House of Commons
CANADA

Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

SNSN • NUMBER 021 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Wednesday, September 21, 2005

Chair

Mr. Paul Zed

Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

Wednesday, September 21, 2005

● (0905)

[*English*]

The Chair (Mr. Paul Zed (Saint John, Lib.)): I call this meeting to order.

Good morning, ladies and gentlemen. This morning we are beginning our second day on the Subcommittee on Public Safety and National Security of the Standing Committee of Justice, Human Rights, Public Safety and Emergency Preparedness. Studying the Anti-terrorism Act and the impact of security certificates in a post-Anti-terrorism Act world is the specific theme of today's committee.

I'm pleased to welcome Christian Legeais, Matthew Behrens, and Janet Dench. I just want to remind both witnesses and colleagues that on any matter that's before the Federal Court we would obviously not want to have a fulsome discussion about any of the details. Our committee is obviously focused on themes and principles and on issues that relate to those principles that are contained in the legislation. I just want to caution everyone that we don't want to get into a debate about the specifics of a particular case that may presently be before the court. So with that caution, I'll just be watching that we don't move too far down that road.

I would ask you, Mr. Legeais, to begin, please.

[*Translation*]

Mr. Christian Legeais (Campaign Director, Justice for Mohamed Harkat Committee): Before beginning my presentation, I would like to tell you that Sophie Harkat is present in the room. During the question period following my presentation, Ms. Harkat will be prepared to answer any questions you may have that relate directly to the implications of the security certificate.

[*English*]

The Chair: As I said, it's exactly what I said I wouldn't do. I just want to clear the air before we get into a further debate about it.

Thank you.

[*Translation*]

Mr. Christian Legeais: Mr. Chairman, members of the Subcommittee on Public Safety and National Security, we are pleased that you have decided to include the security certificate in your review of the Anti-Terrorism Act, because the government considers the security certificate such an effective tool that the provisions regarding it have been included in the Anti-Terrorism Act.

We think the security certificate is an odious, unfair instrument that meets none of the human rights criteria recognized by all modern societies, such as Canada. It is a medieval instrument, one that runs counter to human rights and justice and allows for secret trials in Canada.

As you know, under a security certificate, refugees, immigrants and permanent residents can be imprisoned for an indeterminate period of time on the basis of secret evidence, without committing any illegal act and without any charges being laid against them. They may be subject to legal proceedings during which the evidence remains inaccessible to the accused—who is not really an accused—and to his or her lawyer. It is a process that uses the most lax criteria for evidence in the entire Canadian judicial system, it does not take facts into account, only probabilities. All appeals may be rejected in cases where the certificate is considered reasonable, and individuals may be deported, even if they are in danger of facing arbitrary detention, torture or even death.

We think the security certificate is unfair, counter to human rights and the fundamental justice to which the Canadian government is committed under the Charter of Rights and Freedoms, the Universal Declaration of Human Rights of the UN, the United Nations Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture.

Another very disturbing issue is that security certificates mean that there is a hierarchy of rights in Canada, whereby some people have more rights than others: naturalized citizens would have fewer rights than citizens born in Canada; permanent residents fewer than citizens; refugees, fewer than permanent residents, and people with no status, fewer than anyone.

Rather than acknowledging that a right belongs to all human beings because of their humanity, that these rights cannot be granted, withdrawn or abandoned, the government is opening the door to arbitrary behaviour and to the impunity of the state and its instruments of repression, namely the police and the secret services. This impunity and this arbitrary treatment become the law and replace the rule of law.

Security certificates, like the Anti-Terrorism Act, have given rise to a significant strengthening of the repressive powers of the state and its law enforcement agencies, in particular, the Canadian Security Intelligence Service and the Royal Canadian Mounted Police. This opens the door to the impunity of the state and its repressive agencies by granting extraordinary powers of investigation and surveillance, by allowing arrest without warrant, virtually unlimited detention, secret trials, the criminalization of dissent, and so on. In the name of national security, this act has transformed rights and freedoms into privileges that can be taken away from us at any time.

How can the interests of the state be placed above those of citizens, residents and all members of society? It is not acceptable to equate the state's interests and national security to the general interest of society. Similarly, individual interests cannot be violated or compromised on the pretext that such action is in keeping with the general interest of society. Once this step is taken, the general interest of society is in jeopardy.

The individual interests of members of society must always be harmonized with the general interests of society but paying the greatest attention to individual and general interests. The security certificate, the Anti-Terrorism Act and all similar legislation passed since September 11 do not do that.

We are aware of the terrible consequences on the lives of whole families resulting from the use of security certificates. These families are now plunged into a state of insecurity, deprived of their future and condemned as civilian casualties. This is true not just of the families, but also of entire communities.

Our committee, the Committee for Justice for Mohamed Harkat, is fighting to have Mohamed Harkat released immediately. He is a Convention refugee who has been imprisoned in Ottawa in a detention centre that is known to have the worst conditions in the entire province. He has been held there for 34 months under a security certificate.

● (0910)

In the course of our work defending human rights and promoting justice, we have learned that Canadian men and women find the use and consequences of the security certificate revolting. One indication of that is the fact that over 1,300 individuals, organizations, political parties and personalities from all backgrounds have signed the Statement Against Secret Trial Security Certificates. The security certificate and secret trials are generally condemned as a medieval, regressive practice that runs counter to justice and human rights. These grave concerns are also shared by international bodies such as the Working Group on Arbitrary Detention of the UN Human Rights Commission, which visited Canada in June 2005.

Consequently, we are asking that the security certificate be abolished and that secrets trials be stopped in Canada.

For those presently in prison under a security certificate, we are asking that they be released immediately, or, if there is evidence against them, that they have an opportunity to defend themselves at an independent, fair, public trial, including full and complete access to the evidence used against them, and that they not be deported.

Thank you for listening to us. I have made available to the committee the Statement Against Secret Trial Security Certificates and a partial list of the people who signed it. It includes members of Parliament, legal and professional organizations, unions, and so on. I have also provided excerpts from the press conference held by Ms. Leïla Zerrougui, the Chair of the Working Group on Arbitrary Detention, where she talks about her concerns regarding security certificates.

● (0915)

[*English*]

The Chair: Thank you.

Mr. Behrens.

Mr. Matthew Behrens (Campaign to Stop Secret Trials in Canada): We have a number of documents that will be put before you later today. Unfortunately, we were unable to get them to the committee earlier, but that really reflects on the nature of our work in our efforts to end secret trials. It literally is a jump from crisis to crisis to crisis. And the latest crisis we are dealing with is the hunger strike of Mohammed Mahjoub who has been held over five years now without charge or bail. Mr. Mahjoub is in day 77 of a hunger strike in Toronto. He is in solitary confinement. He has yet to be hospitalized for monitoring, despite the recommendation of a medical doctor that this be done, and he was actually told yesterday by health officials, “Keep going. We think you can last another 10 days.”

This is the nature of the very human crises that we are dealing with. I would actually ask that members of this committee get on your cell phones at the morning break, contact the Prime Minister, the Deputy Prime Minister, and the justice minister, and demand of them that they intervene immediately to save Mr. Mahjoub's life and the lives of his wife and his two young children.

Beyond that, ask why it is that Mr. Mahjoub has not been hospitalized. And beyond that, ask why it is that someone like Mr. Mahjoub, a refugee who has never been charged with, much less convicted of, anything, must go to the point of death—77 days without food—for basic human rights such as health care and touch visits with his children, the kinds of visits that are allowed under the Saudi dictatorship prisons, under Egyptian prisons, but not in Canadian prisons like the ones in which Mr. Mahjoub and the other detainees are being held.

I currently coordinate the Campaign to Stop Secret Trials in Canada, and I work directly with the Toronto men who are detained on security certificates and with their families and their lawyers. As of this month the Secret Trial Five have been incarcerated a collective 219 months—that's more than 18 years—without charge and in four cases without bail, and in one case without access to bail. They are being held on secret evidence, which neither they nor their lawyers are allowed to see.

The families are also punished by this process. They're ostracized. They're isolated in their communities. These are communities that, as you heard yesterday, are very much fearful of guilt by alleged association. They're economically marginalized, and they live in a purgatory of uncertainty, not knowing whether their loved one will survive detention or punitive conditions, whether they'll be granted bail or whether they will be deported to torture or worse. They live not knowing when the nightmare will end. Such conditions have been condemned by the International Committee of the Red Cross at Guantanamo Bay; they should be similarly condemned here in Canada.

I've had the privilege over the past several years of working with and knowing these men and their families in Toronto as well as here in Ottawa and in Montreal, and I can personally assure you that the toll on all of them and their loved ones has been tremendous.

I would also go so far as to claim that this subcommittee simply cannot understand the true impact of these security certificates without hearing from the detainees themselves and their families. The detainees in Toronto, whose names you should know—Mohammed Mahjoub, Mahmoud Jaballah, and Hassan Almrei, who has been in solitary confinement almost four full years—have requested an appearance before this committee. They ask that you visit them in jail, just as the UN Working Group on Arbitrary Detention visited them in jail in June of this year. Adil Charkaoui is also available to meet with you either in Montreal or in Ottawa if he is given permission to travel.

The families from Montreal and Toronto, who have been beset on so many sides, have also found it impossible to travel to Ottawa today. One family, as I mentioned before, is clinging to the hope that Mr. Mahjoub will survive the next few days of this hunger strike. Once again I put the challenge to this committee: during the break, contact the Prime Minister, Anne McLellan, and Irwin Cotler and urge that immediate intervention take place in this hunger strike so that Mr. Mahjoub can get the most basic and decent human rights: health care and access to his children.

In what follows in this presentation it's crucial to grasp that the security certificate is not a finding of fact, nor is it an assessment of a threat or risk to Canada. The judicial review of the certificate is based on the reasonableness test.

● (0920)

Facts need not be proven beyond a reasonable doubt but simply shown to possibly exist. Cases to support the very general, overly broad allegations are built using evidence shielded from scrutiny by secrecy, taking full advantage of paragraph 78.(j) of the Immigration and Refugee Protection Act, which states:

> the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law....

I can't stress that enough: “even if it is inadmissible in a court of law, and may base the decision on that evidence”.

Therefore, we see newspaper articles, hearsay, gossip, double hearsay, and possibly information gleaned from torture, all with no right to appeal.

Our campaign is here today to call for the abolition of security certificates. We believe the Criminal Code is a more appropriate legal framework to handle the alleged potential terrorist offences. We believe that IRPA is definitely not the place for this.

Some supporting material on the use of the Criminal Code in these cases has been prepared by John Norris of the firm Ruby and Edwardh in Toronto. Mr. Norris represents three of the detainees. Those materials will be given to the clerk of this committee.

In terms of security certificates, it's important to point out that they violate equality. Citizens suspected of identical involvements and activities are not subjected to the same abusive treatment as refugees and permanent residents. They face the presumption of guilt, the lack of a fair trial, and preventive detention or preventive conditions reserved only for non-citizens. They also violate due process. The reasonability standard, rather than proof beyond a reasonable doubt as we would see in a criminal case, the secrecy provisions, the low standard of evidence, and the lack of appeal and other procedural safeguards open the door wide to abuse.

Any solution to this problem must address these concerns. It must also accord with the non-negotiable, absolute prohibition of deportation to torture that Canadians are legally and morally bound to respect, as we were reminded by the UN Committee Against Torture in May of this year.

The Criminal Code helps us. It is immediately available. Proposed reforms of the security certificate, including the amicus curiae process suggested last week at the conclusion of the Arar inquiry, are simply window-dressing of a fundamentally flawed process and do not show a way out of our conundrum.

It's commonplace to pose the problem as one of a balancing act between individual rights and public safety. We would propose that the question is rather one of where we put our trust. Though far from perfect, do we put it in a criminal justice system that has been honed over hundreds of years or in the hands of an agency, CSIS, that has a 21-year unchanged pattern of withholding information, destroying interview notes, overstating risk assessments, refusing to provide information that goes against its own theories, and, as supporting documents before you will indicate, an outright ideological bias and deception?

It concerns us that the patterns in the security certificate cases are replicated in CSIS assessments that are provided to the federal government. It concerns us that an agency upon which you rely has shown itself capable of deceiving officials and acting for political purposes. Lack of due process and security certificates certainly open the door to these kinds of abuses.

Under sentencing law in Canada, security certificate detainees have already served the equivalent of between nine and over fifteen years behind bars in provincial remand centres that are not equipped for long-term detention. In other words, they have already spent more time behind bars than if they had been Canadian citizens who were charged, tried, convicted, and sentenced to the full ten years under the Anti-terrorism Act.

The UN working group on arbitrary detention, mentioned previously, as well as the UN Committee Against Torture, has expressed deep and grave concern that Canada is holding men on mere suspicion and is preparing as we speak to violate the absolute prohibition on deportation to torture.

I would go one step further here today and say that we need to make an immediate move to end the torture to which these people and their families are being subjected. I do not use the word lightly. Detentions of three to five years, severe conditions that hamper every attempt to normalize life, denial of touch visits with family members, and the ever-present threat of deportation to the fate tasted by Mr. Arar, Mr. El Maati, Mr. Almalki, and Mr. Nureddin, among others, the agonizing uncertainty, the precariousness, the arbitrariness, and the humiliation of their situation—is this not torture?

If there is a case to be made, these men have said time and again that they should be charged and provided with a fair, transparent judicial process under the Criminal Code. We say this knowing that in the case of one of the detainees, Hassan Almrei, an internal DFAIT document released by the Arar commission acknowledges that the evidence against him "does not meet the threshold for criminal charges to be laid". If the Canadian government recognizes that we can't even lay a criminal charge against an individual still four years in solitary confinement, what does that say about the nature of this process and our willingness to put up with it? There is no reason to believe this is not the case in the other four cases.

● (0925)

So what do we do with these men and their cases? If we're serious about equality, the answer is obvious: immediately release them to their families and begin the regularization of their status.

In conclusion, last night I spoke to Hassan Almrei in solitary confinement, after four years at Metro West Detention Centre, and told him I would be here today. He said, "I'd like you to tell the committee something because I can't be there today, but I hope they will visit me". He said this: "I want this government to prove to the Canadian people that Hassan Almrei is a terrorist, if that is what they truly believe. If they can prove this, then shed no tears for me, but so far they have not because there is nothing and I am an innocent man. Ask Maher Arar. Ask the inquiry. Look what happened to him. They finally found that he is a victim. He got a chance to clear his name because he is a Canadian. I have not had that chance because I am a refugee."

Thank you.

The Chair: Thank you very much.

Janet Dench, please.

[*Translation*]

Ms. Janet Dench (Executive Director, Canadian Council for Refugees): Thank you. I am pleased to be here to represent the Canadian Council for Refugees, a group with 180 member organizations in Canada.

The CCR is a member of the Coalition for International Surveillance of Civil Liberties, whose representative you will be hearing today. We support them in their comments and concerns. In particular, we are also opposed to the Anti-Terrorism Act. However, today, we will be focussing on security certificates.

We congratulate the committee for deciding to include security certificates in its review of the Anti-Terrorism Act. These certificates are one of the main measures used against people suspected of having links with terrorism. Actually, we will go a little further, and suggest the committee take into account other measures included in the Immigration and Refugee Protection Act.

I have six points I would like to mention quickly. I hope you received a copy of our lengthier presentation.

First of all, we would like to emphasize our concern about discrimination. With respect to security certificates, we see evidence of discrimination on the basis of race and religion. We know that the five individuals held under security certificates are Arabs and Muslims. In Canada today, there is discrimination against these groups as regards antiterrorism measures.

In addition, there is discrimination against non-citizens when measures that violate the most fundamental rights apply to them only.

