the type of Canada we choose to stand for.

We come to you as legislators to remind you that you have a duty to make sure that this society remains inclusive, that there is no such piece of legislation that can encourage racial profiling or racism against any group in our society. Thank you very much.

● (1605)

The Chair: Our last presenter is from Human Rights Watch, please.

Mrs. Julia Hall (Senior Counsel, Terrorism and Counter-Terrorism Program, Human Rights Watch): Thank you, Mr. Chairman, and thanks as well to the entire committee for giving Human Rights Watch this opportunity to appear today.

I understand the committee is in the process of considering hearing additional witnesses, and of course we welcome that as well.

I'd like to just say, as a point of beginning, that Human Rights Watch endorses Amnesty International's basic concerns with Bill C-3, but I'd like to take you back a couple of years to Human Rights Watch's first foray into advocacy around security certificates. In an April 2005 report we recommended:

> Repeal as a matter of urgency Division 9 (sections 76-87) of the Immigration and Refugee Protection Act (IRPA), providing for the use of security certificates authorizing the government to detain and deport, based on secret evidence presented in *ex parte* hearings and without procedural guarantees, persons determined to be an imminent danger to Canada's security, including potentially effecting such transfers to countries where a person would be at risk of torture or ill-treatment.

We also noted at the time that although the IRPA did not expressly provide for indefinite detention without charge or trial of persons subject to a security certificate, the practical effect of the detention regime accompanying certification could result in just that: indefinite detention. If a judge determined that a person would pose a threat to Canada's national security and deportation could not be effected, then indefinite detention was, at that time, a possibility, given the loopholes in the law. Human Rights Watch called for closure of that loophole since indefinite detention without charge or trial is by its very nature arbitrary and in violation of international human rights law.

Many of these concerns were articulated in our amicus brief in the Charkaoui case, the decision from which struck down certain provisions of the IRPA as unconstitutional.

We appear before you today to comment on Bill C-3, the stated purpose of which was to remedy the deficiencies of the IRPA identified by the Supreme Court in Charkaoui. We deeply regret, however, that Bill C-3 does no such thing. In fact, the very same criticisms levelled against the IRPA prior to Charkaoui back in 2005 stand with respect to Bill C-3. The substantive and procedural deficiencies we identified in 2005 cannot be set right simply by adding to the mix a security-cleared third party in the form of a special advocate. Regrettably, under Bill C-3 a person subject to a security certificate still will not have access to the secret evidence upon which he has been labelled a national security threat or to secret evidence used to assess his risk of torture upon return. A person assigned a special advocate will not enjoy the benefits of an attorney-client relationship, making any communications between him and his assigned advocate vulnerable to disclosure. The government is still not expressly directed to disclose all evidence, including exculpatory evidence, in this case to the special advocate, making the claimed utility of such an advocate even more limited.

In the interest of full disclosure, I served as an expert witness before the Special Immigration Appeals Commission in the United Kingdom in the case of Abu Qatada. I was there serving as an expert on returns to the risk of torture and the use of diplomatic assurances, or, what they call in the United Kingdom, memoranda of understanding. I personally witnessed more than once special advocates in that case complaining to the judge in open session that the government had not fully cooperated with disclosure requests that had been lodged months prior, at which point the Chief Justice, Judge Ouseley, would call the session into close to discuss the matter further. It was of great interest to those of us in the audience or serving as experts that the special advocates felt the need in open session to challenge the government's lack of cooperation with respect to disclosure.

Finally, under Bill C-3, indefinite detention without charge or trial remains a real possibility since a judge could in fact rule that a person is a national security threat but recognize correctly at the same time that he could not be deported due to risk of torture on return. You will see in our written comments as well that Human Rights Watch does not believe that diplomatic assurances against torture, that is promises from a receiving government that a person would not be tortured on return, are reliable and thus do not mitigate the risk of torture upon return. A certain sense of déjà vu thus surrounds our reading of Bill C-3.

● (1610)

The deficiencies in the bill also fail to meet criticism from other international quarters, and it should be of note that we do sit here to represent to some extent an international perspective on the bill.

In April 2006, the UN Human Rights Committee expressed concern that some persons subject to security certificates in Canada had been detained for several years without criminal charges, without being adequately informed of the reasons for their detention, with limited judicial review, and called on the Government of Canada to legally determine a maximum length of such detention.

Therein lie, in that one paragraph of concern from the UN Human Rights Committee, all of the concerns we have with Bill C-3. This language is eerily similar to the committee's recommendations to the United States government with respect to detentions at Guantanamo Bay.

In December 2006, the Human Rights Committee called on the U. S. to give detainees access to counsel of their choice and expressed concern that detainees did not have adequate due process due to restrictions on their rights to have access "to all proceedings and evidence".

The use of secret evidence and the establishment of special advocates has been commented upon by many, as the committee well knows from the documents that have been submitted into evidence, including those from Human Rights Watch. But I'd like to share some words with you from a lecture given by Justice Arthur Chaskalson, president of the International Commission of Jurists and chair of IJC's Eminent Jurists Panel. The lecture was given at Cambridge University in May 2007, and the title was, "The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law".

First, Justice Chaskalson applauds Canada and the Canadian Supreme Court for having struck down those provisions of the IRPA that did not comply with the charter or with international human rights obligations. But he goes on to say:

> But the appointment of special counsel for this purpose [of testing secret evidence] is not an all embracing panacea. Persons against whom accusations have been made are told that evidence material to the decision to take action against them may not be disclosed to them. Instead, the government that has taken the action will appoint lawyers with security clearances to represent their interests. The lawyers may see the evidence but may not tell them what it is. They must just do the best that they can in the circumstances without being able to get detailed instructions from the affected persons on the information that has been withheld. I am not sure how an English family with a child detained in some foreign country would feel about such a system; or indeed an English family with a child detained in England.

I must confess to having considerable reservations about the fairness of this process.

In closing, I'd like to say that the special advocate system proposed in Bill C-3 simply does not answer the requirement for transparency that is enshrined in international human rights law with respect to fair trial guarantees. Therefore, it does not, as constituted in Bill C-3, provide a person subject to a security certificate with the proper ability to mount a defence.

