



**SPECIAL ADVOCATES PROGRAM
EVALUATION
Final Report**

February 2015

**Evaluation Division
Corporate Services Branch**



Information contained in this publication or product may be reproduced, in part or in whole, and by any means, for personal or public non-commercial purposes, without charge or further permission, unless otherwise specified.

You are asked to:

exercise due diligence in ensuring the accuracy of the materials reproduced;

indicate both the complete title of the materials reproduced, as well as the author organization; and

indicate that the reproduction is a copy of an official work that is published by the Government of Canada and that the reproduction has not been produced in affiliation with or with the endorsement of the Government of Canada.

Commercial reproduction and distribution is prohibited except with written permission from the Department of Justice Canada. For more information, please contact the Department of Justice Canada at: www.justice.gc.ca.

©Her Majesty the Queen in Right of Canada,
represented by the Minister of Justice and Attorney General of Canada, 2015

ISBN 978-0-660-02036-5

Cat. No J22-26/2015E-PDF

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
1. INTRODUCTION.....	1
1.1. Context for the Evaluation	1
1.2. Scope and Objectives of the Evaluation	1
1.3. Structure of the Report.....	2
1.4. Acknowledgement	2
2. DESCRIPTION OF THE SPECIAL ADVOCATES PROGRAM	3
2.1. Legislative Framework	3
2.2. Key Activities	4
2.3. Management Structure and Financial Resources	5
2.4. Program Logic	6
3. METHODOLOGY	7
3.1. Evaluation Approach	7
3.2. Research Methods	8
4. EVALUATION FINDINGS.....	9
4.1. Relevance of the Special Advocates Program	9
4.2. Achievement of the Special Advocates Program’s Expected Outcomes.....	13
4.3. Efficiency and Economy.....	21
5. CONCLUSIONS AND RECOMMENDATION.....	23
5.1. Relevance	23
5.2. Performance	24
5.3. Recommendation	25
Appendix A : Evaluation Matrix.....	27
Appendix B : Interview Guides	31

EXECUTIVE SUMMARY

1. Introduction

This document constitutes the final report for the evaluation of the Special Advocates Program (also referred to as the Program or the SAP). It covers all activities undertaken through the SAP over the past five years (2010–11 to 2014–15). In accordance with the *Policy on Evaluation*, it addresses both the relevance and the performance of the Program.

2. Description of the Special Advocates Program

Division 9 of the *Immigration and Refugee Protection Act* (IRPA) mandates the Minister of Justice to establish a list of persons who may act as special advocates, and to ensure that these individuals are properly supported to fulfill their mandate.

In order to adequately fulfill these statutory obligations, the Department of Justice Canada, through the SAP, implements the process used to solicit and select candidates who may act as special advocates, publishes the list of selected individuals, ensures that security requirements are met, liaises with the Courts Administration Service (Federal Court) and the Immigration and Refugee Board, attends all in-camera hearings involving special advocates, coordinates professional development activities, provides support and resources as required, and manages contribution agreements.

The Policy Implementation Directorate of the Programs Branch, within the Policy Sector of the Department of Justice Canada, administers the Program. At the time of the evaluation, the Department had assigned a complement of 3.5 full-time equivalents (FTEs) to SAP, including one senior counsel, one counsel, one administrative assistant and one half-time financial advisor.

The Program was also provided, at the time of the evaluation, with access to a yearly amount of \$1.2 million in contribution funding (Vote 5), in order to cover expenses incurred by special advocates assigned to specific cases, as well as professional development activities offered to those individuals who are on list.

3. Methodology

In order to address the questions included in the evaluation matrix, the evaluation included a document review and key informant interviews.

A systematic review of relevant information related to the SAP was conducted. The list of documents consulted includes Program-specific information (performance information, terms and conditions, etc.), relevant legislative provisions, court decisions addressing the role of special advocates, and broader contextual information related to the IRPA Division 9 and the National Security Inadmissibility Initiative.

Key informant interviews were conducted to provide additional insights into activities undertaken by special advocates, and to address evaluation questions related to the relevance and performance of the Program. A total of 11 individuals were interviewed, including special advocates, Minister's counsel, public counsel, and program representatives.

4. Evaluation Findings and Recommendation

4.1. Relevance

The primary pillar upon which the relevance of the SAP resides is the legislative framework established in IRPA. The Minister of Justice must establish a list of persons who may act as special advocates and must provide them with adequate support and resources. Now that the viability of this framework has been confirmed by the Supreme Court of Canada, the Minister of Justice must plan for the ongoing management and sustainability of this Program until such time as Parliament modifies this legislative framework.