● (0930)

[*English*]

Second, I would like to address the issue of the definition of security inadmissibility in the Immigration and Refugee Protection Act. We hear, rightly, concerns about the definition of terrorism in the Anti-terrorism Act, but you have to understand that in the Immigration and Refugee Protection Act there is no definition of terrorism.

Further to that, there is no requirement in the Immigration and Refugee Protection Act that a person found inadmissible on security grounds have any knowledge or direct association with terrorism. The person can be inadmissible based on membership in a group that has engaged, or is engaging, or may engage in terrorism. Further, the standard of proof is "reasonable grounds" for believing.

The result of the very wide definition of security inadmissibility is that a person can be inadmissible on security grounds and the subject of a security certificate that is upheld because there are reasonable grounds for believing the person was in the past a member of an organization that there are reasonable grounds for believing may in the future engage in terrorism. There is no requirement that the person have any knowledge or link with anything that could be described as terrorism.

Third, there is the question of the lack of due process. The issue of secret evidence and the inability for there to be justice done to someone who is subject to a proceeding in which they do not get to hear, to know, or to test the evidence that is being presented against them is widely criticized, and it is widely accepted that this is fundamentally unfair.

What is less well known is that there is another measure within the Immigration and Refugee Protection Act, section 86, which allows the same secret evidence and secret hearings to be used outside of the security certificates. Our concern is that this provision is being increasingly used by the government and therefore should be equally of concern to this committee as the security certificates.

Fourth, there is the issue of mandatory detention. If I tell you about a country in which two government ministers can put somebody into detention and where the person has no access to a review of that detention before a tribunal, you would think I am talking about a country with a military or other type of dictatorship. But we're talking about Canada. This is the country where somebody can be in detention for years without any judge ever reviewing the justice of the person's detention.

Fifth is the issue of return to torture. It is a grave shame that the Canadian government is maintaining, in violation of well-established international law, in violation of the Convention Against Torture to which Canada is signatory, that it is possible and conceivable to send someone back to a risk of torture, but that is what is happening today.

We urge the committee to take a very clear and firm position that Canada must abide by its international obligations and have absolutely no complicity with torture. This is a particularly important position to take given recent prevarications about complicity with torture, particularly expressed by some in our neighbour country towards the south.

Sixth, I want to emphasize the issue of lack of oversight. The RCMP and CSIS have responsibilities for security, and they have mechanisms of oversight. There is much to criticize in the scope of those measures and the ability of those oversight mechanisms to properly protect against abuses, but those oversight mechanisms at least exist. In the case of Canada Border Services Agency, which applies the Immigration and Refugee Protection Act security measures against non-citizens, there is no independent oversight mechanism.

This is a very serious flaw. We're talking about non-citizens who by definition are among the most vulnerable in Canada. They do not have the same protections and the same ability to assert their rights as citizens; therefore, to be giving an agency completely unsupervised ability to apply the security measures against them is a very serious flaw, and we would urge the committee to recommend an independent, effective, transparent oversight mechanism for the Canada Border Services Agency.

● (0935)

That is my submission, and I look forward to a discussion.

The Chair: Thank you very much. Thank you to all the panel.

We'll begin our first round of questioning with Mr. MacKay, please.

[*Translation*]

Mr. Peter MacKay (Central Nova, CPC): Thank you, Mr. Chairman. I would also like to thank all our witnesses for their presentations and for being so passionate about this issue.

[*English*]

I want to begin, Mr. Legeais, with the security certificates themselves. The process as you've laid it out, as all of you have referred to it, is of course generally surrounded and cloaked in secrecy. This perhaps is the most troubling aspect for all, and the fact that there isn't the opportunity to subject the evidence to the normal rigours of some form of cross-examination, or even examination at all. The detainees' lawyers are not permitted to see the evidence, examine it, or refute it. I understand it's simply presented to a judge.

Is it your belief that if a process were to be set up where lawyers were passed through a process of qualification or security clearance that would enable them to look at the evidence, be more fully apprised, and participate in a process before a judge on behalf of the detainee, this would go some way toward addressing some of the very legitimate and certainly very troubling aspects of this security certificate process? That is, there would be the capacity to have a lawyer security cleared to represent that detainee before the judge in this process and therefore create, if I could call it, the more routine adversarial process we would find in the normal course of a criminal justice proceeding.

[*Translation*]

Mr. Christian Legeais: Yes. At the moment, any change with respect to the security certificate will be a step forward. There is no doubt about that. First of all, the security certificate in its present form is absolutely unacceptable, contrary to human rights, and completely incompatible with a modern society.

There is also the security approval. The problem is that the security approval will be done by the Canadian Security Intelligence Service, which, in my opinion, is a political police force. The political police have no business being involved in the immigration process and security certificates. In my view, that is the main problem with respect to having a lawyer in the room to represent the accused. I do not know how this process could work.

However, any change would be an improvement, and the role of Canadian security services in immigration matters, as in security matters, must clearly be reviewed.

The fact is that with the exception of the five persons being detained under a security certificate, the Canadian Security Intelligence Service is responsible for admitting all immigrants into Canada. The result, as has been mentioned to this committee, is that approximately 8,000 to 9,000 people are deported every year. therefore, all of the Canadian Security Intelligence Service's responsibilities regarding security should be removed.

● (0940)

Mr. Peter MacKay: In other words, you would prefer to eliminate the process completely. What process would you recommend in that case? With what would the government replace this process with respect to security?

[*English*]

If, as you say, we completely eliminate this process, if we remove from the act the security certificate process, and if Canada requires, based on an assessment of risk, the removal of a claimant, how do we proceed? It's a very straightforward question. If, taken at your evidence, this process is so fatally flawed and so fundamentally unjust that we remove the process entirely...we can't incarcerate, we can't hold, we can't send somebody back to their country of origin. Are you suggesting that we simply use a process of recognizance where we put conditions in place? I guess this is the crux of the matter. If CSIS, the RCMP, our security forces, have deemed that someone is of such risk and threat to national security that they need to be removed from our general population—and many of you have already touched on this—where do we go? How do we strike that balance, as you have put it, between protecting our citizens, protecting the public generally, and respecting the rights of an individual who is here and proceeding through our immigration process?

Mr. Matthew Behrens: I'd be happy to answer that, and it is a good question. The documents that we will present to you later are coming from criminal lawyers who are more than capable of handling it. Essentially, in consultation with those lawyers, they've said it's time to stop treating terrorism offences as if they are, in the legal term, *sui generis*, as if there is something inherently different about them as opposed to any other violent criminal offence.

Mr. Peter MacKay: I'd just stop you there, sir. I would suggest that a terrorist act is much different from a regular Criminal Code offence, and maybe that's where we part company on this issue. What we're talking about is mass destabilization, if not mass violence, within society, and that in and of itself puts a crime in a much different category.

Mr. Matthew Behrens: We're not saying that it is not a horrible, criminal act to engage in a terrorist act. What we're saying is that in the Canadian Criminal Code there are provisions such as the conspiracy provisions, as well as conspiring outside of Canada to commit an offence in Canada. These would cover terrorist offences both outside of and inside of Canada.

The problem we're seeing, though, is that the law is being applied in a discriminatory manner. It is applied directly against non-citizens. There are Canadian citizens whom CSIS alleges are a threat or are people of concern, yet they walk the streets freely in Canada. They have not been arrested.

So if someone is suspected of being involved in this, we have a Criminal Code. We would suggest that charges be laid against that individual and they be allowed to see the case against them, as they would if they were biker gangs, if they were involved in the Mafia or in any other form of organized crime.

Mr. Peter MacKay: Let me bring it back to the earlier question then. Understand what this committee is trying to do. We are trying to address some of these very real concerns.

If there was a process that allowed for the inclusion of lawyers—criminal lawyers in this case—to do just as you've suggested, to be able to receive disclosure, to examine the evidence, to make full representation and have full participation in a process, to avoid the secrecy...and the very legitimate points that you make about making full answer in defence.... That is one of the fundamental tenets of the criminal justice system.

And I take your point, sir, that the process of clearance would be left inevitably to the government, and most likely CSIS. But does that go some distance towards addressing the concerns? I can appreciate what you're asking for is a complete removal of security certificates, but does this move us in the right direction?

Madam Dench.

● (0945)

Ms. Janet Dench: If I may, I would like to suggest that we need to step back and review the policy of the government to use deportation in response to the concerns they have. It is a policy that has been articulated with respect to war criminals too. There can be debate around to what extent that is appropriate. We take the position that while deporting Nazi-era war criminals may be a good way of dealing with it, deporting modern-day war criminals is not an adequate response. The same can be said about people who represent a threat to national security in any way, for two reasons. For one, because threats to national security can be by citizens as well as by non-citizens, a measure of deportation that can only be applied to non-citizens is obviously not going to be adequate to address the threat. Second, because the threats of terrorism are widely perceived as being global—they cross borders and people cross borders—simply deporting someone without any attention to where that person is going to be deported and what they may do subsequently is perhaps not very helpful from the global approach.

Mr. Peter MacKay: I want to challenge one of the premises you just put forward, that a Canadian citizen shouldn't enjoy or be the beneficiary of our legal system in a different way perhaps from somebody who has come to this country or has just set foot in Canada and cannot necessarily afford themselves all of the same rights, privileges, responsibilities, and protections. A Canadian citizen going to another country doesn't take their charter of rights with them; it doesn't work that way. Maybe it would in an ideal world with all that's happening and all the advances we're making, but that doesn't happen today.

Ms. Janet Dench: Perhaps I was not adequately clear in my comments. I was not actually making a point about what the person deserved here in Canada, although we obviously have positions on that. The point I was making is that if the Canadian government's concern is to address security threats, a measure that only addresses the security threats posed by non-citizens is obviously not comprehensive; it's not dealing with the threats that may be posed by citizens. Therefore, if the concern is to make sure we have a completely adequate response to the threats, we should be looking at responses that can also be applied to citizens.

Mr. Peter MacKay: Okay.

If I could just have the time, Mr. Chair....

The Chair: Very short.

Mr. Peter MacKay: Thank you.

One of the things that has concerned me the most in hearing your evidence this morning and having followed this—and I note the presence of Mr. Trudeau here as well, who has brought this to the country's attention—is the current treatment of these individuals. I think this is perhaps something we can deal with in the immediate term, this lack of contact with their families, their lack of legal representation. Are they currently being afforded proper food and treatment, albeit one of the individuals is engaged in a hunger strike? But is that food available to them, and what are the current conditions in which they're being held?

I know from having worked in the criminal process that in many cases, in lieu of bail and where there is the need to separate an individual from the general population, the holding cells are often very constricted, as is the ability to have the person taken outside and be given access to sunlight and basic human amenities.

Can you tell us a little bit about the actual physical holding of these individuals currently?

[*Translation*]

Mr. Christian Legeais: The problem is that the situation of people being detained varies from one province to another. However, even if these cases come up under federal jurisdiction, the federal government refuses to assume complete responsibility for these individuals. These people are being detained in isolation. For his part, Mohamed Harkat has been in isolation for close to a year, with no contacts whatsoever and with no opportunity to get outside his four walls.

Mr. Charkaoui's situation in Montreal was different. So is that of the other individuals being held in Toronto. The Ottawa Detention Centre, where Mohamed Harkat is being detained, is known to be one of the worst for overcrowding and poor conditions generally. The situation is so bad that for some individuals the time spent in preventive detention in this facility counted as three days of prison time.

The 34 months that Mr. Harkat has now spent in detention should be multiplied by three. That means that he has spent 102 months in detention, some of the time in solitary confinement, and exposed to the arbitrary treatment of the authorities and the psychological torture caused by not knowing when he is going to get out, if there is any chance he will get out, and particularly by being in prison when he has committed no crime.

The detainees...

● (0950)

[*English*]

The Chair: I'm going to jump in here, colleagues. In the fullness of time, I know you'll get a chance to have another exchange, but I'm going to jump in and let Mr. Ménard take over.

Thank you, sir.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): I would like to start by saying that I am very pleased to see the three of you here this morning to present your views. Time is very precious. Rest assured that we—speaking for myself and I believe for the other committee members—are conscious of the legal issues you have raised.

However, since you are here, I would like to put forward some arguments we have heard to get your reaction to them and to the situation generally. You must not interpret these questions as a judgment. We will make a judgment after discussing the issue among ourselves and after hearing from all our witnesses, both those who defend the legislation and those who challenge it.

What we are talking about here are the harshest provisions, those that apply only to residents who are not citizens. We had been told that for these people, there is one way of getting out of prison, and that is to go back to their own country. I understand that in the cases where they would be tortured in those countries, there is a problem. But otherwise, why would these people not go back to their own countries?

Mr. Christian Legeais: Mohamed Harkat is a Convention refugee who arrived in Canada in 1995.

Mr. Serge Ménard: We have very little time. That is a good answer. But what about the others?

Mr. Christian Legeais: The situation is the same.

Mr. Serge Ménard: They are all refugees?

Mr. Christian Legeais: Most of them are, yes.

[*English*]

Mr. Matthew Behrens: In all of these cases, if you have been labelled a security risk by Canada, the chances of your being warmly accepted in any country around the world are zero.

[*Translation*]

Mr. Serge Ménard: Do you distinguish—as Mr. MacKay seemed to—between people who have just arrived and whose settlement in Canada is considered inadvisable by security officials for reasons that may be valid even if they do not tell us what they are, and other individuals who came here as refugees, in some cases, a number of years ago? In other words, do you distinguish between those who are established here and have a family, and those who have just arrived, as Mr. MacKay was saying?

● (0955)

Mr. Christian Legeais: In my opinion, I think everyone in Canada must enjoy the protection of the Charter of Rights and Freedoms, however limited it may be. The fact that people come from another country does not mean that they lose their human rights when they come to Canada because of suspicions or allegations.

Mr. Serge Ménard: This leads us to the second point I would like to discuss with you. In the first place, we must understand that terrorism is different from ordinary crimes, and even from criminal gangs, in that we accept the fact that we cannot punish people who are members of criminal gangs until after the fact. However, in the case of terrorism, we have to take action before terrorist acts are committed.

We have been told that this intelligence, which may sometimes be very reliable—I understand that this is not always the case, and that in the past, there have been some flagrant errors—cannot be disclosed without endangering the lives of the sources, or without revealing facts that would prevent the necessary infiltration of security agents into terrorist organizations.

You never discussed this aspect in your comments, and yet it is what justifies secret evidence as a necessary part of the process. You understand very well that if we want to use police methods to discover the secrets of terrorists, people have to infiltrate their organizations. Those people run risks and provide information. If the information is disclosed, it makes it possible to trace the source, and thus infiltration becomes impossible. What is worse, we are jeopardizing the lives of the people who have infiltrated the organizations.

Have you thought about this aspect?

[*English*]

Mr. Matthew Behrens: Absolutely. Actually, I have here a response from John Norris, the attorney in Toronto who represents three of these men. He said:

> Any group engaged in illegal activities will attempt to keep its activities secret, will be suspicious of surveillance, will act in a clandestine fashion, etc. Often it is only possible to investigate criminal organizations by using confidential informants. None of this has prevented Canadian authorities from investigating and prosecuting various forms of organized crime, [which is fairly violent, as we all know], from the traditional Mafia to biker gangs to today's street gangs. Neither should it prevent Canadian authorities from investigating and prosecuting criminal conduct by alleged "terrorists" that occurs in Canada

I'd also refer you to the sentencing statement that was given by the judge in the Ressam case, who noted that here we know of a man who was planning to go to the Los Angeles airport with a trunkload of dynamite. In his conclusion he said:

> I would like to convey the message that our system works. [In the Ressam case] 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.
>
> I would suggest that the message to the world from today's sentencing is that our courts have not abandoned our commitment to the ideals that set our nation apart. We can deal with the threats to our national security without denying the accused fundamental constitutional protections.
>
> Despite the fact that Mr. Ressam is not an American citizen and despite the fact that he entered this country intent upon killing American citizens, he received an effective, vigorous defense, and the opportunity to have his guilt or innocence determined by a jury of 12 ordinary citizens.
>
> Most importantly, all of this occurred in the sunlight of a public trial. There were no secret proceedings, no indefinite detention, no denial of counsel.
>
> Unfortunately, some believe that this threat renders our Constitution obsolete. This is a Constitution for which men and women have died and continue to die and which has made us a model among nations. If that view is allowed to prevail, the terrorists will have won.