It is the position of Human Rights Watch, then, that Bill C-3 and a system for special advocates should categorically be rejected.

Thank you.

● (1615)

The Chair: We'll begin our round of questions and comments with the official opposition.

Mr. Dosanjh, are you sharing your time with Ms. Barnes?

Hon. Ujjal Dosanjh (Vancouver South, Lib.): Yes, I am.

First of all, thank you all for being here at such short notice. You are part of the additional witnesses; there are going to be more.

I appreciate all of the concerns and comments all of you have made. Because there is not that much time, I will simply ask one question of Mr. Neve.

You talked about the exculpatory evidence and of the need to place an obligation on the crown to disclose the exculpatory evidence. Obviously, that's very important, but you would agree—and I'm not defending anything here, but my understanding is that the crown prosecutors in the courts every day have that inherent obligation to disclose exculpatory evidence to the accused. There is nothing in this law, on the face of it, that would grant them the right to ignore that convention or that obligation, and the same might be argued of the government itself; that's the crown. But what you're arguing for is an expressed obligation to provide exculpatory evidence. I might not disagree with you, but what do you think of what I just said? Does that not place an inherent obligation on the crown, including on the government, that will make up the information that would be released?

Mr. Alex Neve: I guess some of the uncertainty arises because the immigration security process is not itself a criminal process. While you're quite right that those obligations around disclosure are clearly established in common law with respect to criminal proceedings, when things transfer into an immigration context—and this isn't the only principle where we see this play out—it is not uncommon that it becomes less clear, less certain, whether those conventions and common law principles will or will not be adhered to. That may well be the intention.

As I noted, I think there is a cautionary reminder from the U.K., which has exactly the same well-established—perhaps even longer-established—conventions with respect to disclosure in criminal processes, where this is not how it has played out, and special advocates have frequently indicated.... It's usually happened because they act in more than one case. They'll see information in some other case they're involved in that has been shared with them, for whatever reason, which they've indicated—if it was disclosed to them in the first case or the other case they were involved in—would have been of some relevance, if not even potentially exculpatory, but wasn't disclosed.

I want to be clear that this doesn't solve the problems with the model for us, but we think it's a very important principle, because regardless of whether a special advocate is the one acting or whether the system did get further improved and gave this power to the individual's own lawyer, that person needs to be able to rely on an assurance of full disclosure.

● (1620)

Hon. Ujjal Dosanjh: Thank you.

Hon. Sue Barnes (London West, Lib.): Thank you very much.

Thank you for coming. I respect what you're trying to tell us. Unfortunately, for procedural reason, many of the examples of changes to this legislation, as presented to us, would be outside the scope of our amendment power for a bill coming to us after second reading.

So I am going to talk to you about some of the things I think are within that scope. One of those would be the choice of lawyers. Another would be a prohibition against using evidence from torture. Another one could be a duty of confidentiality, just because the bill specifically says there is no solicitor-client privilege.

I would like to canvass how important you think each one of those would be. I am not saying right now that we are absolutely certain they're within the confines of any amendments we could make, but I can tell you some of the others I've seen are definitely not within the confines of the process. This is not a bill...and I know the procedure for a bill sent to us after first reading is that we can amend it in any way we want. So even though I understand what you and others have been telling us, I'm just telling you that some of those wider amendments are not possible with this particular piece of legislation at this time.

Having said that, I would like to go to the Canadian Arab Federation, because I think the choice of a lawyer in this situation would be a critical thing to have in the bill. Could you expand on that?

Mr. Mohamed Boudjenane: Absolutely, we agree with you. But again, our position is, do we really need this type of extraordinary legislation?

Hon. Sue Barnes: I understood that.

I'm trying to see if there are things you feel would be very, very important, if we were faced with amendments on what we know will be a confidence bill.

Mr. James Kafieh (Legal Counsel, Canadian Arab Federation): The three points you've mentioned are all important, but they're not nearly sufficient. One of the fundamental points I would make is that we're talking about, in effect, taking away somebody's liberty and putting them in solitary confinement for years. This is the effect of it.

In our legal system, one of the fundamental points we should always be able to relate to is that if somebody is judged or is being assessed whether they're competent to stand trial, one of the criteria we look at is, are they able to assist their counsel in their own defence? If they are not allowed to have access to the information, if they don't know the specifics of the allegation, they can't even begin to do this.

So through an administrative sleight of hand, we are taking away somebody's liberty, putting them in what is, arguably, the most severe punishment our system can mete out, and doing this to somebody who has not been found guilty in a criminal court of anything but is being held on the basis of suspicion.

With regard to the points you've made, I respect what you're telling us, that you understand there is only so much you can do on this committee. So we would ask that you do what you can on this committee, but the point is that this is really not even beginning to deal with the issue.

Hon. Sue Barnes: I can tell you, if we were in government, this is not a bill that I think we'd present. But we're not in government.

Ms. Hall.

Mrs. Julia Hall: I really would simply endorse the same. It doesn't matter which of the special advocates you would select as your own special advocate. The limitations upon the advocate's ability to actually represent you in an attorney-client relationship and to share evidence with you that may be of crucial importance to your exoneration obtains, no matter what.

On the absence of torture evidence, that's already codified, to some extent, in Canadian law—

Hon. Sue Barnes: And international covenants, to which Canada has acceded.

Mrs. Julia Hall: Right.

In general, I would point the committee to a very recently released—November 27—general comment, only the second in history by the Committee against Torture. The Committee against Torture categorically includes within that prohibition ill treatment, because prison conditions and conditions of detention very often are categorized as ill treatment as opposed to torture. You have the very sensational vision of torture—for example, being strung upside down and being electrocuted. The committee has made a decision that within the definition of torture itself comes those practices that would constitute ill treatment.

What I would say to that is that in general in Canadian law, and in general in anything that this committee passes, there should be a prohibition against evidence extracted under torture or conditions of ill treatment.

That is my response to your query.