Evidence gathered as part of this evaluation indicates that the relevance of the Program does, in fact, exceed the IRPA legislative framework. The federal government has placed national security, and the fight against terrorism in Canada and abroad, among its top priorities, with a range of commitments that include the strengthening of processes and tools to gather and share relevant information and intelligence. As this agenda moves forward, it is crucial that any proceedings related to the inadmissibility of non-citizens be fully compliant with the *Canadian Charter of Rights and Freedoms* (Charter). Having special advocates in place for Division 9 proceedings plays a vital role in that regard.

From an operational perspective, it is difficult to predict the extent to which special advocates will be appointed in future proceedings under IRPA. What the evaluation indicates, however, is that admissibility hearings and detention reviews heard by the Immigration and Refugee Board, appeals before the Immigration Appeal Division, or judicial reviews undertaken by the Federal Court may well play as important a role for special advocates as proceedings related to security certificates.

4.2. Performance

Outcome Achievement

The Program has succeeded in developing and maintaining a list of persons who may act as special advocates. Individuals included in the list are experienced legal practitioners who possess the credentials required to act as special advocates. This list is readily accessible, and public counsel, along with their clients, do not appear to face any difficulty in accessing and selecting names of individuals to be recommended to the presiding judge or the member of the applicable division of the Immigration and Refugee Board.

During the period covered by this evaluation, the Program has also offered significant support to special advocates, including the required assistance to those assigned to specific cases, as well as ongoing professional development activities to all those included in the list of individuals who may act as special advocates.

Despite these achievements, the evaluation indicates that other stakeholders, notably the Courts Administration Service and the Immigration and Refugee Board, play a significant role in ensuring that special advocates have meaningful access to the classified information held in their secure locations. Initial challenges in fulfilling this role appear to have been addressed, although it remains unclear as to the role that the Minister of Justice could play in fulfilling his statutory obligation in the event that future issues emerge, as both institutions operate at arm's length from the federal government.

The more substantive challenge that special advocates continue to face in fulfilling their responsibility is the absence of assistance that would typically be provided by junior law practitioners and administrative assistants. At this point, special advocates largely operate in isolation, which is bound to create inefficiencies.

Although their overall involvement in specific proceedings has steadily decreased over the period covered by the evaluation, special advocates have been heavily involved in complex proceedings, where they collectively offered close to 13,000 hours of assistance, with the support of SAP.

Efficiency and Economy

The Program has been administered effectively and economically, engaging fewer FTEs than initially anticipated. It has also turned to online options to deliver some of its professional development activities. Finally, although it cannot anticipate the number of hours during which special advocates will be required to offer assistance in the future, the Program has been offering a per diem that continues to attract senior members of the Bar, even though it represents only a fraction of their normal hourly rate.

The SAP also represents a well contained investment that maintains the constitutionality of a wider set of activities undertaken by various departments and agencies involved in IRPA Division 9 proceedings.

4.3. Recommendation

In order to strengthen both the contribution of special advocates and the efficiency of the Program as a whole, and ensure the Program's continued sustainability, the following recommendation is submitted:

It is recommended that the Department explore the possibility of diversifying the scope of resources and support that are provided to special advocates within the current legislative framework, including the provision of direct support from junior practitioners and administrative assistants to special advocates assigned to specific files.

1. INTRODUCTION

This document constitutes the final report for the evaluation of the Special Advocates Program (also referred to as the Program or SAP). The Department of Justice Canada administers the Program, whose purpose is to implement the set of legislative requirements contained in Division 9 of the *Immigration and Refugee Protection Act* (IRPA).

1.1. Context for the Evaluation

In 2008, the Department of Justice Canada established the SAP in response to the 2007 decision of the Supreme Court of Canada in the *Charkaoui* case.¹ In its ruling, the Court concluded that the existing scheme applicable to security certificates allowed for the use of evidence “that is never disclosed to the named person without providing adequate measures to compensate for this non-disclosure and the constitutional problems it causes”.² The Program was first evaluated in 2010, as part of the evaluation of the *Security Certificate Initiative* led by Public Safety Canada.³ This time, the evaluation of the SAP was led by the Department of Justice Canada. Although it is meant to be a stand-alone evaluation, it is also expected to contribute to the 2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative led by Public Safety Canada.

1.2. Scope and Objectives of the Evaluation

This evaluation covers all activities undertaken through the SAP over the past five years (2010–11 to 2014–15). In accordance with the *Policy on Evaluation*, it addresses both the relevance and the performance of the Program. More specifically, the evaluation focuses on the following dimensions of the Program:

¹ *Charkaoui v. Canada*. [2007] 1 S.C.R. 350.

