CANADA'S SECURITY CERTIFICATE SYSTEM

On February 12, 2008, the Senate approved new "security certificate" legislation, which the Commons had passed on February 6, and which came into force on February 23. The Conservative government had submitted the bill specifically to address a February 23, 2007 Supreme Court ruling that the existing certificate approval process infringed Canada's Charter of Rights and Freedoms by not allowing individuals subject to security certificates to know the cases against them and by denying them the same detention review rights as permanent residents. The revised legislation also reflects some recommendations of parliamentary committees reviewing the 2001 Anti-Terrorism Act (also now undergoing revision in the Commons, following Senate approval of new legislation on March 6). The Supreme Court had suspended its ruling for one year to give Parliament time to rewrite the law.

Prime Minister Stephen Harper had made passage of the revised legislation on security certificates a prominent feature of his policy agenda in the October 2007 "Speech from the Throne," as part of the government's efforts to combat terrorism and to enhance law and order. However, human rights groups, as well as at least one of the individuals subject to security certificates, have already argued that the new law still violates civil rights and have indicated that they will continue to challenge the law's constitutionality.

AN IMPORTANT TOOL

Minister of Public Safety Stockwell Day has publicly described security certificates as an "important tool" to protect Canada from terrorist threats, while still respecting civil rights and freedoms. The security certificate system has been in use since 1978 to detain and deport non-citizens – both permanent residents and foreign nationals -- whom the government deems inadmissible to Canada under various security-related provisions (including terrorism, serious criminality, organized crime, or human rights violations) of the Immigration and Refugee Protection Act (IRPA). IRPA authorized detention pending deportation on the basis of sensitive information without any disclosure to the individuals in question, subject to review by the Federal Court of Canada. Certificates are preventative in nature and deal with potential threats, not crimes after they take place.

The Minister of Citizenship and Immigration and the Minister of Public Safety must both sign a warrant for detention when the government judges an individual presents a danger to national security, to the safety of any person, and/or is unlikely to appear at a proceeding for removal (deportation). A Federal Court must review the "reasonableness" of each request for a certificate; if the Court upholds the request, the ruling becomes a removal order.

Prior to implementation of the new legislation, the government had issued 28 security certificates. Courts had quashed three of these, while the government was able to deport 19 other subjects from Canada. Six certificates were still valid as of February 2008 under the old legislation. The government has sought re-issuance of five new certificates under

the revised legislation, which the Federal Court must now approve, while the Supreme Court must rule on the constitutionality of the new legislation in light of its 2007 ruling.

Persons subject to removal nonetheless have the right to a pre-removal risk assessment by Citizenship and Immigration Canada, subject to a further review by a Federal Court judge. If the judge determines a person faces a risk of torture or death in his/her country of origin greater than the risk he/she poses by remaining in Canada, the judge may stay the removal order and the individual may be detained (even indefinitely) pending deportation or released, subject to whatever monitoring conditions the judge may deem appropriate. Various conditions currently in use in different certificate cases include the wearing of electronic GPS ankle monitoring bracelets at all times, the posting of cash or bonds as bail, living with/being accompanied by guarantor(s) at all times, house arrest (approved supervised outings only), restrictions on activities, restrictions on communications (no use of internet, telephone, or other communication device), wiretaps on telephones, opening of all mail, and access to the home by federal agents at any time.

NEW PROVISIONS

The revised legislation addresses the balance between security and civil rights through substantial changes to procedures relating to secret evidence and disclosure through the appointment of "special advocates" from a list of independent, qualified, and security-screened lawyers that the Minister of Justice compiles. (Previously, persons named under the government's request for a certificate received only a summary of the case against them.) Under the new law, special advocates will have access to confidential evidence on which the government may have based its decision to seek security certificates against specific individuals, and, when appropriate, to challenge the relevance, reliability, and weight of such confidential information – without disclosing it to their clients. Special advocates may also act in all review and other proceedings related to ongoing certificate cases. The Ministry of Justice has already accredited 13 new special advocates.

The legislation also changes rules on disclosure. Under the previous system, a judge had to determine that disclosure "would" be injurious to national security or to the safety of any person. Under the new system, a judge must decide only whether disclosure "could" possibly be injurious to national security or endanger the safety of any person. However, the revised law specifically bans use of any evidence if there are reasonable grounds to believe authorities obtained it as a result of torture. (Previously, the admissibility of any evidence was left to the discretion of a judge.) There is a new but conditional right of appeal on the reasonableness of a certificate to the Federal Court of Appeal.

New detention and release provisions go even further than the changes that the Supreme Court had required, provide new avenues of review and appeal, and may facilitate the release of detained individuals. All persons subject to security certificates are now entitled to an initial detention review by a Federal Court judge that must commence within 48 hours of their detention. A judge either deems the certificate to be reasonable or quashes it. If a judge finds the case reasonable, he/she may order continued detention

or conditional release. Individuals may apply to the Federal Court at six-month intervals for a review of their detention or of the conditions of their release.

RENEWAL OF FIVE CERTIFICATES

On February 23, the government renewed requests for re-issuance of five certificates, dropping an earlier certificate against Manickavasagam Suresh, an alleged Tamil Tiger fundraiser who has been subject to a certificate since 1994.