● (1625)

The Chair: Thank you. Your time is up.

Hon. Sue Barnes: Thank you very much.

The Chair: Mr. Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): I didn't hear you say anything about the appeal process. Are you satisfied with the appeal process provided for in this bill?

[*English*]

Mr. Alex Neve: The one concern that Amnesty International has highlighted is the fact that the special advocate himself or herself does not have the ability to launch a judicial review or an appeal. That is, of course, left in the hands of the individual and his or her own lawyer. But the special advocate, being the only one of that group who has access to the in camera proceedings, who knows the full extent of what is or is not going on and thus would have some very different perspectives and insights as to when a judicial review or an appeal may be necessary, does not have the power to launch the judicial review or appeal and can't even have a conversation with the individual or the individual's counsel to suggest that a judicial review or an appeal may be necessary for particular reasons.

So we do think there are some shortcomings there.

[*Translation*]

Mr. Serge Ménard: If that's all you mention about the appeal, I conclude that you are pleased with the fact that it's the person who accepts the certificate and thus who maintains the incarceration of a person who decides on his or her own what ground of appeal will be recorded, as well as the fact that that appeal will be limited to questions of general importance. Am I right?

Do you believe that person will be treated better than a person convicted of second degree murder whose sentence might only be 10 years? That person could appeal on a question of rights and facts before a bench of three other persons to decide a question as important as a 10-year incarceration.

[*English*]

Mr. Alex Neve: No, certainly not. We would share concerns with respect to all of those points.

[*Translation*]

Mr. Serge Ménard: It seems that no one saw the problem. I hope I won't be the only one.

Mr. Mohamed Boudjenane: As regards the Canadian Arab Federation—

[*English*]

The Chair: Mr. Ménard, the translator cannot hear you. Can you move closer to your microphone? They're not getting the full message.

Go ahead, Mr. Boudjenane.

[*Translation*]

Mr. Mohamed Boudjenane: I wasn't going to answer your question directly, but rather make a comment on the spirit of this bill.

We have repeated a number of times that, as far as we are concerned, this kind of bill has no purpose in a democratic, transparent society that is respectful of the process of law.

Regardless of the situation, our penal system—you know this better than I, since you are a lawyer—has all the necessary levers to deal with criminals. As regards terrorists—at least if someone is considered a potential terrorist—they are criminals as well. So we don't see why there would be any reason to debate this kind of bill.

According to Ms. Barnes, it seems you virtually don't have a choice: you've received a bill on second reading, you're limited to the type of amendments that you can make to it and you have to work within these limits.

In our view, as far as the Arab community is concerned, the Bloc Québécois has always been progressive. It has always been the path to follow when it came to protecting our civil liberties and human rights. How can it even consider debating such a bill?

Mr. Serge Ménard: You apparently don't understand our procedure very well. Wait until the end of the process; you'll understand better.

For the moment, you nevertheless have to realize that the Supreme Court accepts this kind of process if it is improved.

We can have a difference of opinion over the improvement. You can obviously have a different opinion from that of the government as to whether the improvement is enough to prevent a successful challenge of this bill before the Supreme Court. In the meantime, it must live. However, we can improve it, and that's what we're trying to do right now.

I listened closely to your proposal, Mr. Neve, which moreover took up most of your speech. I understand that you are rather in favour of the person choosing his own advocate.

We're told these lawyers will need training and security. You know that, once the person has chosen his lawyer, the lawyer will be asked to submit to a security check to determine whether he or she can in fact be trusted with secret documents, so that the secrets are kept, and that he or she will be given that training.

Is that how you would adapt this? That would enable us to avoid needlessly training a lot of them.

● (1630)

[*English*]

Mr. Alex Neve: Our focus isn't so much on the issue of training. It's clearly the individual who already chooses their own lawyer, and in proceedings, individuals do have representation. As we all know, there's a group of lawyers in Canada who have developed considerable expertise and specialization in national security cases in an immigration context, so individuals concerned are probably most likely going to look to that group and emerging lawyers who continue to develop expertise. The key would be that they need to obtain the necessary security clearance so that they can get access to the information, subject to whatever undertakings are necessary, and, as I said, there are precedents throughout the Canadian legal system of those kinds of models working, including in the national security context.

[*Translation*]

Mr. Serge Ménard: And if he doesn't get his security certificate? I can't help thinking of Robert Lemieux, who defended the FLQ terrorists in 1970 and who was constantly monitored by the police. I'm sure he wouldn't have been trusted with secret documents.

[*English*]

Mr. Alex Neve: Undoubtedly, there would be individual cases in which there would be a tussle between the individual's choice of counsel and the ability to get security cleared. There may even be instances in which security clearance ultimately is not possible, and the person concerned would then have to choose another counsel, again of their choice, but we would hope those instances would be limited.

The Chair: We'll have to wrap this round up.

[*Translation*]

Mr. Serge Ménard: You're aware that we can find large numbers of lawyers in Canada.

[*English*]

Mr. James Kafieh: There would be a couple of points to make, and one is that we're not looking at hundreds of cases that we're dealing with. Even if training were required for each individual lawyer who's going to be coming forward, we would not be talking about a very large pool. There would be a major difference between telling somebody that you must choose among this pre-selected pool and saying that out of all the lawyers in Canada, that one lawyer you chose is one we can't security clear, and then they can go back and choose any one of the others. There's a major difference between these two prospects.

The Chair: Thank you.

Ms. Priddy, please.

Ms. Penny Priddy (Surrey North, NDP): Thank you, Mr. Chair, and thank you to Amnesty International and Human Rights Watch and the Canadian Arab Federation for being here today.

To set some context for my question, as you may or may not know, the NDP is opposed to this piece of legislation and believes it could be done in a different way. We think security certificates actually undermine a number of democratic values that our country believes in and that our democracy is founded on, and therefore our job at this table is to ask the questions and, where possible, see that we do as little harm as can happen.