Finally, you mentioned that we often rely on evidence that is produced by CSIS, and I need to point you no more clearly to *The Globe and Mail* from September 6:

> It was hyped as a terrorist map. It was cited by Egyptian torturers. It is a visitor's guide to Ottawa.

This is the quality of so-called evidence that is being used by Canada's spy agency to send people off to torture chambers in Syria and Egypt.

● (1000)

[*Translation*]

Mr. Serge Ménard: I understand your point of view. Not that I could not reply otherwise. There is no doubt that there are cases where legal action could be taken without jeopardizing the lives of the people who have infiltrated the organizations. In other circumstances however, this is impossible.

I would like to mention that I established the Carcajou squad, which worked quite effectively against criminal motorcycle gangs. However, during the three years of investigation that led to the arrest of the main leaders, they did a lot of drug trafficking, committed murders, and the police even heard one of the undercover agents being killed because he was equipped with a device that transmitted conversations. These are risks that were run in enforcing the law. Note that all the charges laid against the motorcycle gangs were not laid under the new act, which was passed later on.

Can we take this type of risk? That it what people ask us when there is a danger of terrorist acts that would kill a number of innocent people.

I would like to turn to another matter. Do people know why these individuals, who are in preventive detention and have not been accused of anything, are being held in isolation?

[*English*]

Mr. Matthew Behrens: I'm just wondering if Janet can respond. She was just about to respond to your first question. Then I'll jump in on that question.

[*Translation*]

Ms. Janet Dench: You asked whether or not we had dealt with the challenge of looking for people who may commit terrorist acts. We have not done much work in this area, because that is not our area of expertise. The police could answer that question. This is also a challenge in the case of citizens who may commit terrorist acts.

You also alluded to infiltration. We have to think about obtaining the participation of Canadians, particularly Muslims and Arab Canadians, who, if they do not have confidence in the Canadian system, if they see Arabs and Muslims being targeted by security certificates, by systems that they feel are unfair, who are questioned by security services as well as others, will not want to disclose information that may prove to be very useful.

Mr. Serge Ménard: That is a very important point that we will consider.

[*English*]

Mr. Matthew Behrens: In terms of the solitary confinement, in the case of Hassan Almrei, he was thrown into solitary confinement upon his arrest in October 2001, was kept there for the first 15 months, was denied visits with his friends, had very limited access to counsel and to phone calls, and did not have heat for the first two winters in his cell.

We were told later in court that Mr. Almrei was put in solitary basically at the request of Citizenship and Immigration Canada officials. He went back on the range for three days after a hunger strike. But if you can imagine being a high-profile detainee who has been kept in solitary, it is not safe to go back on the range. He was beaten up after three days on the range and has since been in solitary confinement for his own protection. It is through no circumstances or misconduct of his own that he has been placed in solitary.

[*Translation*]

The Chair: Do you wish to ask a final question?

Mr. Serge Ménard: No, thank you.

[*English*]

The Chair: Okay.

Mr. Comartin, please.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Mr. Behrens, to start with you and Mr. Mahjoub, I gave some information to the committee that he had been taken to a hospital. They wouldn't tell us where they took him. But I understand that overnight he was sent back. Just to confirm that's the situation, that he's back in—

Mr. Matthew Behrens: I spoke to him from solitary confinement last night, yes.

Mr. Joe Comartin: Was he given any treatment at all?

Mr. Matthew Behrens: He had his vitals checked and was told that as far as they were concerned he was stable.

This is a concern to us, given that the doctor who saw him on Sunday said he's at major risk of cardiac arrhythmia if he continues the hunger strike. Within a few days he's at risk of losing kidney function. His blood pressure is very high and he could have a heart attack. The biggest problem here is that he's not hooked up to the kind of monitoring equipment one would get in a hospital. You can check on Mr. Mahjoub at 11 and then leave his cell and at 11:05 his blood pressure can fall to the floor and he can slip into a coma. That is the concern. He needs constant monitoring.

As an alternative to that, he needs to know that there is a structure in place to meet his very reasonable demands, and I believe that if that structure is in place and he can see progress being made he'll come off the hunger strike. But until that time, he definitely requires hospitalization.

● (1005)

Mr. Joe Comartin: We heard from the chair yesterday afternoon as well that there had been some contact between the minister, Monte Kwinter, provincially, and the Deputy Prime Minister on this file. I have had no information as to the outcome of that. Is there any indication of any change in the position taken by the correctional services in Ontario as to how they're going to treat Mr. Mahjoub?

Mr. Matthew Behrens: Mona Elfouli and I actually ran into Mr. Kwinter just before our demonstration at his office. He refused outright to discuss the case with us and jumped into his limo and ran away.

We met with ministry officials. They listened to our concerns. They promised nothing. Later in the day we were informed by the legal adviser to the government that a response would be coming from the Ontario government. That was Monday afternoon. It's now Wednesday morning. We have yet to receive an official response from the Ontario government. They seem content to really roll the dice with this man's life.

Mr. Joe Comartin: Just to deal with the health condition—the problem of whether he should be having a liver biopsy and the rest of it—the sense I have is this was initiated to a great degree to try to get a change of position with regard to visits with his two children. Is that basically accurate?

Mr. Matthew Behrens: That's part of it. It's largely health conditions, uninhibited visits—visits that are not stopped by the arbitrary actions of officials at the jail. For example, his children were denied a visit about a year ago because they were spotted at a peaceful demonstration outside of the jail and were told, “You can't come in if you demonstrate outside the jail”. But he wants touch visits. He has not been allowed to hug his kids at the jail in over five years.

Mr. Joe Comartin: How old are his children?

Mr. Matthew Behrens: Six and eight.

Mr. Joe Comartin: I believe the same....

[*Translation*]

Mr. Legeais, does the same thing apply to Mr. Harkat? Mr. Harkat does not have children, but he cannot touch his wife.

Mr. Christian Legeais: No. Mr. Harkat is entitled to two 20-minute visits per week. Mr. Harkat is in a box, he is not even with the general population. The visitors sit on the other side of the Plexiglass. Sometimes the telephone for communicating is not plugged in, visits are shortened, there may be no visits whatsoever or they may be denied for no reason. Nevertheless, this is not specific to Mr. Harkat. Correctional Services may decide that, on that particular day, there will be no visits. And too bad for those people who were there!

Mr. Joe Comartin: And this has been going on for 34 months?

Mr. Christian Legeais: We are talking about 34 months. Mr. Harkat was also kept in isolation for nearly one year. His meals were not in keeping with the rules of his religion, meaning that he did not have any halal meat. Consequently, he hardly ate. He was not given the Koran for several weeks, and so forth.

[*English*]

Mr. Joe Comartin: Mr. Behrens, is it the same with Mr. Almrei and Mr. Jaballa?

Mr. Matthew Behrens: Yes, no touch visits. Mr. Jaballa actually has six children. There are limitations on the number of individuals, so his children can only see their dad once a month, for 20 minutes, behind the Plexiglas, because there are six kids and only three or four people are allowed to visit him at the same time.

● (1010)

Mr. Joe Comartin: That's because that's the standard policy. That's the standard rule for corrections in Ontario, when you're incarcerated short-term waiting disposition, either by way of trial or dismissal of your charges.

Mr. Matthew Behrens: That's correct, but the thing is, the institution and the ministry do have discretion to make changes.

In 2003, when Mr. Almrei was on a hunger strike to have the heat turned on in his cell and to be able to wear his sneakers inside his cell, the way every other prisoner is allowed to do, he had to go on a hunger strike and we had to spend six days in provincial court fighting the government. We eventually got a court order for a $2 pair of shoes, which cost taxpayers hundreds of thousands of dollars.

It appears that this is what the Ontario government now is forcing us to do: “If you want to hug your kids, you have to spend half a million dollars of taxpayers' money, and we'll fight you in court”.

Mr. Joe Comartin: Maybe all the way to the Supreme Court of Canada.

Mr. Matthew Behrens: Well, if we have to.

I mean, it's such a basic human right, and as Mr. Jaballa has said, when he was being imprisoned and tortured in Egypt, he was allowed full-day family visits. They would have picnics. So if it's good enough for a dictatorship, I don't see why it's not good enough for a democracy. Mr. Charkaoui was allowed touch visits with his children when he was detained in Quebec.

Mr. Joe Comartin: We'll give Mr. Ménard some credit for that.

The other point I want to raise in this regard is I understand as well that lawyers, when they're meeting with their clients, are not across the Plexiglas wall. They're actually having physical contact.

Mr. Matthew Behrens: That's correct, as are media. So, for example, when Mr. Trudeau goes in he will be able to shake the hand of Hassan Almrei or any of the other men he interviews. As a journalist he has more right to contact visits with these men than their children do.

Mr. Joe Comartin: I'd like to shift to—Ms. Dench, you may want to add something on this—the use of the certificates and the responsibility of the federal government. As I understand the situation, we have a contract between the Canada Border Services Agency and correctional services in Ontario and Quebec. There are no other detainees other than in those two provinces at this point.

We in effect contract the services to detain people who are victims of the certificates. Is that accurate?

Ms. Janet Dench: It's accurate, and it's accurate also more broadly for immigration detainees who are not in the Canada Border Services Agency facilities, and that is a problem for many immigration detainees—the conditions in which they're kept, the lack of access to NGOs or lawyers.

One of the things that we often run up against when we are arguing against immigration detention and the fundamental rights to liberty is that we are told this is only administrative detention; it's not like a criminal detention. Therefore, the argument goes that there should be a lesser obligation on the courts and the government to provide meaningful rights to liberty for the person. Yet at the same time, when they're in detention, the conditions of the detention don't seem to reflect this principle that it is supposedly a lighter form of detention than if the person had been convicted of a crime.

Mr. Joe Comartin: Being conscious of the time, do you have any suggestions—and this again is putting the emphasis on the federal government—of an alternative? It's going to be a while before we get rid of these certificates. Is there an alternative that they should be implementing as to where they are going to incarcerate?

Mr. Matthew Behrens: I think the alternative is to actually look at their human rights and come to the conclusion that at least an intermediary process has to be brought to bear that says these men have a right to bail and release on conditions. There are other individuals, such as Mr. Suresh, who was held under security certificate and was released in 1998 on conditions. He's lived a normal life ever since. Mr. Charkaoui has been on conditions. The conditions are not at all satisfactory, but he is trying to get on with his life, difficult as that is. It is possible to release these folks on conditions, and that should be done immediately.

● (1015)

[*Translation*]

Mr. Christian Legeais: That's where you also see discrimination, in that the security certificate is different for residents. These individuals, despite the fact that they have been deprived of their rights, have more privileges.

Mr. Charkaoui was entitled to have his incarceration reviewed every six months. That didn't happen for other people. In the case of Mr. Harkat, who for several years had been recognized by Canada as a refugee, the few rights that he had had as a refugee were waived. The security certificate stipulated that he could be imprisoned automatically without any opportunity for release. The certificate did, however, provide for a review of this incarceration 120 days after the security certificate had been deemed reasonable and providing that his deportation from the country was not too immediate.

These people have been kept in custody for years. Unlike any other common law inmate, they are not kept in federal penitentiaries. They have no access to any training or rehabilitation programs. They are not entitled to any visits or contact with their families. They have nothing whatsoever.

That in fact is how the security certificate deals with these people. It condemns them to a civic death. They are kept in prison and ignored. It is not surprising that, in the case of Mr. Mahjoub, the provincial government allowed him to go on a hunger strike for 75 days. They are simply condemned to a civic death.

The Chair: This will be the final question.

[*English*]

Mr. Joe Comartin: Thank you, sir. I didn't think I had another question, but I'll take it.

Ms. Dench, we haven't had much on this. I'm talking about a comparison of how other countries have handled this. I'm thinking in particular of the position the European Union took, which really forced the House of Lords to come down with that decision in England in December.

Are there other countries we can look to who have treated detainees in a more humane way than we have? Is there anybody else we can look to?

Mr. Matthew Behrens: Pretrial detention in numerous European countries is certainly far more “humane” than it is in Canada, but again, given the incredible amount of time that these men have already spent behind bars, I don't think we need to be looking at more humane forms of detention. I think we need to be looking at more humane solutions such as release.

The Chair: Thank you, Mr. Comartin.

Mr. Maloney, and then if there's extra time we'll share it with Mr. Boudria.

Mr. John Maloney (Welland, Lib.): The issue this morning that this discussion is focused around is security certificates and the need for balance. I think we all recognize the right, responsibility, and obligation of the government to keep Canada and Canadians secure and that we not be a safe haven for terrorists who may prey on other countries. It's perhaps the execution—how these certificates are utilized vis-à-vis the detention—that is certainly part of the issue and perhaps is clouding this issue this morning. We've had security certificates for some time now—not just since 9/11—perhaps for 15 or 20 years. They've been challenged time and time again and found to be constitutional. The issue of the certificate has been dealt with time and time again.

What I have real difficulty with, and I think most Canadians would when listening to this today, is the treatment of these individuals in a less than humane way, as you've portrayed it this morning. It's not something that we as Canadians are necessarily—nor should we be—proud of, but where do we strike the balance? Is the issue not the security certificates but the amendments or procedures that might prevent people being detained for four to five years without due process?

● (1020)

Ms. Janet Dench: I think the issues of detention and conditions of detention are important ones and it's good that you are focusing on that. But at the same time, we mustn't lose our perspective on the reason these people are in detention, and that is because the government is trying to deport them and the deportation is alleged to be to a country where there is a substantial risk of torture. That is a very real threat facing the detainees.

So while dealing with the detention is necessary, and we hope this committee will make some recommendations in that regard, it doesn't address the fundamental problem, which is whether we are going to deport people to face the risk of torture, in violation of international law. We hope the committee will say very strongly and clearly that it is completely unacceptable to send someone to a risk of torture and that Canada must live up to its international human rights obligations.

Mr. John Maloney: I accept that argument, but what do we do with those individuals who we would hope would be found to be security risks or not. If they are found to be a risk to our security, what would we do with them—if they were not to be deported because we don't want them tortured?

Ms. Janet Dench: We would urge that people who are guilty of crimes be charged and prosecuted and given a chance to defend themselves in a court of law. If there is no evidence that would allow for there to be a criminal prosecution, then the situation is the same as if that person is a Canadian citizen.

What do the Canadian security forces do when they have suspicions that a Canadian citizen may have involvement in terrorist activities but the person has not committed any crime? That is the challenge facing the security and police forces, but it would be the same whether the person is a citizen or a non-citizen.

Mr. Matthew Behrens: I think you're asking what do we do with these individuals. But I think we have to put the question back a bit and say what do we do with the individuals who are naming these individuals as a security threat.

You are no doubt familiar with this document on Mr. Bhupinder Liddar and the way in which CSIS declared, categorically, undeniably, and right down the line, that this man was a security threat who could not get security clearance. Yet, as we saw in this SIRC report, this was a whole lot of garbage, which was thrown out. The denial brief was fundamentally flawed and biased. It contained conclusions that were not supported by the information. It presented conclusions, categorically negative terms, that were not justified by the evidence. We see this time and again.

