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SEEKING JUSTICE IN AN UNFAIR PROCESS

Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings

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of the *Canada Evidence Act*). The discussion below outlines core prerequisites for a sensible special advocate system. It suffices to say here that special advocates could be brought within the envelope of persons permanently bound by secrecy under the *Security of Information Act*, in the same manner as SIRC or members of security services. As noted above, refusing access to information to special advocates under these circumstances would constitute overreach of originator control or other secrecy rules. Special advocates should also be viewed as persons with the same need to know status under secrecy rules as, for example, the members of the Security Intelligence Review Committee.

We believe that the chief role of the special advocate should be to press for greater disclosure of secret information to the named person before the Federal Court (pursuant to the *Canada Evidence Act*-like balancing test discussed above) and, in relation to information that is not disclosed, to test its veracity in active cross-examinations and independent investigation. To perform these functions, however, the special advocate system must meet certain core prerequisites discussed below.

5. No Secrets Justify Anything More Extreme than Recourse to a Special Advocate Meeting Core Prerequisites

In the Canadian IRPA *status quo*, no special advocate exists and judges exercise an inquisitorial function as well as sitting as a decision-maker. Because of their prior background, some of the designated judges at the Federal Court have experience in security intelligence matters that equals or exceeds that of any prospective special advocate. This is not the case for every judge, however. Moreover, asking a judge to be both an inquisitor and a trier of fact creates an impossible burden. It is not simply that these two roles may create difficult tensions in the psyche of the judge, or that they may lack the training to perform an effective inquisitorial function. As the Supreme Court also noted,[156] judges may not be adequately positioned or resourced to perform the investigative and research function required to counter the government's case.

No one we spoke to in the United Kingdom endorsed the double-tasked judge system employed by Canada, and several – such as Lord Carlile – explicitly warned against it. In Canada, the outside counsel we spoke to from SIRC and the Arar Commission also warned against the Canadian *status quo*.

We believe that judges should continue as adjudicators in the section 7 triggering matters discussed above. We suggest that even in a special advocate system, an unusual burden will continue to fall on judges to respond to the absence of the named person by pressing the government side more vigorously than might otherwise be the case. Further, just as in criminal cases the government lawyer is obliged to pursue the interests of justice and not be single-minded in their partisan cause, so too in cases in which the named person is excluded a special burden of fairness must fall on the government side.

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156 *Charkaoui*, 2007 SCC 9, at paras. 50 *et seq*.

There is no question, however, of maintaining a system in which the full burden of testing the government case falls on the judge, even when in the presence of the most principled government lawyer. We can imagine no circumstance in which the state has so pressing and substantial an objective that it would be impossible to employ a special advocate.

F. In Those Limited Circumstances Where Special Advocates are Appropriate, the Special Advocate Function and Office Should Meet Certain Core Prerequisites

As the discussion above makes clear, we believe that pressing grounds may necessitate an unfair hearing, with the most extreme manifestation of that unfairness being recourse to a special advocate in *ex parte* and *in camera* administrative proceedings. It is critical to underscore, however, that not all conceivable systems of special advocates are equal. A system that does not meet certain core prerequisites would, in our view, be worse than no system at all. An inferior system would give the false imprimatur of more fairness. Such a system – paying mere lip service to minimal impairment of a fundamental right – would prove truly perilous to the rule of law.

We will be blunt: any system that does not meet the core qualities we set out in this part will be a sham. We do not make this assertion lightly. It is based on our extensive conversations with participants in and critics of the UK and New Zealand systems and our interviews with outside counsel to SIRC and the Arar Commission. In particular, a system in which the special advocate has no meaningful contact with the named person once the former has seen secret information and where full disclosure is not made to the special advocate is no better than simple *ex parte* adjudication before an experienced and earnest Federal Court judge, knowledgeable in security intelligence matters.

It is also notable that most of the prerequisite qualities we identify are already part of the existing SIRC outside counsel system. For this reason, a special advocate system that does not incorporate these prerequisites would almost certainly constitute a derogation from the practice already employed in Canada in national security cases, including in immigration proceedings prior to 2002. Given this SIRC experience, we do not see how any system less robust than that employed by SIRC could be justified on a minimal impairment theory under section 1.

1. The Government Must Make Full Disclosure to the Special Advocates Themselves

We repeat a point made above: the consequences to named persons in IRPA proceedings may far exceed those that may be lawfully imposed under the *Criminal Code* – removal to persecution or prolonged detention without trial. It is unpersuasive, disingenuous and simply unjust to urge that the nominally administrative nature of IRPA (and several of the other section 7 triggering processes listed above) should attract