I'd like to first ask Amnesty International, if I might, what may be a bit of a side question, but not totally. A number of organizations, I think including yours in the past, have raised issues about flaws around security-related immigration procedures in general. Could you quickly—because I want to get to everybody, and maybe with different questions—share any brief comments you want to make with the committee on this topic?

● (1635)

Mr. Alex Neve: I think it is important that Bill C-3 is focusing on one particular aspect of how security plays out in the immigration system. There are various other ways, proceedings, and procedures wherein this plays out and wherein a lot of these same concerns about secrecy and adequate representation arise.

Then there are the wider concerns I've flagged, which are not addressed in either Bill C-3 or anywhere else in Canadian law, around those sorts of proceedings, either possibly leading to the deportation of individuals to situations where there's a serious risk of torture or to instances of an individual against whom there are quite serious allegations of criminality, be it terrorist criminality or involvement in war crimes or crimes against humanity, being deported and thus escaping justice.

Both of those should be of concern to us in our immigration system. We should not be contributing to injustice by sending people off to face human rights violations. We should not be contributing to a lack of justice by sending people off to face nothing.

Ms. Penny Priddy: Okay, thank you.

Ms. Hall, would you comment for me on our choosing, as the NDP, to look at this as a case where, if somebody plots against our country, they should be tried with due process, convicted, and punished as we would punish anybody else who would do that?

Can you comment, please, on that perspective? I think you're the one person I didn't necessarily hear speak to it. You may have done so when I was getting up.

Mrs. Julia Hall: Human Rights Watch's official position, whether in the case of Guantanamo Bay or of people left for years in detention up here in Canada under security certificates, is to prosecute or release. Prosecution is the primary mode for accountability of any person who is suspected of a crime related to terrorism.

Since I do this work globally, it is increasingly clear to me that in Europe, in the Americas in particular, and now even moving into some of the central Asian republics, immigration law is being used as a proxy for criminal prosecutions, and when it's used in that respect, we should all take note, I think, because there is a seepage now.

Whereas Canada, the United Kingdom, and the United States may think that using immigration laws for these purposes can be controlled, can be fixed, can somehow be tested and measured, we see countries that may not be quite so conscientious also using immigration mechanisms to do the very same thing.

Ms. Penny Priddy: All right. Thank you.

Do I have time for one more? I have a very quick question.

The Chair: Yes, you have three minutes.

Ms. Penny Priddy: Oh, I'll slow right down or I'll add some questions.

To the CAF, you prefaced your remarks at the very beginning, Mr. Boudjenane, with comments around the StatsCan information that came out yesterday. Some of us, depending on the constituents we represent, weren't very surprised by that. I live in Surrey, with an already grown Sikh population and a growing Muslim population. I certainly wasn't surprised to see what it looked like in the lower mainland of British Columbia.

But I was wondering, if you could comment on this, whether you see those statistics having relevance for the future of this kind of legislation.

Mr. Mohamed Boudjenane: As I said, the message we're sending to people who are aspiring to come to this country, to contribute to this country, is that if you are an immigrant and are suspected of a crime we consider may be a threat to our national security, you can be detained, and, with this legislation, indefinitely. Basically the message we're sending them is that we're clearly creating a two-tier system: one for Canadians and one for immigrants, the people who are going to be Canadian at one point. I think for the social cohesion of this country, for the image of this country, and for the future, it's not appropriate.

Ms. Penny Priddy: Do you think it will affect all immigrants, or do you think it will affect those immigrants that you see as currently targeted or profiled?

Mr. Mohamed Boudjenane: It does affect many immigrants. I remember 9/11, and one of the first acts of vandalism and hate crimes was against the Sikh community in a temple in Hamilton. Because you have a turban on your head or you have a beard...we're all the same. Racialized minorities and minorities in general are the target of these types of anti-terrorism legislation.

● (1640)

Ms. Penny Priddy: Thank you.

The Chair: Mr. MacKenzie.

Mr. Dave MacKenzie (Oxford, CPC): Thank you, Chair.

Thank you to the panel. I know it was short notice. I know it's sometimes difficult to get to these things with a long notice, and I do appreciate your being here.

I would like to clarify a few issues. To the Canadian Arab Federation, I heard you earlier when you made your presentation, and you said how 9/11 directed a focus to racial profiling. I'm sure you're quite well aware of the number of security certificates that have been issued in this country. You'll not be surprised if I tell you there are really only two. Immediately after 9/11, there was a third one, plus one more, a Russian individual who decided to go home because of industrial espionage. There have been only three, and 28 certificates have been issued since 1991. Would your suggestion not seem illogical that immediately after 9/11 we started to focus on one group of people?

Mr. Mohamed Boudjenane: The reality is that after 9/11, and a little before, as you said...six men now have recently been detained under a security certificate.

Mr. Dave MacKenzie: No, no.

Mr. Mohamed Boudjenane: I understand the certificates were issued before 9/11, and that's your point. After 9/11 only three were issued against Arab and Muslim people. That's what you're telling me, right?

Mr. Dave MacKenzie: All I'm saying is that you said the focus all of a sudden was on a group of people, but since 9/11 there have only really been three.

Mr. Mohamed Boudjenane: Yes, but since 9/11 we also had Maher Arar.

Mr. Dave MacKenzie: That's not a security certificate, sir.

Mr. Mohamed Boudjenane: No, but I'm telling you about the impact of 9/11 and this type of legislation and what it can do against a community. I'm not telling you the security certificate is written so we have to detain Arabs and Muslims. I never said that. The legislation doesn't say that, but it's the perception. The fact that of the six men who were detained recently, five were Arabs and Muslim adds to the perception and to the negative stereotypes. That's what I'm telling you. I didn't say the legislation was designed to go after Arabs and Muslims.

Mr. Dave MacKenzie: I agree with what you're saying, but what we're dealing with is what the Supreme Court directed us to do. All I'm saying is you have indicated that since 9/11 this was the focus, and I disagree with you. I don't think it is. I don't think the issuing of security certificates has changed as a result of 9/11.

However, if I go to one other statement you made about the individual claiming harassment by Air Canada, how far back does that go?

Mr. Mohamed Boudjenane: It was last year.