If you read the SIRC reports, SIRC is a generally accommodating committee in terms of sharing the world view of CSIS, but year after year SIRC comes to the conclusion in their recommendations that CSIS really needs to try to get their facts right and try to cross their Ts and dot their Is. After 21 years, if Canada's spy agency is still being coddled by its oversight committee to say, “Come along, little spy agency, you really need to try to get it right when you're dealing with these issues”, I think that's the real issue. If they can't get that information right, the risk to Canadian security doesn't come from individuals such as the Secret Trial Five; it comes from either incompetence or ideological biases being driven by CSIS.

Mr. John Maloney: Thank you, Mr. Chair.

The Chair: Mr. Boudria.

[*Translation*]

Hon. Don Boudria (Glengarry—Prescott—Russell): I would like to go back to what was said earlier about rights—and here, I will paraphrase—that are identical or at least similar. I'm going to quote from a document that was given to me regarding the Chiarelli case before the Supreme Court:

[*English*]

> The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. The common law recognizes no such right and the Charter recognizes the distinction between citizens and non-citizens.

[*Translation*]

This is about a Supreme Court decision that alluded to a type of hierarchy. So there is therefore a hierarchy.

Perhaps you do not like the fact that there is this hierarchy, and that is quite valid. The fact remains, however, that Supreme Court decisions cannot be appealed. And, as we say, that is that. So the principle already exists.

I would like to focus on what could be done to tighten the rules regarding the use of these certificates. Should the criteria be changed? I know that, in an ideal world, you would like them to no longer exist. Nevertheless, for those people who would like to find a solution somewhere between these two positions, how could we tighten the rules?

Also, how can we ensure that, in the case of longer incarcerations, we don't find ourselves with cases such as the one you just described earlier, whereby a multiple murderer is given better treatment by the justice system than an inmate who has not been charged with anything?

The following facts are what bother me. Somebody may be held in custody temporarily, and we do recognize that this is for a more limited period of time than in the case of an inmate. Yesterday, certain examples were given and I will not bother repeating them, but in certain cases that are well known, individuals who have killed 10 or 12 people, I don't know exactly, receive more favourable treatment. I would like us to establish, perhaps after a period of detention resulting from this certificate, that there be an automatic transfer to another facility that is better equipped to handle long term custody.

Do you have any recommendations to that effect which will help us when we draft our report?

● (1025)

Mr. Christian Legeais: Yes. In my opinion, the fundamental recommendation would be that all security measures taken must respect human rights. That's not the case with the security certificate.

At the same time, we need to stop viewing these individuals for whom a security certificate has been issued as statistics, as an average of 1.5 cases per year since the security certificate has been in existence. We need some respect.

Hon. Don Boudria: I did not refer to that either.

Mr. Christian Legeais: This committee should recommend that the Canadian Constitution be modernized, so that this hierarchy of rights in Canada will not be included. That is a much broader issue that deals with the concept of rights in Canada.

Indeed, we can look at what the judge does in cases of security certificates. He does not take a position with respect to the constitutionality of the allegations made in the security certificate; he takes a position with respect to probability. Consequently, his hands are tied. Some judges, or former judges, have stated that they hate this process. Now their hands are tied.

It is, therefore, up to the legislators to change this process so that it complies with the respect for human rights.

[*English*]

Mr. Matthew Behrens: I think also simple consultation with criminal lawyers who have been involved in the security certificate process. They're more than happy to discuss how the Criminal Code can be applied.

But with respect to potential alternate forums, I think a really important question for this committee is why did security certificates stop being handled by the Security Intelligence Review Committee in 1991, and why did detention suddenly become part of that process in 1991? Before that time, these cases were heard by SIRC. They were not heard by the Federal Court, and in most of those cases—at least the ones that were dealt with by lawyers such as Barbara Jackman—CSIS was losing.

So there's a real question here as to whether or not it was at the impetus of CSIS that the process be changed to make it so incredibly impossible that no one could possibly withstand the low standard of proof that is required to uphold a security certificate's reasonableness.

Ms. Janet Dench: If I can add, the process is important, but at the end of the day the definition is crucial, and the definition that is used for security certificates, as for other immigration processes, is the security inadmissibility definition, which, as I said, is so vast that people who have no knowledge or connection with any terrorist action are included in that definition. Therefore, there can be no justice as long as people can be removed, based on the current definition.

[*Translation*]

Hon. Don Boudria: Do I have any time remaining?

● (1030)

[*English*]

The Chair: One more minute.

[*Translation*]

Hon. Don Boudria: I do not know if I could ask you to examine the second aspect I raised pertaining to incarceration, presuming—although you don't want this—that the system remains. How could we change this incarceration system, especially for those who are held in custody for a longer period of time? I know that you do not like them being there. Should we establish an automatic threshold whereby we would change the way these people are kept in prison? If yes, how should that work?

It seems to me that, in the end, we need to make recommendations that will not be only theoretical. We are hoping that the government will adopt these recommendations to enhance the act, notwithstanding the fact that, even if we do enhance the act, it will not perhaps meet your expectations.

[*English*]

Ms. Janet Dench: If I may, I would suggest that it would be very much appreciated from our side if the committee could recommend that the government include, in all of its contracts with other authorities for the detention of immigration detainees, strict standards that must be abided by in the case of these detainees, and that those standards address things like appropriate food, medical care, access to NGOs, visits with family and friends, access to telephones, lawyers—a whole range of things that the facilities, whether they be provincial jails or others that are detaining immigration detainees, would be required to meet before the immigration department, CBSA, would sign a contract, because they are the detaining body and they should have some accountability for the standards under which people are detained.

Hon. Don Boudria: Thank you.

The Chair: Thank you, colleagues.

I'm going to run over our time for a couple of quick interventions from Mr. MacKay, Mr. Ménard, and anyone else who wants one, if that's okay. If we could keep it really short with questions and answers, that would be helpful.

Mr. MacKay.

Mr. Peter MacKay: Thank you, Mr. Chair, and again, thanks to all of you.

I'm concerned that we focus back on doing some productive things, as opposed to theorizing as to what should be. I think all of us accept that the threat of terrorism in this country is very real. That is the impetus for much of the discussion and for much of what we have seen with the adoption of Bill C-36.

Ms. Dench, your response to Mr. Boudria was I think one of the more productive things we've heard here.

As far as security certificates are concerned, I accept, Mr. Behrens, that you don't have a lot of love for CSIS; that is the experience you've had. Yet it's the process we have to deal with here. Whether it's the judges themselves being given more background information, or injecting, as has been suggested, a process where lawyers with specific training—whether they be legal aid lawyers or lawyers who have volunteered for this type of security clearance—are given the ability to intervene and be given the intelligence that is being relied upon for the security certificate itself, and who inject into that process an ability for some cross-examination, an ability to actually challenge what has been put forward, that type of injection, I would suggest to you, is at least a step in the right direction.

Throwing out the certificates altogether denies the obvious: that the evidence that has been gathered was done so in secret, in many cases on the reliance of confidential informants. Putting another rigorous examination of the evidence into play, I would suggest, is going to at the very least provide another means to legitimize whether in fact the risk assessment is proper, whether the balance is being struck, whether society is being protected versus the rights of the individual being denied and the individual incarcerated.

Do you acknowledge, any of you, that this would be helpful in the process, or do you maintain out of hand that it's simply the removal of the certificate process that is going to achieve the form of justice you seek?

In the absence of some other suggestion, you're not leaving us with a lot. You're just saying, remove the security certificate process and release people, as you've said, Mr. Behrens; release them into society with conditions, I suppose, or a recognizance that's going to prevent them from committing some horrific act of which they have been accused.

For you to say that there's no reason to hold them.... You haven't seen the evidence, sir. Just as I can't make that assessment, I would suggest you're not in a position to do so either.

● (1035)

Mr. Matthew Behrens: What I would say in terms of the process is we don't want to bring to people who are sinking into quicksand doughnuts and water to make them feel better; we have to pull that person out of the quicksand. In terms of alternatives, again, I don't know why we're so afraid to use the Criminal Code. The Criminal Code is a vast, wide-ranging instrument that can be used. The Criminal Code is more than capable of setting up cases in which judges can hear confidential information, the information from informants. That often happens, especially with respect to the issuance of a wiretap; that information can be kept secret. This process does exist at criminal law, so it can be used.

Our problem here today is that a piece of immigration legislation is being used in a discriminatory fashion. If there's such a threat in Canada—and CSIS tells us time and again the number of potential risks is in the triple digits—where are all these people? Why aren't they in jail?

It's very easy to put that information out and not provide any proof. When we've seen examples of abuses and patterns of abuses in the past, it's not for a lack of love of CSIS; it's about a concern over an abusive process that cannot be fixed without some form of public oversight.

Janet, did you want to respond as well?

Ms. Janet Dench: I will just emphasize that you do not need to be alleged to be a security threat in order to have a security certificate signed against you. You said, “we don't know the evidence”. We don't know the evidence, but we don't even know whether in fact the judge will ever decide that the person is a threat or will even look at that question because that is not the question in the security certificate. It's extremely broad. It can be signed by ministers when they think the person is inadmissible on security grounds. There may be no threat at all.

The Chair: Thank you, Mr. MacKay.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard: I admire people who are able to mobilize to examine the fate of others. Generally speaking, these are the people who make societies move forward. However, I wonder why you have not tried legal recourse.

[*English*]

Mr. Matthew Behrens: There's currently a challenge going through the Supreme Court—the Charkaoui case. Mr. Almrei has a case in which we're seeking leave of the Supreme Court challenging the denial of bail. Mr. Harkat is seeking leave to go to the Supreme Court as well. And Mr. Mahjoub might be headed there as well in an effort to hug his kids. So we're trying everything we can.

[*Translation*]

Mr. Serge Ménard: You have raised numerous arguments under the Charter. You have said nothing, however, that would lead us to believe that the Supreme Court would not be sensitive to violations. I'm wondering why, because the means do exist, even though the legislation does not provide for them.

The Supreme Court has general oversight over the entire judicial system of Canada. Moreover, I think that you could have had some recourse, but I do not want to give you advice, even though I am a lawyer. I have always wondered why recourse has not been used more often. Recourse does exist.

You can rest assured that we impatiently await the Supreme Court opinion on the recourse that they have agreed to use. However, I have always wondered why others have not used it.

[*English*]

Ms. Janet Dench: I cannot comment on other legal recourses that might have been attempted, but I would like to underline that we would hope to not have to rely upon the courts to establish in law what are the basic rights under the charter. I would hope that it would not be left to the Supreme Court to establish that a return to torture is unacceptable and contrary to the charter. I would hope that it is the responsibility of the houses of Parliament to clearly legislate that there will be no return by Canada of anybody to face torture.

The Chair: Thank you.

Thank you very much, ladies and gentlemen, for your appearance today.

You can tell there's a lot of interest in this area. You're certainly making our job challenging as we move forward. We have another panel of witnesses on the same subject, and we look forward to hearing from them.

Thank you very much for your appearance.

We're suspended for a few moments to change panels.

● (1040)

(Pause)

● (1050)

The Chair: We're resuming, colleagues, our discussion of the security certificates, and I'm happy on your behalf to welcome three individuals. Represented are Amnesty International and the International Civil Liberties Monitoring Group. I welcome you, Mr. Neve, Mr. Allmand, and Mr. Copeland—the Honourable Mr. Allmand, of course. Welcome back to the Hill, sir.

We'll begin with you, Mr. Neve, followed by Mr. Copeland and then Mr. Allmand.

Mr. Alex Neve (Secretary General, English Speaking Section, Amnesty International Canada): Thank you, Mr. Chair, and good morning, committee members. Thank you very much for the opportunity to be here today to share Amnesty International's concerns and recommendations as you carry out this important review of the Anti-terrorism Act.

Of course, the focus of our panel today is the particular issue of security certificates, and I will most certainly focus my remarks on that area. I hope you will understand, however, if I take about 30 seconds at the end to take advantage of this opportunity to refer briefly to a limited number of other concerns we have about a variety of other human rights issues regarding the operation of the act.

Let me begin with one general comment. It will, I'm sure, come as no surprise to committee members to hear Amnesty International urge that you very much put a vigilant concern for fundamental human rights principles at the very centre, the very heart of your review of this act. I say so not only because human rights are an essential, precious concept—which of course they are, and I very much hope and expect you would attend to human rights for that reason alone—but I say so additionally because the central goal of anti-terrorism legislation is obviously security, and security that is not firmly grounded in scrupulous respect for human rights is anything but secure.

In our view and experience—and this is experience proven and tested over many decades of human rights research—disregard for basic human rights serves only to deepen inequities and create injustice, leading to resentment, divisions, and grievance, all of which ultimately leave us only with greater insecurity in the end.

That brings me to outline Amnesty's concerns about the security certificate process. International human rights law lays out a range of very important safeguards meant to ensure that people's liberty is only taken away from them in accordance with basic minimum guarantees of fairness and due process, the essence being that the person concerned should know the nature and specifics of the allegations that have been made, should have an effective opportunity to examine witnesses who may be the source of those allegations, and should have a real chance to respond to and refute those charges with meaningful legal representation in the process.

Fair-trial standards have gone further and laid out that the normal principle is that legal proceedings are open to the public, an extra protection meant not only to allow the public to understand and follow cases of interest and concern, but also to bring an added level of scrutiny and care, which comes perhaps most obviously through the attention and often the investigative work of journalists, but also from the public more generally, all of which goes further in guarding against the possibility of abuses or miscarriages of justice.

These principles have been enshrined in a number of important international human rights instruments, most notably the International Covenant on Civil and Political Rights, ratified by Canada almost thirty years ago.

Quite simply, Canada's security certificate process does not conform to these international human rights obligations. Security certificate detainees do not know the precise allegations against them. They see only a summary of the evidence. Much evidence is presented in court in camera, in the absence of them and their counsel, affording the individual no chance to examine it or to question the witnesses who are the source. The possibility of error, misunderstanding, and even mischaracterization in such a setting is very real.

And we have had a recent reminder of just how real that is. The case of Ahmad El Maati, one of the Canadian citizens “of interest” in the course of a Canadian national security investigation, who experienced interrogation and torture abroad in Syria and Egypt, is a sobering reminder of how critical it is to ensure that evidence is well and thoroughly tested.

All along in his case, a mysterious map described in early days as hand-drawn—a map of part of Ottawa found by U.S. customs agents in the cab of the tractor-trailer he was driving while carrying out a routine delivery to the United States in 2001 for a Toronto-based trucking company—has figured as a central, supposedly incriminating, piece of evidence. Questioned by U.S. customs officials and then, months later, questioned again during interrogation and torture sessions in Syria and Egypt about the map, with the implication that this map was some sort of a plan for intended Ottawa bombings, Mr. El Maati consistently pleaded no knowledge of the map, suggesting it perhaps belonged to another driver.

● (1055)

It is only this month, through some investigative work done by the *Globe and Mail*, that the mystery of the map has been solved. It was nothing sinister at all. In the end, it turned out to be an innocuous, standard issue, government-prepared map of the Tunney's Pasture office complex here in Ottawa. Public attention, public scrutiny, was what was needed to shed light on the true nature of a supposedly critical piece of evidence in a national security case, which had stood unchallenged and had been relied upon in various ways by government officials in four countries—Canada, the United States, Syria, and Egypt—over a period of almost four years. Public trials, public justice, matter for very real reasons.

For Mr. El Maati, the consequence of error was torture and other human rights abuses, and that is precisely what is at stake for the security certificate detainees as well—very real risks of torture in Morocco, in Algeria, in Egypt, in Syria—and that critical backdrop cannot be overlooked. Security certificate proceedings are deeply flawed in the failure to comply with international fair standards, but that failure is of even graver concern given the potential consequence at the end of the day: torture.