² *Ibid.*, par. 139.

³ Public Safety Canada. (2010). *Final Report: 2009-2010 Evaluation of the Security Certificate Initiative*. Ottawa.

- the extent to which SAP activities align with the role and current priorities of the federal government, as well as with the strategic objectives of the Department of Justice Canada;
- the extent to which the Program responds to identified needs; and
- the ability of the Program to achieve its expected outcomes efficiently and economically.

Appendix A includes the complete list of issues and questions covered by the evaluation.

1.3. Structure of the Report

This report contains five sections, including this introduction. Section 2 provides a description of the Program. Section 3 describes the methodology used to address the set of evaluation issues and questions. Section 4 summarizes the key findings that have emerged from the data collection process, while section 5 provides the overall evaluation conclusions and recommendations.

1.4. Acknowledgement

The contribution and collaboration of many individuals have made this evaluation possible. We wish to thank all of those who participated in data collection, provided information, and responded to inquiries.

2. DESCRIPTION OF THE SPECIAL ADVOCATES PROGRAM

A central feature of the SAP derives from the legislative framework within which it must operate. This section of the report describes this framework, along with key activities undertaken through the Program, its management structure and financial resources. A description of the logic that links program activities and their expected outcomes is also included.

2.1. Legislative Framework

IRPA mandates the Minister of Justice to establish a list of persons who may act as special advocates and to ensure that these individuals receive adequate administrative support and resources to fulfill their mandate. As stated in section 85 of IRPA:

85. (1) The Minister of Justice shall establish a list of persons who may act as special advocates and shall publish the list in a manner that the Minister of Justice considers appropriate to facilitate public access to it.

(3) The Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources.

In fulfilling these requirements, the Minister of Justice must take into account the role that IRPA attributes to special advocates. At a fundamental level, special advocates are expected to protect the interests of a permanent resident or foreign national involved in certain proceedings under IRPA “when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel”.⁴ This involves, among other things, challenging “the Minister’s claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person”, or challenging “the relevance, reliability, and sufficiency of information or other evidence that is provided by the

⁴ Section 85.1 of the *Immigration and Refugee Protection Act*, S.C., c. 27.

Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it”.⁵

Division 9 of IRPA covers a number of scenarios in which special advocates may be required:

- As part of the issuance of security certificates as prescribed under section 77 of IRPA, and more particularly as it relates to the determination by a judge of the Federal Court as to whether the certificate is reasonable⁶ and any procedures related to the arrest and detention of a person who is named in a security certificate.⁷
- As part of admissibility hearings and detention reviews heard by the Immigration and Refugee Board, and appeals before the Immigration Appeal Division.
- As part of judicial reviews undertaken by the Federal Court of decisions or orders made by the Immigration and Refugee Board, whenever an application is made for the non-disclosure of information or other evidence.⁸

2.2. Key Activities

In order to adequately fulfill these statutory obligations, the Department of Justice Canada, through SAP, undertakes a series of activities that includes, at a minimum, the following tasks:

- implementing an adequate process to solicit and select candidates who possess the qualifications to serve as special advocates;
- ensuring that the list of selected individuals is easily accessible to the public, and particularly to public counsel and their clients when the procedures in which they are engaged require the assistance of a special advocate;
- ensuring that those included in the list of individuals who may act as special advocates possess and maintain the required security clearance and that they are permanently bound to secrecy in accordance with the *Security of Information Act*;

⁵ Subsection 85.1 (1) and (2) of the *Immigration and Refugee Protection Act*, S.C., c. 27.

⁶ Section 78 of the *Immigration and Refugee Protection Act*, S.C., c. 27.

⁷ Section 82 to 82.2 of the *Immigration and Refugee Protection Act*, S.C., c. 27.

⁸ Sections 86 and 87 of the *Immigration and Refugee Protection Act*, S.C., c. 27.

- liaising with the Courts Administration Service (Federal Court) and the Immigration and Refugee Board to ensure that special advocates receive all the required support and are provided with proper access to secure facilities to fulfill their mandate;
- attending all in-camera hearings involving special advocates to ensure a continuity of knowledge related to common legal issues faced by special advocates;
- coordinating professional development activities for individuals who may act as special advocates, to ensure that they are kept abreast of legal trends relevant to the role of special advocates; and
- managing contribution agreements signed with each member of the list , including processing payments.