Mr. Dave MacKenzie: Last year.

Mr. Mohamed Boudjenane: Yes, and he just tabled his complaint.

Mr. Dave MacKenzie: I take it you suggest that's indicative of some issues. Would you also agree with me that people claim harassment many times with many things? That is certainly one case that has not been proven in court, but that's his allegation.

Mr. Mohamed Boudjenane: That case was an example I gave you, but I can give you hundreds of cases of people calling us on a regular basis, being detained for hours for no reason.

Mr. Dave MacKenzie: I understand that, and we have, I think everyday, people who call our office and claim they are being harassed because they're male or because they're female or whatever. I think harassment is of a fairly broad type.

Mr. Mohamed Boudjenane: With all respect, sir, I don't remember when the IRA was putting bombs left and right in London that the Irish Canadian community was targeted, or that we had many complaints from the Irish Canadian community as being racially profiled and so on.

But this time around, the reality is you have a group in our society who, due to their religious affiliation or their colour, have been clearly the target of—

Mr. Dave MacKenzie: I think that's where you and I would disagree. I don't think there is harassment. You believe there is. I say to you that in my office we hear from people who believe they are being harassed because they're male or they're female or whatever the case may be.

I just suggest to you that's a broad term, and to point to this legislation as being flawed because of what you're using as a term—

● (1645)

Mr. Mohamed Boudjenane: No, I said this legislation is part of much legislation that is clearly having an impact on our communities and contributing to the stereotype.

Mr. Dave MacKenzie: I think Mr. Neve wanted to say something.

Mr. Alex Neve: I'll just be very brief, because I'm sure your time is short. I think it's really crucial around this issue of profiling to remember that there is reality and there is perception and that both are things that as legislators, as advocates, as a society we need to be very sensitive to and concerned about.

I think with respect to perception and zeroing in on immigration security certificates in particular, the fact that all this secrecy has surrounded the process is much of what fuels the perception of profiling. I think it's one more reason why it's so important that that process be opened up to become more open and transparent, more in conformity with international standards around fair process, because it might start to dispel some of the perception.

Mr. Dave MacKenzie: I don't disagree with you on all of those issues. We hear from an area I have come from that men felt they were discriminated against in the court system when it came to domestic violence, that they were not listened to or whatever.

I understand that, and if we can eliminate it, it's the best thing we can do.

The other thing I was interested in, Mr. Neve, when you were suggesting the changes with respect to the special advocate, is that I don't think the court in its ruling suggested that we look at the client's solicitor being security cleared to fulfill that role. It seems to me that what the court said was that we look at using a special advocate or a SIRC model.

Mr. Alex Neve: I don't think the court actually pronounced on what model is necessary. I think they referred to things like the special advocate model and SIRC as illustrations of the fact that there are less rights-violating alternatives open to the government, such that the arguments that this didn't violate the charter were dismissed.

Mr. Dave MacKenzie: Right.

Mr. Alex Neve: So I think with respect to special advocates, while, yes, it's true that they acknowledge the existence of it and pointed to that as something that would be better than the existing system, they did also acknowledge, without pronouncing on this at all, that there is criticism of that process as well.

So I think to a certain degree what the court will feel about this model remains an open question.

Mr. Dave MacKenzie: But they didn't rule it out. My point is that they didn't rule out that it was one of the options, perhaps among many unstated, but it was given as an option by the court.

Mr. Alex Neve: They didn't rule it out. I would think, though, as legislators trying to come up with a system that's going to be strong and withstand the inevitable challenges that will come in the courts, the fact that the U.K. model has been so widely and so publicly criticized by a range not just of radical advocacy groups but mainstream organizations, by Parliament, by special advocates themselves, obviously means there's a very powerful evidentiary record out there that will be put in front of courts, and that, I would submit to you, increases the chances that this proposal, too, will fall under charter challenges. I assume that is a prospect that you'd want to act to avoid.

Mr. Dave MacKenzie: Sure. Fair enough.

Do I have time, Mr. Chairman?

The Chair: Yes. Go ahead. There are a couple more comments to come.

Mr. Dave MacKenzie: Ms. Hall, you had indicated that the torture issue is a concern. I'm wondering if you know of the history of the security certificates in Canada and of the, I believe, something like 20 or 21 individuals who have been returned to their country of origin.

Do you know of any records of torture having been applied when people were returned?

Mrs. Julia Hall: Our experience with security certificates, as I said, began in 2005, with the security certificate five. Those returns would be made to Morocco, Syria, and Egypt. We've done quite a bit of research on each one of those individual cases. Every case where there's an issue of the non-refoulement obligation arising is assessed on a case-by-case basis. So it wouldn't matter whether all 21 of those people had been returned and none of them were tortured. What matters is, will this particular person in this particular situation, with conditions on the ground in general and specific to this person in particular, be at risk of torture? It's well established under international law that that assessment occurs on a case-by-case basis.

With respect to the five security certificate detainees that we have carefully followed, we are of the strong opinion that none of those five would be able to be returned to their home countries and be safe from torture or ill treatment—even with diplomatic assurances from those countries against torture.

● (1650)

Mr. Dave MacKenzie: Okay, thank you.

The Chair: Did you still have a brief comment?

Mr. James Kafieh: I do. I would like to just return to one of the earlier points.

If your point is that anti-Arab racism in Canada didn't begin on 9/11, I would agree with that. I think it's an important point. It has a long history; it goes back decades. But you have to understand that since 9/11 there's been a change.

For example, security certificates did exist prior to 9/11. However, because of 9/11 and because of the need for agencies to show Canadians what they were doing to protect them, there's a lot greater profile for security certificates now, and it certainly is a far more sensitive point for the Arab Canadian community and the Muslim community today than it was prior to 9/11.

I would absolutely agree with you that the anti-Arab racism didn't begin with 9/11. Certainly the ground was already prepared. The legislation and the focus is something that all of us who have lived through that period would know about.

The Chair: Okay.

Mr. Cullen, please.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chair, and thank you to the witnesses for being here today.