International law is crystal clear: torture is never permissible, nor is deporting someone to the waiting arms of a torturer. Nowhere is it more clearly stated than in article 3 of the UN Convention against Torture, which was ratified by Canada 18 years ago. Sadly, the Canadian government continues to assert that there should be exceptions to this prohibition in national security cases. The Supreme Court, in 2002, in the Suresh decision, eloquently affirmed that international law allows no such exception, but unfortunately did suggest that under the charter it might be okay in exceptional circumstances.

It is time for Canada to close the exceptional loophole for security certificate detainees and all others and ensure that Canadian law will never countenance complicity in torture, will never aid and abet the torturers in their gruesome misdeeds, and will instead firmly and convincingly stand behind the fundamental international legal principle that all torture, everywhere, at all times, should be opposed, eradicated, and abolished.

There are essentially four things that Amnesty International wants to say to you about security certificates. The first is that the current process should be abolished and replaced with a process that fully conforms to international fair-trial protections. Second, Canadian law should be amended to absolutely prohibit the return of anyone to face a risk of torture. Third, Canadian practice, particularly in cases where there are concerns a detainee may face human rights abuses if deported or extradited, should begin to live up to the promise of the Anti-terrorism Act, namely that Canada would ensure that security cases are dealt with through fair domestic criminal proceedings in Canada or elsewhere. Shipping individuals off elsewhere does nothing to further security and it does nothing to make our contribution to the international effort to counter terrorism.

Fourth, this matters because it matters. It matters because human rights issues are at stake here in Canada, but it matters particularly because Canada can and must strike a global lead on this issue. Canada's voice on human rights issues is a critical voice on the world stage, and it is debilitating and very problematic that Canada is not able to bring to the current very important global debate about security and human rights a clear indication of our fundamental unwavering commitment to ensuring that human rights standards govern counter-terrorism practices.

You may have questions as to whether the process could be improved by appointing independent counsel of some description who would be allowed access to the secret evidence and be present at all proceedings. It is a shame, really, that this is not the state of Canadian law at present, that this is not the bare minimum we already have in Canadian law, and that our debate today isn't about the need and the ways in which that should be improved. It is very distressing that this is not our starting point.

That said, based on our experience of the U.K. system, where a model of this sort has been used for a number of years, there's a note of caution that you should be aware of, concerns about that process, and I can certainly come back to that in questions.

I probably have no more time. Just let me refer, without going into any detail, to three other key issues that you will see in our brief.

First, Amnesty International is very concerned about the definition of terrorist activities in the act. It is very problematic, especially the inclusion of political, religious, or ideological motivation as part of the offence.

● (1100)

Second, the secrecy provisions must be loosened. We are particularly concerned about the wide scope the government has taken to keeping information and proceedings secret by asserting concern about international relations, something that is not in keeping with international human rights law.

Finally, I referred to the case of Ahmad El Maati earlier. His is emblematic of a growing concern about a possible policy or pattern of Canadian citizens of interest in national security investigations here being set up for arrest, detention, and interrogation abroad. It is a growing concern that perhaps much of Canada's counter-terrorism practice has actually happened outside the scope and ambit of the piece of legislation you are reviewing.

We have made a number of recommendations in our brief as to what we think needs to be done to get to the bottom of that concern, as well as some suggestions around law reform to guard against it happening in the future. I hope you'll have an opportunity to look at those and take them seriously.

Thank you. Those are my remarks. I look forward to exchanges once we get to question time.

The Chair: Thank you.

Mr. Copeland, please.

Mr. Paul Copeland (As an Individual): I would like to start by reading to you a portion of the Suresh judgment. The Supreme Court of Canada said:

> The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.
>
> On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society—liberty, the rule of law, and the principles of fundamental justice—values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.

I think that very succinctly expresses the problem that is facing all of the liberal democracies in the world. In the United States, the government action seems to have been way overboard in favour of national security, with no regard to fundamental liberties. I point to the incarceration of people at Guantanamo and the incarceration of enemy combatants, with virtually no access to the courts.

In the United Kingdom, while the House of Lords, after the Chahal decision from the European Court of Human Rights, has been doing a fairly good job, the government seems to be going in the other direction.

I want to comment briefly on the changes from the Immigration Act to the Immigration and Refugee Protection Act. As I'm sure you are all aware, under the Immigration Act permanent residents, before IRPA came in, had their cases dealt with before the Security Intelligence Review Committee. It was a process that had not only CSIS counsel there, but commission counsel. Commission counsel in those cases very much performed the function of a special advocate in England. Non-residents at that time, before IRPA came in, went to the Federal Court. When IRPA came in everybody was going to the Federal Court.

You might ask yourself—and I've certainly been asking myself—what were the reasons for the change. I've talked to a lot of lawyers who are doing this work, and I am counsel for Mohammed Harkat, so I'm fairly familiar with this process. My suspicion is that the government was starting to lose the cases before SIRC, that SIRC was starting to get a sophistication and an understanding of some of the information that CSIS presented before it, and government wasn't having success.

The case of Moumdjian went to SIRC and then went to the Federal Court of Appeal a mere 11 years later. I was counsel for Mr. Moumdjian. Mr. Moumdjian is still in Canada, even though both SIRC and the Federal Court of Appeal found he was likely to engage in violence in Canada. It may be that the delay in that process was another reason why they said let's send everybody to the Federal Court—let's have a situation where there are no rights of appeal.

I can't conclusively point to the reason for that change, but I can very briefly point you to the changes that happened from the Immigration Act to IRPA in relation to right of appeal to the Immigration and Refugee Board on humanitarian grounds. In the Immigration Act there used to be a danger opinion. They could take away your humanitarian right of appeal. After the Williams case the government was losing all the cases. They brought in amendments in IRPA, so now if you get two years in jail or the equivalent of two years, if you do some dead time and the total comes up to over two years, you get no right of appeal. So that change has happened.

I want to read to you very briefly one paragraph. Mr. Ron Atkey is the former immigration minister in the Joe Clark government. He was the first chair of the Security Intelligence Review Committee, and he is the amicus curiae at the Arar inquiry. He made submissions a week ago Saturday, as did everybody else at that inquiry, and I just want to read paragraph 95. Mr. Atkey sat through all of the secret testimony. Paragraph 95 reads as follows:

> Should the RCMP be engaged in security intelligence activities at all, or should they stick to law enforcement, which they do well, leaving security intelligence to CSIS, which was recommended by Macdonald in the '70s? Did RCMP officers and/or members of Project A-O CANADA have adequate training, policy guidance, and direction for security intelligence work of the sort involved in Mr. Arar's situation?

Mr. Atkey saw all of this and obviously had some concerns about the quality of work done by Project A-O CANADA. I sat in on parts of that inquiry.

● (1105)

My recollection is that Superintendent Cabana, who is in charge of Project A-O CANADA, said there were 30 people involved in that investigation, and not one of them had national security investigation training.

Paul Cavalluzzo, who is counsel at the Arar inquiry, did a press conference the other day and talked very much about the security certificate process. I extracted from the transcript of that press conference all of his comments on that process, and I sent them up to Mr. Cole at the committee. I hope they are distributed to you.

I also sent to Mr. Cole a master of law thesis done a year ago by a guy named Rayner Thwaits, which looked at the Canadian security certificate process and looked very closely at the British process after the Chahal decision. And the last thing I sent up was a draft master's thesis written by a young woman named Irina Ceric, which looks at the security certificate process and looks in great detail at some of the international criticisms of Canada's security certificate process.

I want to talk very briefly about fundamental justice. First, Justice McGillis, and then the Federal Court of Appeal in 1996 in Ahani, said that the security certificate process in the Federal Court before a single judge meets fundamental justice. In December 2004, the Federal Court of Appeal said in Charkaoui that it met fundamental justice, or that it met section 7 of the charter.

As I said, I'm counsel for Mohammed Harkat. We argued that question before Justice Dawson in the fall of that year. We finished the argument on December 9. The Charkaoui decision came down from the Federal Court of Appeal on December 10. Justice Dawson came down with her decision on March 23. We filed an appeal on that. We had a conference call with the chief justice in May, where I asked, please just dismiss the appeal and let me get to the Supreme Court of Canada. He declined to do that, so I came up to Ottawa a couple of weeks ago, on September 6, and asked him the same thing, basically, and they were good enough to dismiss the appeal. They retired for about 20 minutes. I wasn't able to persuade them that they were wrong in Charkaoui, which didn't surprise me much.

I must say that I am optimistic that the Supreme Court of Canada will reverse the decision of the Federal Court of Appeal in Charkaoui. I can tell you that the Federal Court of Appeal has had the fundamental justice issue wrong in three cases. It had it wrong in Singh, which was the refugee decision in 1985. It got it wrong in Chiarelli. The Federal Court of Appeal said the Chiarelli process before SIRC violated fundamental justice. The Supreme Court of Canada said no, it didn't. They got it wrong in Suresh. So I am rather hopeful that the Supreme Court of Canada is going to say this doesn't meet fundamental justice, which I think then means it's back in your court and that you have to design a system that meets fundamental justice.

I can tell you, having been counsel in the Harkat case and having talked to the other counsel, Johanne Doyon in Charkaoui—although they haven't finished that case—and Barb Jackman and John Norris in the other three cases, including Rocco Gallati, who was involved in the first Jaballah case, that the process is impossible for counsel. We don't know what the case is about; we don't know what evidence needs to be called. At the end, when you see the decision, there are some things on which you say, gee, probably I should have called some evidence on that, but you didn't even know it was an issue.

In Harkat, one of the issues was how much he got paid while he said he was working for a refugee organization in Pakistan. The judge found $500 a month was way too much money. I don't know what Saudi agencies pay to people working in Pakistan. I do have knowledge of what Doctors Without Borders pay, and I do have knowledge of what the United Nations pays for people doing work of that sort, and $500 doesn't seem much to me. I don't know. Justice Dawson found that it was one of the reasons for disbelieving him, his saying that he would be paid that much.

I want to talk very briefly about the special advocate. As you know, in the Chahal decision, the European Court of Human Rights said that the British process didn't work. It recommended that a special advocate be created. In their decision—and I have the extract from it here—they talked about the Canadian model as being great. They got the Canadian model all wrong. They mixed up the SIRC process with the Federal Court process, but they have a process where there is a special advocate.

In Harkat I applied to Justice Dawson to have an amicus curiae appointed to assist her in doing this. I actually found a national-security-cleared lawyer, John Laskin, who said he would be prepared to do it. We brought the application to have him appointed; she turned me down.

So I think that the special advocate process is one improvement that you can make, but I don't think the cases should be done before Federal Court judges. I think they should be done before something like SIAC, or something like the Security Intelligence Review Committee—people who have some expertise and gather some knowledge over a period of time of the quality of work that CSIS does.

● (1110)

The Chair: Thank you very much, Mr. Copeland.

Mr. Allmand, please.

Hon. Warren Allmand (Member of steering committee, International Civil Liberties Monitoring Group): Mr. Chairman and members of the committee, I'm making this presentation this morning on behalf of the International Civil Liberties Monitoring Group, which is a coalition of more than 30 groups, NGOs, trade unions, churches, environmental groups, and human rights groups, who came together in the aftermath of September 11, 2001, to monitor the impact of anti-terrorism measures on human rights. We've prepared a very complete brief, which we sent to the clerk of the committee, on Bill C-36, and we trust that this brief has been distributed to all members of the committee.

I'm also making this presentation on the basis of my experience as Solicitor General for four years and as president of the International Centre for Human Rights and Democratic Development for five years. This morning, of course, our focus is on security certificates and their use as a template or model for other post-9/11 security measures, including the Anti-terrorism Act and the Public Safety Act. As has been pointed out by others, the security certificates in their present form were introduced in the Immigration and Refugee Protection Act in 1991, well before 9/11, and allow ministers to sign these certificates accusing individuals of terrorist or related activity based on information provided by the police and CSIS. But these certificates only apply to refugees and permanent residents, not to Canadian citizens, even though Canadian citizens might be suspected of terrorism.

The certificate must be put before a judge, who decides in camera *ex parte* without the presence of the accused, and without a lawyer representing the accused, on a very low burden of proof. The burden of proof on the security certificate is reasonable grounds to believe. If you compare that with the burden of proof in criminal cases, or even in civil cases, it's a very low bar. There are no provisions for cross-examination, no place for counter-proof of argument, and no due process. The result is individuals can be held in prison for years without knowing the basis of the accusation against them, and without trial. They are arbitrary, non-transparent, and, as someone said this morning, reminiscent of procedures found in totalitarian states. They remind me of the infamous provisions under the Star Chamber in England in the 17th century, which were abolished in 1641. Because the information for these certificates comes from the police and CSIS, the information can be unreliable and inaccurate, sometimes based on speculation or hearsay, on racial profiling, and guilt by association. Not only do we have the recent cases of Maher Arar and Bhupinder Liddar, where mistakes were made, but I can tell you that when I was Solicitor General I came across several cases of error by the security services that were documented before the McDonald commission in the 1980s.

With respect to the Arar commission, I should bring to the attention of the committee that Judge O'Connor, of course, has been hearing evidence and conducting research on related matters on the whole security issue. It would be wise for the committee to take note of the work of Justice O'Connor and his interim report, which will come up before the end of this fiscal year. We have innocent individuals being held in prison for years without knowing the reason thereof, and without trial. Even after their release, in some cases, their lives are often left in ruin. Many ask, how is this possible when we have a Charter of Rights, and when we have article 7 that says:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Paul Copeland referred to that.

And article 9 states: “Everyone has the right not to be arbitrarily detained or imprisoned.”

Then we have article 15. I have to refer to some questions asked by my good friends, Peter MacKay and some other members of the committee, this morning. They suggested that perhaps refugees and recent arrivals don't have the same rights as Canadians. But article 15, on equality rights, says “every individual”; it doesn't say every Canadian. It says:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination....

Under security certificates there is a discriminatory practice that doesn't respect article 15. There are parts of the charter that say they only apply to citizens, but article 15 applies to all individuals.

● (1115)

These matters, of course, are going to the Supreme Court. With Mr. Copeland, I'm optimistic that it will correct some of the decisions of the lower courts. I also have to refer you to—and this might have been done already—the Immigration and Refugee Protection Act, section 3(3), where it says that this act must be applied in a manner consistent with international law. If you refer to the International Covenant on Civil and Political Rights, article 4, a convention that was ratified in 1976, it says that some of the rights cannot be derogated from at all, even in emergencies, and others can be derogated in emergencies but with very strict limitations.

It's my view that Canada, with security certificates and with other provisions in anti-terrorist legislation, has not respected article 4. I urge you to look at article 4 of that convention. Of course, there is also the Convention Against Torture. This summer the committee under that convention condemned Canada for the manner in which it was proceeding with the application of the provisions with regard to refugees, sending them to torture.

I also want to refer you to a resolution of the United Nations Commission on Human Rights, resolution 2004/87, and I'll just refer to one paragraph. By the way, this is a resolution of the Commission on Human Rights. The title of the resolution is “Protection of human rights and fundamental freedoms while countering terrorism”. It reaffirms that states must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law.

I also want to bring to your attention the Emergencies Act of 1988, which was adopted by this Parliament. It provides for exceptions during emergencies, but it also says in that act that all the provisions in that act are subject to the charter.

Mr. Chairman, while I would argue that not only are security certificates unconstitutional and contrary to our charter and contrary to our international human rights obligations, I also want to point out that they appear to have served as a template or model for many of the provisions in Bill C-36 and Bill C-7—individuals being put on lists, branded, having their assets frozen, being bugged, subjected to investigative hearings. This, in my view, is also in a sense condemning people without due process.