One of the initiatives that our government launched in our last mandate through the Canada Border Services Agency was the fairness initiative, and a consultation process was started. I don't know if you're aware of it, but it was to deal with people who came across the border and felt they were being treated unfairly. They had an objective third party that would look at it. Part of the rationale was to deal with people who felt they were singled out because of their race or religion or creed.

I don't know if this government is planning to implement that, but I would suggest that's something you should press them to do. Even though at the border they operate on a risk-management model, there are some circumstances, some occasions, when the officials will be unfair, and this is an opportunity to challenge that. I'd suggest you take that up with the government, because it's on the website, but it's being archived slowly as we speak.

I'd like to go to Amnesty International. I have a couple of questions, Mr. Neve.

First, there's only so much that can go into legislation. I don't think you were arguing, or maybe you were, that the job description of a special advocate, the qualifications—whether they should be a lawyer, how much law they had practised—would actually be in the legislation. I know everything's important and we'd like to see it in the legislation, but I think in practical terms a lot of that information will be in regulation. Maybe you could just comment on that.

I have a second question for you, sir.

People who are being detained under a security certificate select their own lawyer. I think there are some practical issues with that in the sense that there is some training and sensitivity work that needs to go on. Secondly, it wouldn't be enough just to say, "We promise not to tell anybody." They'd have to be sworn, and they'd have to be sworn for life, I would submit.

The idea of having a cadre of special advocates.... In fact, in our subcommittee report we recommended special advocates not only for security certificates but also for the listing of terrorist organizations and the delisting of charitable organizations, because they also have a certain star chamber, if I can use that expression. The government is still pondering those recommendations.

So there are two questions. How much can you actually put in a bill? Secondly, it takes time for people to be security cleared. You can't pick up the phone and say, "We'd like this lawyer." It takes time to security clear people. And they have to be sworn in a very rigorous way for life, because there are people's lives at stake out in the field, and our confidentialities with our friends and allies.

I wonder if you'd comment on that.

Mr. Alex Neve: Sure. Thank you.

With respect to your first question, I agree that there's a matter of balance there. We are concerned that there's nothing in the legislation with respect to signalling, even in a high-level sense, the importance of some of the criteria or the kinds of background or expertise special advocates should possess. I absolutely would agree that going to the level of talking about university degrees and years of practice, etc., is not necessary and would be too cumbersome, but we think it is certainly not adequate in the way it's expressed right now.

With respect to security clearance for lawyers, we're not suggesting that it wouldn't be without its challenges, but we think it is doable. I'd refer to earlier comments that reminded us we're not talking about dozens and dozens of cases, and certainly not hundreds of cases a year. It's a small number of cases. The band of lawyers already very active around these issues, and quite expertly so, is fairly small, so the challenges around who would need to receive security clearance in getting that done are not insurmountable.

I think you're quite right that this need for swearing an oath and for giving specific undertakings with respect to precise pieces of evidence would be absolutely crucial to that model, but it exists. Lawyers are called upon to give undertakings to each other and to the court all the time, every day, on a whole variety of matters.

I was going to say something about the integrity of lawyers. Being a lawyer myself, I know that's not always the case, but as a matter of fundamental principle, we recognize that we can and should rely upon those undertakings and swearings of oaths and promises that lawyers give around judicial matters of that sort.

● (1655)

Hon. Roy Cullen: I'm an accountant, so we'll compete against each other on the perception credit.

I wondered if any of the panellists would like to comment. Sometimes there's a perception in the media that the person who is being detained—or, it's being argued, who should be detained—on a security certificate has no information about what they're being charged with. I think there's clearly an issue about the amount of information; that's why we're talking about these special advocates and other options. But a Federal Court judge can basically relate information as long as it's not injurious, potentially, to our national security interests and as long as it's not going to lead to injury or death of individuals. That could be anybody. It could be someone out in the field who has infiltrated some organization or something similar.

Just so there's a reality check here, you understand that there's more information than being told you're being charged and that we're sorry we can't tell you anything about it.

Mr. James Kafieh: Our security services—RCMP and CSIS—are famous for overclaiming in terms of national security confidentiality issues; the idea that the person is going to get sufficient information isn't supported by the facts.

I sense some people think that since you must be a terrorist, you know why you're there. Millions of Canadians watching may think that they wouldn't do this to a good Canadian, so you must be a terrorist, so you know why you're there and you don't need them to tell you why.

The fact is, though, that people need to be presumed innocent until they're proven guilty. This is the foundation of our legal system. If that is the case, then they shouldn't have to guess; they should be told what the issues are. They should be able to deal with them.

Hon. Roy Cullen: They're told what the issues are; they're just not told the sources.

Mr. James Kafieh: Let's talk—

Hon. Roy Cullen: I agree there's a question about the amount of information. Maybe we can do a better job of making sure all the information comes forward.

A quick point is that we had Ernst Zundel on a security certificate, and this Russian chap, and if you go back.... I think we need to be careful about saying it's racial or has connotations against Arabs or the Muslim world. If you look at how many security certificates have been enacted, I'm sure you'd profile it to see the number of people from Arab countries and the number from non-Arab countries. Have you done that work?

Mr. Mohamed Boudjenane: No, we haven't, but what we said earlier—and I think it was the comment from the gentleman over there—was that this is now a tool against terrorism. It is not an immigration tool anymore; this is used as a way to fight terrorism, like Bill C-36 and other provisions out there.

The problems with this type of legislation and bill are proven. They have records. I mean, I don't have to remind you of Maher Arar and the clear incompetence of our security officials and security agencies. I don't have to remind you of the Iacobucci commission now looking at three other Arabs and Muslims. There's a clear pattern there, and that's our concern. We are concerned. We are not telling you that you guys are writing pieces of legislation targeting our communities, but that's the—

The Chair: I'll have to cut it off there.

Mr. Ménard, did you have any more questions?

● (1700)

[*Translation*]

Mr. Serge Ménard: No, sir.

[*English*]

The Chair: Okay. Go ahead.

[*Translation*]

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): Thank you very much.

Thank you for being here.

Mr. Neve, I listened to your presentation and I took notes. Amnesty International definitely has a lot of experience in these matters. You mentioned that the principle of security certificates is also recognized in Europe, but that it is highly criticized, particularly in the United Kingdom.

I would like you to tell me how that has changed and what the Europeans now think about security certificates.

[*English*]

Mr. Alex Neve: With respect to the criticism in the United Kingdom, which is really what I was referring to, it wasn't so much the notion of a security certificate as the idea of a special advocate and their role in that process. That's where our particular concern lies. We do not feel that the special advocate model proposed, and a special advocate model even with some enhancements, will be sufficient to ensure that an individual's fair trial rights and the ability to mount an effective defence are truly safeguarded. That's why we've proposed the idea that instead of focusing energy on strengthening and improving the ability of an individual's own lawyer, providing them with that level of defence.

I think Ms. Hall probably has more knowledge about the European scene than I do.

Mrs. Julia Hall: This also is in response—I'm sorry, I don't know your name—to your prior question about full disclosure.

There was a recent case in the special immigration appeals commission that should be of great interest to all of you, because not only was the person subject to the proceeding before the SIAC not permitted any access—except a very brief summary—to the evidence against him on the national security case, he also did not have access to any of the evidence against him on the risk assessment case. But then the judgment was issued enclosed—the judgment was issued enclosed. There was a very short public judgment and then there was a closed judgment.

There are facts on the ground in Europe that show us that the issues related to secrecy are very concerning on the slippery slope basis, and it was really striking to see a closed judgment from an official court in the U.K. that no one had access to, not even his lawyers. The special advocate had access to it, but his lawyers didn't have access to it and he did not have access to it. I personally find that deeply troubling, and would caution this committee that this is the kind of slippery slope that has developed with respect to these procedures in the United Kingdom.

[*Translation*]

Mr. Mario Laframboise: Has the Canadian Arab Federation studied the situation elsewhere, in other European countries? Have you contacted other associations?

Mr. Mohamed Boudjenane: The only example is that, in England, and we've seen the limits of that friend of the Crown, as Mr. Neve and Ms. Hall explained. The Muslim and Arab communities are quite similar, except that, in some countries—France, the Scandinavian countries and so on—there are no laws or special projects that have been set up to fight terrorism. As I said earlier, I don't know whether it's become an important tool for fighting terrorism today, but security certificates have never been developed in that sense or without that objective.

In our view, that's part of the Immigration and Refugee Protection Act and is used in order eventually to expel people considered undesirable, who may be dangerous, but it has never been used as a process that resembles what's being done in Guantanamo Bay, where there isn't any transparency and the public isn't informed.

Mr. Mario Laframboise: However, in your presentation, you nevertheless make some recommendations. You say it would be interesting to include these rights in criminal law. So you're not necessarily opposed to the principle of security certificates, but you would like there to be a better framework for it.

Mr. Mohamed Boudjenane: Essentially, we believe that, in our legal system, in our criminal system, there are enough measures to fight crime. If ever someone is considered a potential terrorist, statutory measures and laws can enable us to judge and convict people, but in a process that is consistent with democracy and the Canadian legal system.

Mr. Mario Laframboise: Perfect, thank you.

[*English*]

The Chair: Mr. Mayes.

● (1705)

Mr. Colin Mayes (Okanagan—Shuswap, CPC): Last night I attended a reception where an Ontario judge gave a presentation to a group of decision-makers. One of the pieces of advice he gave us was to make sure we had the facts before we delivered a decision, as naturally he would do.

It's interesting, because—I'm just looking at this submission by the Canadian Arab Federation—there are some accusations here and profiling right in this document, if you look at it. It says “the Harper administration indicates the level of racial profiling”. That's profiling me because I'm part of that government. And I don't like the lack of respect, because it's Prime Minister Harper, and I think as citizens we should always recognize the title given to our Prime Minister, no matter which government it is.

Then if you look on the second page, it says, “Security officials have made several grievous errors in the past”. That's a generalization of security officials. If you go further down, it says, “security agencies are therefore given free rein to violate our rights and freedoms”. That's completely broad-brush, stereotyping security agents.

We talked a little jokingly about lawyers, and you profiled lawyers. This is the sort of thing that happens. And for you to believe that you're a victim of this.... I'd like to have the facts—not what is written in the media—of how many times the Government of Canada and the people who are serving our nation as civil servants, whether they be security officials or not, have violated the rights and freedoms of any of our citizens. It's very rare.

I'd like to make that statement because I think we're accusing people who are working for the security of this country, and I really have more confidence in them than you have put in this document.

I'd like to ask Madam Hall this question, if she would just let me know: what are the procedures in France and Germany with regard to these types of procedures?

Mrs. Julia Hall: Thank you for asking that, actually, because it's very interesting. One of the members commented that security certificates are used in Europe. In fact, returns, under the immigration laws, yes, are made in Europe, and in France there have been a number of them.

You may have heard of radical Islamist imams preaching certain things in certain mosques having vulnerable immigration status and being deported, and then in some of those instances, even after having been deported, lodging an appeal in either a French court or, for example, with the Committee against Torture or with the European Court of Human Rights. So it is a feature of the human rights and immigration landscape and counter-terrorism landscape in Europe that almost every single western European country—and we just had a case in Slovakia—is attempting to deport or expel or otherwise transfer people who they suspect of having committed either offensive acts of speech or who may have been associated or alleged to be associated with terrorist activity.

Deportation, in some ways, is now very quickly becoming the tool of choice over prosecution. In Germany, it's very much the same thing. You may have heard of the case of Metin Kaplan, who is a radical Islamic imam who was extradited to Turkey. Deportations and returns, stripping of refugee status—I would say it's fairly well established in most of the west European countries that this is an acceptable counter-terrorism tool.

I might just add, however, that in one recent case that was just cited this year, the case of man named Adel Tebourski, who was sent back from France to Tunisia, I believe it was, the Committee against Torture ruled that France did violate his article 3 rights, that he was in fact at risk of torture.