Our recommendation is that the provisions on security certificates in the Immigration and Refugee Protection Act be repealed. We've also recommended in our brief—and there are more arguments for this if you read the brief—that Bill C-36 be repealed. We feel that the provisions of Bill C-36 are not necessary to deal with terrorist acts such as murder, hostage-taking, bombing, hijacking, or the use of explosives. All these are in the Criminal Code and can be dealt with through effective police work. In emergencies, as I've stated, you have the Emergencies Act of 1988.

In regard to security certificates, I point out again that such measures are not available for Canadian citizens even if they're suspected of terrorism. The police have to deal with Canadians who may be suspected of terrorism. They don't have the security certificate. As I said, it's my belief that those measures are discriminatory under article 15 of the charter, and therefore contrary to it.

In conclusion, Mr. Chairman and members of the committee, you don't enhance security when you dispense with due process, when you disregard the rule of law, and when you suspend human rights, contrary to international human rights obligations. What message does this send to new democracies and states in transition, states in eastern Europe, in Asia and Africa and Latin America? In fact, with security certificates and some of the provisions in Bill C-36, you undermine security because you are setting a precedent of disrespect for the rule of law. If we in Canada can suspend the rule of law, can suspend due process for reasons we think are right, then we cannot complain when others do the same for reasons they think are right.

● (1120)

We are asking Parliament to repeal the security provisions in the Immigration and Refugee Protection Act and also to repeal Bill C-36 and to attack terrorism by respecting due process, by respecting the rule of law, by respecting human rights instruments, and to implement a more effective use of the criminal law and proactive policing. We believe this will encourage respect for law by others and at the same time provide us with more security.

Thank you.

The Chair: Thank you, Mr. Allmand.

We'll now begin a round of questioning with Mr. MacKay, please.

Mr. Peter MacKay: Thank you, Mr. Chair.

Thank you all for your submissions. I know you come to this with considerable experience and background, so I'd like to pose some fairly direct questions.

First, perhaps to you, Mr. Copeland, given your own courtroom experience and particular knowledge with respect to security certificates and—you touched on this in your evidence—the current change that took place with respect to the process around the use of the Federal Court versus the use of the SIRC reviews, what is your understanding as to why that happened? Because we know that the difference is very real.

The outcome, as you say and suggest, seemed to be that the Federal Court is far more likely to grant these types of certificates and to pursue it in this way. That, to me, seems odd in a way. Is it perhaps because judges are less broadly informed about the process of the gathering of information? Is it because—and I think you alluded to this—the SIRC committee maybe has more specific knowledge of intelligence-gathering and techniques? Why do you surmise that this change occurred?

Mr. Paul Copeland: I have trouble dealing with parts of that, as to why the change occurred. I did not have an opportunity of looking at the parliamentary record of Hansard to see whether anybody ever discussed this question. I rather expect that if you go back, you'll find out there was no discussion whatsoever and it's just another one of the things that the security agencies slipped through in the legislation.

As to why SIRC is better than the Federal Court, I think it's a matter of experience. I did the first hearing. It wasn't quite a security certificate hearing, but rather a hearing in some aspect of national security before the Security Intelligence Review Committee in 1984. I lost the case. There was a reason why they agreed to hear it again. They used the exact same evidence—they didn't call any new evidence—and came to the exactly opposite conclusion and let the person into the country.

I think that what happened over time was they created some sophistication and some understanding of the quality of work done by CSIS. You really should get perhaps Mr. Atkey or perhaps Paule Gauthier to come and visit you and explain their process. I think that sophistication allowed them to assess it a little bit differently.

I know Mr. Rae did a case I think in regard to a Kurdish guy—I can't remember his name—in which CSIS had made a number of allegations against him, and Mr. Rae found they weren't established at all. So—

● (1125)

Mr. Peter MacKay: Would it be your belief—

Mr. Paul Copeland: If I can just continue.....

Mr. Peter MacKay: Sure.

Mr. Paul Copeland: In the Federal Court there's another whole aspect—where the judges come from, what their history is, their lack of knowledge of anything—that in this area I think is a real problem.

I must say I thought that Justice Dawson, who presided in the Harkat case, worked her guts out in trying to come to the right decision. I don't know whether she came to the right decision or not because I don't know what the case is about.

Mr. Peter MacKay: Are we headed to a legal process where judges in the area of national security have to have specific background? I mean, we have family court judges, we have tax court judges. Is this something...? You alluded to this in your evidence as well, and we had discussed this morning with witnesses the need to have special counsel or amicus curiae—this European model where the lawyers at least inject another process of cross-examination of evidence.

A lawyer friend of mine who just returned from China was shocked to understand that there was no cross-examination, no ability to present defence evidence, and in many cases, no disclosure. That appears to be the model that we're following under this process, taken right out of the Republic of China.

Mr. Paul Copeland: Absolutely.

Mr. Peter MacKay: However, is this something that we need to do or examine with respect to judges? Because if the case is such that judges don't have the sufficient capacity to grasp the seriousness of this.... And I'm not suggesting they do, but I'm very interested to hear your opinion.

I'm also curious as to why you think you'll be successful on this appeal. Is it because there has been a change in how the Supreme Court of Canada is now composed?

Mr. Paul Copeland: I haven't gotten there yet. I've asked the federal government whether they'll consent to the application for leave on Harkat, and they're thinking about it. I will still have to bring a formal application, whether of consent or not.

I think that partly the makeup of the court has changed a little bit over the years. On the application for leave in Ahani, I understand that the Supreme Court of Canada sat on it for seven months before they turned down the application for leave. It may be that they felt the particular merits or non-merits of Ahani's situation didn't really require them to let it come forward. As I say, I think the Federal Court of Appeal got it wrong in almost all the fundamental justice cases.

It's a very critical question that's going to go before the Supreme Court of Canada. Will it be the process that we have now, where you don't get to know the case, you don't get to cross-examine, and you don't get to have any discovery? In fact, in Harkat there was barely a live witness called in the in camera proceedings and almost everything was on paper. How do you challenge that?

Mr. Peter MacKay: All of the abandonment of fundamental principles of criminal justice, which go right back, as Mr. Allmand has alluded, to the mists of antiquity and the very beginnings of the criminal justice system, is justified in the argument presented by government: because the threat of terrorism is so real.

I'm going to invite all of you to respond to this. I would suggest that when you start to break that down and examine it, it's because the evidence is so often gathered through sources that have to be protected. It's the investigative techniques that could be jeopardized. It's the ongoing investigation itself that might be revealed, should the normal course of criminal justice be followed; that is, if it were done in an open courtroom, and if the rigours of the normal criminal process were attached to it.

Yet governments would say, the current government included—and Mr. Allmand's scathing condemnation of the legislation attaches to his own government, because this is the government that brought the legislation forward, not the opposition—that all of this is justified because the threat is of such grave concern and must be predicated on the realization that there are terrorist cells operating in Canada right now.

When Mr. Ressam crossed the Canadian border into the United States and was apprehended there, had he been subject to a process that would have revealed, through the normal process, his sources and how he was going about this, it may have tipped off others who were working with him and who may have proceeded with the plan to blow up the L.A. airport. Had we the ability to use this process to incarcerate individuals around the Bali bombing, the Madrid bombings, and the 9/11 bombings, and had this process been attached to individuals involved there, do you believe that those attacks could perhaps have been prevented?

● (1130)

Mr. Paul Copeland: Can I start?

One, my view of Ressam is that it was a fairly significant failure by CSIS.

Mr. Peter MacKay: He got into the States. He was apprehended by Americans, not Canadians.

Mr. Paul Copeland: He was apprehended by Canadians. He was travelling on a real Canadian passport that was improperly issued. He'd come back to Canada. Where was CSIS during all the time that Ressam and his friends were hanging around in Montreal?

You talk about the criminal process, and you've touched on a split among us—Matthew Behrens and people who were on the previous panel, and some others. It's a split among the lawyers as to whether you have to go to a criminal model.

I am one of the ones who says a criminal model is not going to work for this kind of thing. You talked about where the evidence comes from, the use of informants, and whether you're ever going to get an informant to come and testify in open court. There often isn't a chance in the world. The witness protection program probably doesn't work all that well for al-Qaeda.

I don't think the criminal process works. I think you're going to need to have some kind of specialized process. This is an immigration process, not a criminal process. You need to have a process that meets fundamental justice. I don't think it does.

I would touch on one other thing. The Federal Court of Appeal said that they looked at it. They said this meets fundamental justice because there's national security. I don't see how it ever meets fundamental justice.

It may be that you go to section 1 of the charter, you say you can't do any better, and it's therefore justified under section 1. The Federal Court of Appeal never got to that point. The Supreme Court of Canada got to that point in Suresh and in Singh.

Mr. Peter MacKay: And found that it was justified in both those cases under section 1.

Mr. Paul Copeland: No. In Singh they said you had to have an oral hearing for refugees. So section 1 justification didn't work. In Suresh it didn't work either. They said you couldn't necessarily return him to torture; you had to do the balancing act.

So Mr. Suresh is out walking around the streets. I'm not quite sure where he lives, but he's been out on bail for a long time and it seems not to have done anything.

Hon. Warren Allmand: I'm just repeating, but the government has to deal with Canadians who might be suspected of terrorism, and without security certificates. I think what we're saying is that you develop law and policy but it has to respect international human rights commitments and our charter. It seems to me that the security certificate is in violation of section 15. We'll see what the Supreme Court says.

There was also the reference to sources in organized crime, and so on. They face that same challenge, and as I said, they face the challenge with respect to Canadians suspected of terrorism. So let's deal with those things and be fair and let's respect the charter and respect our international human rights conventions and the Convention against Torture and others. I have read documentation to you that says that is what we have to do, and I think it can be done.

Mr. Peter MacKay: Mr. Allmand, you quoted from section 15 and that “Every individual...”. So is it your belief that an individual like Osama bin Laden, should he be captured in Canada, should be subjected to a process that you've described?

● (1135)

Hon. Warren Allmand: According to section 15, if you're here on a holiday and something happens that you're picked up—

Mr. Peter MacKay: Well, we're concerned about people who are coming here to do Canadians harm, not about people who are here on holidays.

Hon. Warren Allmand: If they're in Canada, it says “Every individual is equal before and under the law...”. In other words, if it's Osama and we know it's Osama, he's arrested and charged and dealt with through the ordinary processes of law.

Mr. Peter MacKay: An ordinary process, not a process designed to deal with terrorism. You would use an ordinary process with that.

Hon. Warren Allmand: Well, if you can design a new process that will be within the charter, but not processes that are contrary to our charter.... If parliamentarians don't agree with section 15, then maybe they should try to change it with the provinces.

Mr. Peter MacKay: So boiling it all down, you believe that the criminal process should deal with terrorists in the same way they deal with your so-called run-of-the-mill criminals in this country. There should not be a special process to deal with terrorism at all.

Hon. Warren Allmand: Well, I would say that you may have another process, but it's not the one we have now. It's not a security. You may have one, devise one that respects the Charter of Rights and international human rights conventions.

Mr. Peter MacKay: So you believe in a dual process but just not the one we have today.

Hon. Warren Allmand: May I also point out to you that the Emergencies Act of 1988—which, by the way, replaced the War Measures Act—states right in the act that it's subject to all the provisions of the charter. So there you have a piece of legislation for an emergency. You may devise in this committee and Parliament a new piece of anti-terrorist legislation that does respect the charter and the international human rights conventions, but there are many provisions in the Criminal Code, from bombing to hostage-taking, to hijacking, etc.—and I could go on and on, because I read about it last night while preparing for this committee. They could be used if somebody comes into the country and there's evidence that they've committed serious crimes.

The Chair: I'm going to jump in, because we have to go to Mr. Ménard. I'd be very interested, because of Mr. MacKay's question, on your view on section 6 on mobility rights.

Hon. Warren Allmand: That's for Canadians.

The Chair: That's right.

Hon. Warren Allmand: That's why I pointed out that some provisions in the charter are only for Canadians, and other provisions are for all individuals, whether they're Canadians or not.

The Chair: That's open for debate.

Mr. Neve wants 30 seconds, and then we're going to Mr. Ménard.

Mr. Alex Neve: I just want to make it crystal clear that I hope it's understood that all of our organizations, and certainly human rights organizations more broadly, are not by any means suggesting that governments shouldn't act to respond to terrorist threats and should in fact not act seriously, aggressively, thoroughly, and all of those things. In fact, the failure of governments to do so is a human rights concern as well. It's one that Amnesty International points to in a number of countries where governments do nothing or pursue inadequate sloppy means of investigating threats to civilians who are at large, including acts of terrorism. It is a human rights issue.

What we are all saying is that the mechanisms, the laws, the procedures that are adopted to do so must be in keeping with the international human rights framework. I think it's important to remember that this international human rights framework, which of course was negotiated and designed by governments—it wasn't Amnesty International at the table setting those principles—very much took security concerns into account in drafting which rights are absolute, which rights are not, which rights should have an inherent sense of balancing in them, which rights can be suspended in times of emergency, and which rights cannot. That was government sitting down at a time of huge global insecurity, the aftermath of World War II, where the reality, the brutality of what governments are able to do to civilians was very much on the mind.

The Chair: You doubled your time on that.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard: Perhaps you will be able to answer that question by answering mine.

Mr. Allmand, I'm very pleased to be able to benefit from your experience here, as a former solicitor general. Moreover, I understand that everyone here has submitted some very valuable written comments.

I find it very persuasive that most of this act does not appear to respect either the Charter of Rights and Freedoms or the anti-terrorism agreement adopted by the Canadian government, nor the 1988 act which, let us remember, was drafted to replace the War Measures Act.

Mr. Allmand, you have experience as the individual who was in charge of security services. My question is along the same line as those I put to the other witnesses who appeared before you this morning. I would like to have your opinion.

First of all, you realize that the ramifications of a terrorist act, particularly today, are much broader than what we saw in 1970. In addition, these acts are different in nature. For example, in our efforts to fight organized crime, we may allow criminal organizations to operate while we look for evidence against them so that when arrests are made, we know that we have adequate evidence to present during a trial.

I also think that you are aware that a large part of security service work consists of infiltrating terrorist organizations and in gaining knowledge about them. Obviously, mistakes will be made. Moreover, in 1970, an incredible number of errors were made. The police were ill-prepared for this type of terrorist action.

I think that the Canadian police were also very poorly prepared to deal with the type of terrorist acts that we are witnessing in this new century. Police have confessed to us that they did not have enough staff familiar with the Arab language in order to deal with the issues. It is, therefore, inevitable that mistakes are made.

However, it is also true that information can be obtained through infiltrations and that publicly disclosing the source of this information may constitute a significant threat to this individual.

What should a department do if it is persuaded that there is indeed a serious risk that significant terrorist acts will be perpetrated? Given that the department is basing itself on sources that must be protected, it cannot prove that this is the case, but it knows for sure that this will happen. Under such circumstances, do you believe that our current legislation is adequate for taking action, and how?

● (1140)

[*English*]

Hon. Warren Allmand: I should point out that in the seventies we did have Baader-Meinhof, the Japanese Red Army, and Carlos. I was Solicitor General when the Olympics were in Montreal, which followed on the Munich Olympics, where 11 Israelis were massacred, killed by terrorists. So we had serious terrorist threats even in the seventies.

I would agree with you that undercover work is important, that infiltration is important, in order to get information and to prevent things from happening. But if we're going to have laws and processes to deal with that, I think they have to still respect.... We couldn't do it and respect the charter. There are ways of dealing with it other than with the security certificates as now constructed, especially since they don't apply to Canadian citizens. Canadian citizens could be as evil and bad as anybody else with respect to terrorism, but those certificates only apply to refugees and permanent residents, not to citizens.

Maybe the damage isn't as pervasive from organized crime, but there have been some pretty horrible massacres and killings as the fallout of organized crime. We have to infiltrate those organizations as well.

I repeat what Alex Neve said, that we're not suggesting that there shouldn't be any anti-terrorism measures; we're saying, as that resolution of the UN Commission on Human Rights says, do it, but do it respecting international human rights obligations. And I think it can be done. As a matter of fact, it's my view that when you don't do it, when you suspend international human rights obligations or your own charter illegally, you leave the door open. There's justification. If I were in the Arab or Muslim community and I saw people in my community being treated unfairly, I would say, “Why not do the same?”

By the way, in the Second World War, how many of the Italians and Japanese we put in prison or in internment really were a threat to security? Peter MacKay probably knows Sheldon Currie, who wrote a book about the Italians in Cape Breton who were put in internment camps. It was documented in a book called *Down the Coaltown Road*. Many of them had worked in the mines for years and years, side by side with Canadians, and were no threat at all but were interned throughout the Second World War as security threats. Of course after the war none of them were found to be security threats at all.

● (1145)

Mr. Serge Ménard: I understand that when you have these powers especially, you can make big errors. It's been past experience that when you get these powers and they are secret.... But I was wondering, you have probably asked yourself at some point if the security—

[*Translation*]

I am sorry, I was speaking in English, but since I have more vocabulary in French, I will continue in this language. I am depending on simultaneous interpretation, and I really like that. Indeed, when a joke is made, people laugh twice. That one was not particularly good!

I am sure that you have asked yourself the following question. Let's suppose that you were responsible for security services and it was revealed to the minister that, according to certain information, within a few days' time, a significant attack would definitely take place in Montreal, in Place Ville-Marie for instance. Let's suppose that you were also told that this information came from informants whose names could not be revealed, but that the department was absolutely certain of the facts and believed it necessary that such and such an individual be arrested, even if the only evidence of their involvement came from informants whose names can't be revealed.

In such a case, what measures would you suggest that the government take?

I recognize that such cases must be exceptional and I understand perfectly that the act goes beyond such exceptional circumstances. All the same, how would you react?

[*English*]

Hon. Warren Allmand: I was in that situation, and it's a very difficult situation, because you're presented with lists of names to authorize taps, to deny security clearances, etc., and if you say no for very little reason and something horrible happens, then you bear the responsibility. On the other hand, you have to rely on these individuals who have collected the information.

It just so happened, when I was Solicitor General—and I stated this to the McDonald commission—that one day I had the list of people to sign for as suspects under security laws. I happened to know one who was a professor at Laval University. I said I was sure that this person, while he was very sympathetic to the Palestinian cause, was not a terrorist, that he was a very peaceful man and was not breaking any law, so I sent it back; I wouldn't sign it. And sure enough, I was right.

There were other occasions when people were denied security clearances and went to see their members of Parliament. A minister came to me and said, “I've known this person since childhood, and this person is not a terrorist or a security risk.” It was sent back, and it was found out to be correct. The methodology by which they came to the conclusion, very much like some of the more recent cases, was very faulty.

They went to an apartment building and asked, do you know so-and-so down the hall? “Oh, yes, that person I think is a communist.” It was this kind of process. It was very badly done.

That was under the Security Service, before CSIS. They were supposed to correct those things with CSIS, but we still see errors taking place, and some of those were put before the committee this morning.

I mentioned the case.... They are still investigating Arar, but there is Bhupinder Liddar, and there is the famous map of Ottawa.

[*Translation*]

Mr. Serge Ménard: From what I understand, your answer essentially boils down to saying that the security services are not reliable.

[*English*]

Hon. Warren Allmand: You don't have a police force to check on the police force, in the minister's office.

[*Translation*]

Mr. Serge Ménard: Yes, but it is clear that, for preventative reasons, we are hoping to have a reliable security system.

I would however like to ask another question, and this question is primarily for the other individuals. Why? Because the legal presentations that have been made to us appear to be, in my opinion, really very convincing.

How can you explain the fact that so little recourse has been sought before the courts to challenge the constitutionality of such measures?

Is it because the people were hoping that the situation would be temporary and that, from one temporary situation to the next, they never tried to obtain recourse? Is it because they don't have the financial means for this type of recourse?

I am hoping that your appeal will succeed. I think that you will be able to defend it with a great deal of competence. The fact remains, however, that there are very few instances of recourse. Indeed, there is only one.

● (1150)

[*English*]

Mr. Paul Copeland: Well, no, there have been a number of challenges in the Charkaoui case. They've succeeded in having him released on bail, which was a major uphill fight; I think it was the fourth application before Justice Noël. They've succeeded in getting leave to appeal in the Supreme Court of Canada.

In Harkat, I'll tell you that yes, we're about to bring an application for leave to appeal in the Supreme Court of Canada. We argued the constitutional issue. We're about to argue a bail application for Mr. Harkat, starting later this month. We've arranged the dates and we're exchanging papers tomorrow. I have made submissions to Canada Border Services Agency about why he shouldn't be sent back to Algeria, and I'm just waiting. They tell me I am soon going to receive their package of material, which will go to the minister's delegates. I have to respond to that.

The only other challenge I see that was available for Mr. Harkat was a challenge to the provisions that say there is no bail, or that you're detained until 120 days after the certificate is found reasonable. That probably violates the constitution. But did I have the funds or the energy to mount that challenge? Even if I had mounted the challenge, and the judge had said, “Yes, you are absolutely right, but I'm going to detain him anyway”.... It just wasn't an issue I could bring forward.

Ms. Jackman is the one who went to Justice Gans and got shoes for her client. She spent six days in court. Matthew Behrens talked about it. It is ridiculous that you spend your time arguing about those types of issues.

The funding we receive, when we receive it.... Sometimes we do and sometimes we don't. We have funding on most of the cases from the Ontario Legal Aid Plan. I don't know what's happening with Charkaoui in Quebec. I can tell you that the Ontario Legal Aid Plan gets dollar for dollar back from the federal government for funding of immigration legal aid, but the rates of pay are pathetic under legal aid, and it's very difficult to litigate all of this.

The Chair: Thank you, Mr. Copeland.

Mr. Ménard, your time has expired.

Mr. Comartin, please.

Mr. Joe Comartin: Thank you, Mr. Chair.

Thank you for being here. As usual, there won't be enough time.

Mr. Copeland, perhaps I can start with you—Mr. Neve and Mr. Allmand, you may want to comment as well once we get an answer from Mr. Copeland—on the role of this subcommittee vis-à-vis our report on the certificates and what perhaps we should be doing in anticipation of the Charkaoui decision, and Harkat's now added to the list, being successful and the certificates being struck down.

My question is, what do you expect the courts will do at that point? Will they give directions to an alternative system or will they simply strike down the certificates and send it back to the government for them to start all over again?

Mr. Paul Copeland: I'm not sure I know what the courts are going to do, but let me say firstly that I don't think you have to wait for the courts. I think Parliament has an obligation to deal with this now. If the courts happen to strike down the provisions, that just means you're obliged to do it, but I think you should be doing it now and you shouldn't be waiting for the courts.

As to whether the Supreme Court of Canada will say the provision is unconstitutional, that it violates section 7 of the charter and we will defer the effect of our decision for six months for the government to get a chance to put things together, that's one possibility. I suppose they could read in, or in some way create, the function of a special advocate and say that has to be there, otherwise it's unconstitutional. I can tell you that Justice Dawson didn't agree with that proposition.

I must say, I would be surprised if they said that you have to do it this way. I think if they agree with us that it's unconstitutional, they're going to say it's unconstitutional, and Parliament, you fix it.

Mr. Joe Comartin: Mr. Neve, before you answer, just let me make a statement.

I think the difficulty we're having—perhaps not Mr. Ménard and I, but the balance of the committee—is that assuming it's struck down, what's the structure we replace it with? We don't have a model, or at least I have not heard that. I have serious difficulty; you know I don't agree with you on what the Criminal Code can do in terms of providing a system, but we don't have that model.

Mr. Neve, if you have any thoughts in that regard, perhaps you could add that to your comments.

● (1155)

Mr. Alex Neve: Sure.

To address the first point, I think I would very much underscore what Mr. Copeland just said, that you do not need to wait, and I think there's a particular reason you do not need to wait. What is happening in the courts is primarily focused, understandably and appropriately, on the Charter of Rights. We would share the view that I'm sure many have put in front of you, that these concerns do violate the charter, but additionally they do violate Canada's international legal obligations, which is not something the Supreme Court of Canada will directly adjudicate on. They will use the international law as a backdrop to their ruling. But I would suggest that as a parliamentary committee, there should be particular concern in this body and more largely within Parliament to be absolutely certain, regardless of what happens with the charter analysis, that Canada is in full conformity with our international legal obligations. As we and others have said to you, there's a whole variety of ways in which the security certificate process and the corollary piece of sending people off to face torture simply don't meet those obligations.

In terms of an alternative model, I think what you're hearing from people around the criminal process, and perhaps I do differ a bit from Mr. Copeland here as well, is that it is something you should look at very seriously. We do agree that immigration law can and should play a role here, but we're very concerned—aside from the fact that immigration law is often used in a discriminatory manner that subjects non-citizens to lower standards of justice than citizens, which is inappropriate under international law and inappropriate under the Charter of Rights, and of course was the very reason that the House of Lords struck down the U.K. system back in December, in their eloquent ruling.

Even aside from that, there's a critical piece here in terms of security and counterterrorism strategies as well, that Canada is supposed to be playing a global role in ensuring that when there are concerns, when there are allegations, the individuals against whom those allegations are made face justice. Well, you do not effect justice by just kicking someone off our back doorstep and sending them off to whoever knows where. Number one, they may face injustice, and number two, they probably will face no justice. They may even get a hero's welcome in whatever the country may be.

If we're serious on both fronts, if we're serious on the human rights front and if we're serious on the countering terrorism and enhancing security front, we should be doing everything to ensure that individuals against whom allegations are made, if the evidence bears it out, actually face justice. That may well very often have to be in our own criminal process.

Hon. Warren Allmand: Another thing that can be done, since the RCMP and CSIS are subject to overview by Parliament, is to look into some of the methodology.

Mr. Joe Comartin: But I take some issue with doing that in that regard, Mr. Allmand.

Hon. Warren Allmand: On the methodology that led to the security issue with Bhupinder Liddar, or Arar, surely there can be an improvement in the way they collect information about people to make it more accurate. I think Mr. Behrens in the previous panel said that if we were getting correct, solid, good information and you really got the people who were dangerous rather than the ones who weren't, that would be a great improvement. That goes to the methodology and process of collecting this information, and also with the burden of proof. Of course, I refer to the burden of proof. It's a very low bar, so almost any kind of proof gets by. Those are the sorts of things you could deal with right away.

By the way, Justice O'Connor, at the Arar commission, in part two of his mandate, has to come up with suggestions on how to improve the system. There are certain things you could do right away, but I'm sure Justice O'Connor will have some useful recommendations as well. He's putting out an interim report before the end of the fiscal year.

Mr. Paul Copeland: I'm not opposed to criminal trials, and if there's actually evidence they can use, I think that's the preferred method.

Mr. Joe Comartin: Mr. Copeland, that's what I want to go to, if I can understand your position better and maybe share with the committee—because I think I do understand it.

It seems to me the problem with criminal law—and I think this is what you've identified—is a more practical one. We have an inability to prove the suspicions we have because so much of the evidence is out of the country; we don't have it here in Canada. We are faced with a burden of proof within the criminal system that's much more substantial. We have a lack of resources to be able to get that evidence before our courts. Of course, we're also faced with the reality of not being able to send people back to torture, other than in exceptional circumstances.

Is that fair—that your basic concern about the criminal system not being able to work is a practical one rather than a theoretical one?

● (1200)

Mr. Paul Copeland: Yes, it's a practical one. In many of these cases you're going to have information coming from other agencies. Whether they're agencies you can trust or not is another question. You're going to have information coming from informants. You're going to have information coming in a variety of other ways that are probably not admissible in the criminal process in any way, shape, or form. So if you say the only way we can deal with non-citizen people is through the criminal process, it's a major problem.

The next problem, of course, is the issue of return to torture. The Supreme Court of Canada in Suresh says you have to do a balancing. The international law says you can't do any balancing and you can't send them back.

I can tell you that in Harkat I've got two opinions from experts, both of whom have great expertise in Algeria, and both of whom say it is more likely than not he'll be killed or tortured if he's sent back to Algeria. So I think even if I lose Harkat all the way through, he's going to remain in Canada.

Mr. Joe Comartin: I know Mr. Zed's going to cut us off shortly.

Just to deal with the return-to-torture problem, how do we design a system to deal with that? The frustration I have when looking at what we've done up to this point, over the last 20 or 25 years, is that we have not had one single problem with the people who we've put through the certificates and have stayed in Canada. There hasn't been one case.

Mr. Paul Copeland: You mean with the people who have remained.

Mr. Joe Comartin: Yes.

Mr. Paul Copeland: That's certainly the case. I mean, Moumdjian, who was found to be likely to engage in violence in Canada, is still here living his life—he's married, going on with a regular life.

Mr. Joe Comartin: I just want to be clear to the committee that I'm including in that list people who are not in detention.

Mr. Paul Copeland: Suresh is not in detention. Moumdjian's not in detention. Charkaoui is not in detention. Charkaoui's out on bail. He's under electronic monitoring. That's a process we're going to be suggesting for Mr. Harkat. I think you can control the behaviour quite effectively through various tight forms of monitoring.

Mr. Joe Comartin: But they are going to be very restrictive, and we're still going to incarcerate people for extended periods of time until we get to the point where they're allowed out on bail—if we follow the Charkaoui model.

Mr. Paul Copeland: In the Charkaoui model, as a permanent resident you were entitled to apply for bail immediately. The non-residents are the ones who have a problem of when they can apply for bail, and depending on how long the process takes to find the certificate reasonable you could be in jail for a long time. Mr. Harkat a few weeks ago passed his thousandth day in custody.

Can I briefly touch on the issue of the mode of detention? Toronto is a whole lot worse than Ottawa. Mr. Harkat is actually in population most of the time. He is working in the jail. It is still not adequate. There are no visits for his wife, there are no contact visits for him. There's no training. There's nothing really for him to do. The suggestion Ms. Dench made about contracts signed between the federal government and the province about what might be available is important. It may be that federal institutions are better able to provide the detention, because they actually have some programs, but then it produces a problem of how the families get to wherever the federal institution is to be able to visit.

The Chair: Last question, Mr. Comartin, please.

Mr. Joe Comartin: No. Let me pass, Mr. Chair.

The Chair: Thank you.

Mr. Maloney.

Mr. John Maloney: Mr. Copeland, you explained why the Criminal Code model won't work, but you also indicated that we need a special process that respects the rule of law. Mr. Allmand's position I think is similar. In a perfect world, how would you craft this special system? What point would you like to see?

Mr. Paul Copeland: The Jahal decision refers to the Canadian model. They got the Canadian model entirely wrong. I think a SIRC-type process with the SIRC counsel really forming the function of a special advocate in many ways will probably meet the charter requirements of section 7.

I haven't been able to devise a better system. It's not particularly my job to do it, but I think you need people with expertise. You probably need more than one person. You need to have a special advocate, and a special advocate who can talk to the person concerned and talk to their counsel so that there can be some dialogue back and forth so that the special advocate can actually do the job. For example, with my client Mr. Harkat the judge found he'd been in Afghanistan. He said he'd never been in Afghanistan. If I had known when they were alleging he was in Afghanistan, he may well have been able to say he could prove he was in Pakistan on that particular day. Now, if the special advocate can't go back and talk to the person concerned after they learn some of the information, they still can't do an effective job of representing them, can't direct them as to where they might want to consider calling some evidence.