So we do have slowly building, because this has happened mainly in the last couple of years, some jurisprudence that is saying that European governments themselves are violating the non-refoulement obligations by using immigration laws to send people back to places where they will be unsafe.

● (1710)

Mr. Mohamed Boudjenane: Can I make comments on your comments, if you don't mind?

The Chair: Your time is actually up. Did you have anything else, Mr. Mayes?

Mr. Colin Mayes: No.

The Chair: Okay. We can come back.

Mr. Dosanjh.

Hon. Ujjal Dosanjh: I just have a comment rather than a question, but then you can comment on my comment if you so wish because I may not be right.

The security certificates as a device go back a long time, several decades in Canada. If I understood it correctly, they were brought in to deal with organized crime that may have roots elsewhere and have branches here, in the form of aliens or immigrants, permanent residents or visitors. So when you had to deal with people who were engaged in espionage or terrorism, at least for those of us who were not citizens, the tool came in handy because it was being used for criminal activity.

Although I understand all the concerns you have, because I come from that part of the world in terms of human rights, I don't think it's true to say that it's now being used. I think it's been used for deporting criminals who you otherwise couldn't prosecute because you didn't have the evidence here, the evidence was somewhere else, and the evidence may not be produceable in a way that would prove the crime beyond a reasonable doubt. So you took the liberty, because these were permanent residents and visitors—less than citizens—of saying, you're undesirables and we want to keep you out.

It has been extended currently to use in the case of those who we might fear might do damage to us. It's not that it is the most ideal tool, but there has been a regime for decades to deal with inadmissible permanent residents or visitors, so that even if you were less than a terrorist and you were simply a convicted rapist or somebody, you're deportable based on the decisions made by the Immigration Appeal Board, without having to prove beyond a reasonable doubt that you should be deported, that you would always be a threat to society.

Many of the presenters have raised this issue to say that because it is slightly a different system from the criminal law system, it is less justified. I may agree with you, but what do you have to say about that?

Mr. Alex Neve: Could I just say that I think we probably all have slightly different perspectives and things we would want to say about the relationship between immigration and criminal law in this area.

Amnesty International has never said there is not a role for immigration law, including in dealing with national security cases. What we have stressed, though, is two important limitations that simply have not been part of Canadian law or practice.

The first is clear, binding obligations not to use immigration law and thus instead turn to criminal law when deporting, extraditing, or removing anyone from Canada under any guise would lead to serious human rights violations such as torture. In those instances we do say, and the international legal system is very clear in saying, Canada must instead either prosecute or release, as Julia Hall said earlier.

The other, though, is impunity. I think this doesn't get enough attention in this debate, and there is a long tradition not just with respect to terrorism cases with but all sorts of criminality: international criminality, war criminals, people who've committed crimes against humanity. In Canada and around the world, and as Julia Hall just highlighted, it is very much the norm in Europe these days of deporting instead of prosecuting, which does us no good in terms of the broader goal of ensuring that there is a response when individuals have these kinds of serious allegations against them.

Is it difficult sometimes to go forward with those prosecutions? Yes. It can be cumbersome. It can be expensive. I think, though, that now, in 2007, certainly as opposed to 1997 or 1987, there is a lot more expertise, wherewithal, and resources that have been marshalled around this whole idea of how to do those kinds of prosecutions.

This is the era of the International Criminal Court. This is the era of the world recognizing that we have to be able to deliver justice on a global scale. That may sometimes be in national-level courts, it may sometimes be in international-level courts, but we have to grapple with that because it's fundamental to both protecting rights and ensuring security.

● (1715)

Mrs. Julia Hall: I would add that factually you may say we've always had security certificates, and factually the United Kingdom government might say we've had the special immigration appeals commission since post-Chahal, since the European court gave the decision that gave rise to the court. But it's not just the human rights organizations and the minority groups organizations who see a clear difference post-9/11. It is the media, as one member noted, but also the government.

You will take note that Gordon Brown and Tony McNulty, when they came into office, made a very concerted effort to dissociate themselves from Blairist post-9/11 policies. That was for a very specific reason. I believe that Gordon Brown, the party, and his administration recognized the damage that had been done in the race to the bottom with counter-terrorism measures that violate civil liberties and human rights after 9/11. They were trying to re-establish a higher bar.

So it's not just our friends from the Canadian Arab Federation; governments themselves are starting to recognize that we hit a nadir, perhaps, and that some sort of balance should be re-established. This is coming from the one government where this project of a special immigration court that only deals with national security deportations and special advocates arose. This is coming from that government.

I see factually how you would say we've had these for a very long time, but it's not just we who see that 9/11 and the bombings in Spain and in London really did put a different sheen on the whole issue.

The Chair: Thank you.

Is there anybody else? We're all done?

Please wait around. I would like to make an announcement for the committee.

Mr. Mohamed Boudjenane: Can I comment on the gentleman's comment, briefly, before we finish?

The Chair: He didn't ask you a question. You wanted to comment?

Mr. Mohamed Boudjenane: Do you mind if I...?

Mr. Colin Mayes: I don't have a problem.

The Chair: Okay.

Mr. Mohamed Boudjenane: It's important. I just want to let you know that this is not a political paper. It's not a critique of Harper or the Conservative government. We are addressing this because you are the government of the hour, and there's no other way for us to express our view and concern. It's indeed very critical of your government because we do have concern.

That being said, you have, I'm sure, a lot of respect for Justice O'Connor and his recommendation in the Maher Arar commission. Clearly, he said that the security officials were incompetent and that there was a pattern of racial profiling and that many of those decisions were directed toward certain groups and a certain community.

There are many reports out there. The OSCE, the Organization for Security and Cooperation in Europe, released its report about hate crimes recently and targeted these policies and the hate crime in Canada, talking about hate crimes against Arabs and Muslims.

I'm not just coming here to be critical of your government; that's not the purpose. The purpose is to tell you how we feel, and how your government is perceived, and maybe how you can change that perception and those prejudices.

An hon. member: Thank you.

The Chair: This meeting stands adjourned.

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