So that's the best I can do on a model that might meet the charter requirements. We sent some stuff out to some of the other people on this issue, and I don't know whether I can find it in here, but what I would want are people who have some knowledge of national security, have some degree of skepticism about the quality of work the security agencies do, and have an interest in human rights. You can find three people populate a room and always decide that the person is a danger to Canada. In the material I sent around, I spent some time in Texas trying to persuade the Texas Board of Pardons and Paroles not to execute Stanley Faulder.

The Texas Board of Pardons and Paroles only once ever recommended commutation of the death sentence. A qualification to be on the board was that you never vote against killing people. So you populate the panel, assuming they go to a SIAC model, and you populate it with people who take the word of the security agency all the time, and it's much the same as what we have in the Federal Court. And I'm not trying to be critical of the Federal Court judges when I say that, but the results will be the same. You really have to populate it with people who understand what they're doing, who understand the adversary process, who understand fundamental justice, and will look at the evidence in an impartial manner and a critical manner.

● (1205)

Mr. John Maloney: Mr. Neve, and then Mr. Allmand.

Mr. Alex Neve: I want to pick up one of the key points that I think Paul has highlighted there coming out of the experience around the U.K. special advocates model, which is exactly this lack of a meaningful relationship with the individual who's at the centre of the case, an opportunity for the special advocate to engage with that detainee, because that opportunity ends the minute the special advocate has had access to the secret evidence, when they are no longer allowed to have any contact. In our view, therefore, in the U.K. model it has become an inadequate replacement for the kind of solicitor-client relationship and in turn detainees' ability to engage with the evidence and know the allegations against them. This is what is so lacking in both the U.K. and the Canadian model.

The degree to which a special advocate model in Canada would look different from that is at the very least a question for me. I think there's doubt in my mind as to whether if this were introduced it would include that kind of a meaningful relationship, which is the essential missing piece in the puzzle here. I think that's one of the things we have to look at in the U.K. process, recognize that many people, many organizations, have named it as a significant shortcoming, including government reviews and parliamentary committees in the U.K. that have looked at the special advocate process, and therefore have some caution as to whether that's really as far as we need to go in reforming this process.

I think that should be the baseline from which we're starting, and we should really be looking for much more significant improvement.

Hon. Warren Allmand: I'll refer again to the Arar commission because I believe your question will be answered partially in part two of the report of Judge O'Connor. That's where he will recommend models for correcting some of the failures that took place with Arar and related cases.

By the way, the International Civil Liberties Monitoring Group tabled a brief to the commission on part two recommending a model. It's too complicated to go into now, but I should point out that the input now on security measures since September 11 and since Bill C-36 is not just from CSIS but also from joint operations with the RCMP and provincial police forces and municipal police forces, who are doing what they call intelligence-led policing, and the CSE, the Communications Security Establishment, and the Canadian Border Services Agency.

So there are a whole lot of agencies—and they all have different monitoring and oversight agencies—so things start falling between the cracks. I think, consequently, some of the information that we're getting on who is really dangerous and who isn't is not really reliable and is subject to a lot of questions. There are models coming forward, but Judge O'Connor probably won't have his report out, as I say, until maybe late next winter.

● (1210)

The Chair: Mr. Boudria, please.

Hon. Don Boudria: Just on the issue of the removals to a substantial risk of torture—recognizing, of course, that one is one too many, and I preface my question by stating that—how many have there been? Have there ever been any?

Mr. Paul Copeland: Ahani was sent back to Iran. That I know for sure.

Hon. Don Boudria: Was that under a certificate?

Mr. Paul Copeland: Yes. Ahani is the previous case in 1996 that said the process was constitutional. It went to the Supreme Court of Canada on the question of whether or not we could return him to Iran. It was argued at the same time as Suresh. In the Suresh case they said we didn't do the appropriate balancing, and in the Ahani case they said yes, you can ship him.

I must say that this is the only one I know. I expect there are a number of others. I think there've been 27 or 28 of those cases. It may well be that there is some reference in the two masters of law theses that I sent up to you that would have some of this information.

Mr. Joe Comartin: Mr. Chairman, I'd rather just go on. We have that information. We got it from the Border Services Agency, I think, when they testified. The numbers Mr. Copeland gave were approximately right. There've been almost 30 cases.

Hon. Don Boudria: That's very important for us to know, I believe.

Now, we recognize, of course, as you've just put it yourself, that the Supreme Court has said that in very limited circumstances it is still an avenue. Nevertheless, just because the court sets a limit, it doesn't mean that we'll go to the wall of the limit. The court actually sets the outer limit, not the minimum threshold, as it were. That's something we need to consider in all the changes we suggest.

Mr. Paul Copeland: I'll read you five lines from the Suresh decision. In paragraph 78, they said:

> ...the fundamental justice balance under section 7 of the charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture.

Hon. Don Boudria: They also said that we do not exclude the possibility in exceptional circumstances.

Mr. Paul Copeland: No. They said, “The ambit of an exceptional discretion to deport to torture, if any, must await future cases.” That's not the state of international law.

Mr. Alex Neve: I just want to add to that. I don't think this committee should stop there.

International law is absolutely clear, and the United Nations has said this repeatedly to Canada. The United Nations Committee Against Torture said it in 2000. The United Nations Committee Against Torture said it again this year, in 2005. They said that Canadian law should never countenance sending people off to face torture.

Your concern shouldn't stop with what the Supreme Court has said might be a possible theoretical case in the future. You should be calling on the government to unequivocally comply with international law on this front. And that is what Canada's voice needs to be on the world stage. Torture is still an ugly, ugly plague throughout this world, and anything in Canadian law or practice that says nudge, nudge, wink, wink, maybe it will occasionally be fine and dandy is disastrous for the people we're dealing with in the Canadian system, but it's also a debilitating message in that wider global campaign to end torture once and for all.

Hon. Don Boudria: Absolutely.

Thank you.

The Chair: Mr. Sorenson, please.

Mr. Kevin Sorenson (Crowfoot, CPC): Thank you.

This has been a great morning, and I thank you for coming.

All three of you, basically, are testifying that you believe fairly close to the same things.

To deal with these certificates is really going to take the wisdom of Solomon.

I'll tell you what I get tired of. I get tired of standing up in the House of Commons, for example in question period, and talking about gathering foreign intelligence or asking the solicitor general about our responsibilities in ensuring that the people who are coming here are safe and being told that we rely on many countries, we network with many countries, and we coordinate with many intelligence-gathering agencies from all around the world. We do that.

Mr. Allmand, there are about three questions. The first one to you is, if we take the information that we have and if it is that important that we network with other intelligence-gathering agencies and then we have a method of disclosure of the information about a certain individual or group, what are the chances of continuing to network with those intelligence agencies from other countries? That's the first question.

I can tell you, we had one former solicitor general, and after the opposition was questioning him and saying he wasn't doing enough, he stood in the House and took praise for preventing a certain attack on a neighbour. He was slapped big time for taking praise for disclosing the fact that they had information and passed it on and it prevented an attack. I'll tell you, it is huge. I mean, a solicitor general can't disclose those types of things.

Now, yesterday we had a couple of groups here. One group said Bill C-36 is very timid legislation and doesn't go far enough. Another individual said this balancing of human rights and security is so important. He said everyone argues and believes so adamantly in the human rights part, but he said he's been involved in the department for close to 30 years and been involved in foreign affairs —I think the chair told me it was close to 30 years—and you cannot have an effective department if you don't have the ability to hold these secrets. I think he said we need to increase secrecy, much like the Great Britain model. So to be more open, as Mr. Neve has suggested, would handcuff much of the department.

I want to say this. This morning we had a number of people who sat here and slammed CSIS. I can tell you that many times we certainly read about when they do wrong and somehow or other we get all that information on the front pages of the paper.

Many of the people who are held, and I don't know about currently, I'll tell you I feel safer with them in prison than I would if I knew they were walking the streets. Let me also say this. I don't feel very safe about the conditions that they're maybe kept in and the duration they've been held in prison, but my fear is that if we say we do not have the ability to...

There are potential things we can do. First of all, deport. If we argue against deporting because of torture, I mean, we can't do that. The second is to disclose everything in court. Then we know, from a solicitor general's point of view, that other networks and other agencies aren't going to pass that information on to us. That's out.

Is there another one, other than continuing what we do with the certificates, but making sure that the conditions of the individual being held are better?

● (1215)

The Chair: I'm going to jump in to let the witness answer, please.

Hon. Warren Allmand: You say that you'd feel safer if these people were in prison. Well, I would feel safer, if they were really threats. But if you continue to imprison people who aren't threats, you're going to have a backlash that undermines security.

Mr. Kevin Sorenson: Are all these people not threats?

Hon. Warren Allmand: Well, I'm thinking of five people of an Arab-Muslim background. I understand that they were dealt with yesterday. Of some of the people that I know, Arar was the threat.

You got into several issues. The sharing of information with other security services is a difficult one, because if you don't share with them, they won't share with you. That's the allegation.

Again, Judge O'Connor is dealing with that because he wants to know how the Americans sent Arar to Syria based on information received from Canada. This whole business of sharing, and the protocols on sharing, is a tough one. We'll see what he comes up with.

We've already dealt with secrecy. We have to infiltrate massive and organized crime. We have to prosecute sooner or later. We can't hold people indefinitely in prison. We have habeas corpus. We have other protections.

Yes, you need infiltration and undercover agents, but there are ways of dealing with that under the rule of law, under due process, and under the Charter of Rights and Freedoms. You don't have to violate it to have that kind of operation.

● (1220)

Mr. Alex Neve: Perhaps I'll add a couple of points on the question of secrecy.

None of us are saying that secrecy shouldn't play a role in Canadian investigatory law enforcement security-gathering processes and that all files should be open to the public at all times. It's obviously only at the critical point, where the rubber hits the road and we're at the point of dealing with someone through the legal process, that secrecy becomes a concern.

I think this committee should very much keep in mind and pay very serious attention to some of the information that's coming out at the Arar inquiry on what really is being held back and what the government really is asserting should be secretive. Huge amounts of information, obviously, in the course of the Arar commission have been sought to be withheld from the public by government lawyers. There have been a lot of battles back and forth between the government and commission counsel on this. I think there is much more to hear about over the months to come.

We have had one or two very interesting windows on what is behind some of the secrecy and the famous black redaction in some of the documents. I have to tell you that some of what we have seen is very disturbing. We're not seeing information being disclosed that, if it were somehow released even to Mr. Arar, let alone to the wider Canadian public, would imperil or impair Canadian national security. We're seeing things that would be inconvenient to another government.

Let me very quickly give you one example. There was one memo that described the first consular visit that Mr. Arar had with a Canadian official, after he'd arrived in Syria. The words that were blacked out in one version of the document and that were not blacked out in a differently redacted version, at a later point, were that Mr. Arar's answers during that visit were dictated to him in Arabic by his guards. Those words were considered to be of sufficient concern that national security confidentiality should take over. The only possible suggestion you could come up with is that somehow the Canadian official doing the redaction felt that our international relations with Syria were at stake, because this was something that was obviously critical of their practices and would somehow embarrass the Syrians. In the process, information potentially exculpatory to Mr. Arar is not disclosed to him, information is not disclosed to the public, and we are left with a skewed understanding of what was happening around a critical issue.

I think part of what we have to be very cognizant of here is that Canadian officials take a wide and broadly overreaching approach to what should be withheld from the public. The Arar commission has certainly been suggesting this. Ron Atkey, who is serving as the amicus curiae in the process and who has had a lot of exposure to this sort of stuff, pointed out in submissions to the commissioner the irony that, in his view, there has been more openness and less secrecy in the United States in the course of the 9/11 commission than what he is seeing on the part of the Canadian officials here.

I think that's another backdrop to keep in mind here, when we're talking about secrecy.

The Chair: I'm going to jump in, because your time is up.

Mr. Paul Copeland: Can I make one comment? You should get Mr. Cavalluzzo here to testify before you so that you understand the secrecy process. He has seen everything that has been presented in secret, and I think it would assist you in your deliberations.

The Chair: Mr. Sorenson, you may have one last, short question.

Mr. Kevin Sorenson: I appreciate that.

We talk about the secrecy and what can be compromised, and you're right. It was pointed out yesterday that the United States is more open than Great Britain, for certain. Great Britain is big on the secrecy end. But when we disclose, the thing our department has to realize—and they do—and the thing we have to remember is that disclosure of some facts, insignificant as they may seem, jeopardizes the investigation and can jeopardize lives.

● (1225)

Mr. Paul Copeland: I have seen many documents in secret processes where they outline the whole aspect of why you can't reveal things: it would reveal investigative techniques; it would reveal targets, or ciphers. There is a whole boilerplate that they use in these applications, and you have to deal with it in a way that is actually sensitive, rather than just taking the government's word for it. That's why I suggest you get Mr. Cavalluzzo here, because he'll be able to tell you the difference.

The Chair: Mr. Comartin, you're going to have the last few minutes. We're over where we said we would be, so you'll have to cut your lunch a little.

Mr. Joe Comartin: It's very appropriate that I get the last word, since we wouldn't have the certificates here if I hadn't pushed you to do that.

I have a quick question for you, Mr. Copeland, and maybe the others.

In terms of dealing with the practicalities when using criminal law, does it make any sense, or is it a partial solution, to go the route Belgium and Spain have gone? They're in effect prosecuting war crimes and crimes against humanity that occurred elsewhere, but are doing it within their countries—Belgium going after Sharon and Spain going after Pinochet. Is that a partial solution for the people that we've traditionally used? Is the existing legislation we have sufficient? Would that deal with any of these cases, in terms of being able to prosecute?

Mr. Paul Copeland: You would still have the same problem. If you're prosecuting somebody who happens to be here—assuming Pinochet came to Canada and somebody could persuade somebody to try the process they started in England and were unsuccessful with, as they are now trying to do in Spain—you're still left with the difficulty: do you have any evidence that you can put in? If you're in the difficulty of everything only being usable in a security certificate type of process, and an amended security certificate type of process, you're not going to have anything to put in for a criminal trial.

Mr. Joe Comartin: So it's back to the practicality.

Mr. Paul Copeland: Yes.

Mr. Alex Neve: The practicality is one side of it, but I think your question points to a significant shortcoming in Canadian policy and practice. We have the laws that allow what you've just described. We have the Crimes Against Humanity and War Crimes Act and we have the Anti-terrorism Act, which craft Canada's responsibility around these sorts of abuses in terms of what's known as universal jurisdiction. It doesn't matter whether the misdeed, the crime, was going to happen or did happen on Canadian soil; these are things of such immense international concern that Canada has a responsibility to prosecute no matter where it is happening.

The problem is, the Canadian appetite for actually living up to that responsibility on any front, whether it be war criminals, or crimes against humanity, or terrorists, has been minimal in the extreme. We have always resorted to immigration remedies to just get rid of the problem and not deal with it, and that only causes human rights violations. I would argue it ultimately does nothing to further the cause of international justice and international security, in which Canada should be playing a leading role.

The Chair: Thank you, gentlemen.

On behalf of the committee I want to thank you all, and your organizations, for presenting your views. As you can tell, this has been an interesting morning for us on the issue of security certificates, and I know all members of Parliament share an interest in this area. I thank you for your participation. You will look forward to our deliberations and our report over the course of the next months.

Mr. Joe Comartin: You had staff looking into what had happened with regard to Mahjoub.

The Chair: I have nothing further to report, Mr. Comartin. I will check over the lunch break to see if I have any further information, and maybe we'll have something by 1:30.

● (1230)

Mr. Joe Comartin: Okay.

The Chair: Thank you.

We're adjourned.

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

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

Also available on the Parliamentary Internet Parlementaire at the following address:
Aussi disponible sur le réseau électronique « Parliamentary Internet Parlementaire » à l'adresse suivante :
http://www.parl.gc.ca