The courts have acknowledged the role the Program plays in the provision of adequate administrative support to special advocates. In particular, the Federal Court, in four cases involving security certificates, granted orders allowing the assigned special advocates to participate in “knowledge sharing sessions”, where they could discuss common legal issues and strategies without disclosing fact-specific evidence or sensitive information. In such cases, a representative of the Program is expected to chair any such sessions and to monitor communications among special advocates, to ensure against inadvertent disclosure of classified information.⁹

2.3. Management Structure and Financial Resources

The Policy Implementation Directorate of the Programs Branch, within the Policy Sector of the Department of Justice Canada, administers the Program. At the time of the evaluation, the Department had assigned a complement of 3.5 full-time equivalents (FTEs) to SAP, including one senior counsel, one counsel, one administrative assistant, and one half-time financial advisor.

The Program was also provided, at the time of the evaluation, with access to a yearly amount of \$1.2 million in contribution funding (Vote 5), in order to cover expenses incurred by special advocates assigned to specific cases, including professional development activities offered to those individuals who are on the list.

⁹ Minister of Public Safety et al v. Harkat, 2009 FC 59, par. 30 and 31. Another example is provided in Minister of Public Safety v. Mahjoub, June 22, 2009 (unpublished), where the Court ordered the Minister of Justice, through the Program, to report on progress made in addressing technical issues related to the work of special advocates.

2.4. Program Logic

The successful implementation of the set of activities described in this section is expected to contribute to the following outcomes:

- The federal government can successfully use classified information in inadmissibility proceedings under IRPA (security certificates, inadmissibility hearings, detention or judicial reviews, as applicable).
- The named individuals involved in inadmissibility proceedings under IRPA are provided with a fair process, namely protection of their interests when information is heard in their or their lawyer's absence.

Ultimately, the Program is expected to contribute to the Department's strategic outcome of a fair, relevant, and accessible Canadian justice system.¹⁰

It is worth emphasizing that, as a component of the IRPA Division 9 and the National Security Inadmissibility Initiative, the Program is also expected to contribute to the Initiative's overarching outcomes of:

- successfully mitigating threats to national security;
- denying status in Canada to foreign nationals and permanent residents inadmissible on serious grounds in a manner that respects international human rights and the *Canadian Charter of Rights and Freedoms* (Charter) obligations, through the participation of special advocates in the closed hearings; and
- maintaining the integrity of the immigration system, safeguarding national security, and securing Canada's borders.

¹⁰ Department of Justice Canada. (2014). *Report on Plans and Priorities 2014-2015*. Ottawa, p. 4.

3. METHODOLOGY

This section provides a brief description of the methodology used to evaluate the Special Advocates Program.

3.1. Evaluation Approach

The strategy that frames the evaluation of the SAP first relies on a clear delineation of what is being evaluated. As already stated, this evaluation focuses on the set of activities that the Department of Justice Canada undertakes in order to manage the SAP. It purposely excludes any assessment of the actual assistance provided by the special advocates who have been assigned to cases. It is also not meant to be an assessment of the legislative framework provided under IRPA, while recognizing that this legislative framework does constitute an important contextual component. Put simply, *IRPA* mandates the Department of Justice Canada to establish a list of individuals who may act as special advocates and to ensure that these individuals are provided with adequate support and resources. The evaluation assesses the extent to which these activities have been successfully carried out, which in turn informs an assessment of the extent to which these activities have contributed to the Program's expected outcomes.

In order to successfully address the evaluation issues and questions covered by the evaluation, some existing data and information collected throughout the Program's implementation and ongoing management have been used. However, additional evidence was required, which was collected through a document review and key informant interviews. The next subsection provides further details on the implementation of these research methods.

Both the data collection and analysis conducted as part of this evaluation align with the overall framework provided by the federal government's *Policy on Evaluation*, which expects the evaluation to support ongoing accountability, inform government decisions on resource allocation, and support the ongoing management and improvement of the Program.¹¹

¹¹ Treasury Board of Canada. *Policy on Evaluation*, section 3.2.

All research activities undertaken as part of this evaluation were administered in accordance with normal practices in the field of program evaluation, including the guidelines provided in the *Code of Ethics* and the *Evaluation Standards* of the Canadian Evaluation Society.¹²

3.2. Research Methods

In order to address the questions included in the evaluation matrix (see Appendix A), the evaluation included a document review and key informant interviews.

3.2.1. Document Review

A systematic review of relevant information related to the SAP was conducted. The goal was to support a thorough understanding of the Program, in addition to addressing a number of evaluation questions.

The list of documents consulted includes program-specific information (performance information, terms and conditions, etc.), relevant legislative provisions, court decisions addressing the role of special advocates, and broader contextual information related to the IRPA Division 9 and the National Security Inadmissibility Initiative.

A key limitation in carrying out the document review was the inability for the evaluators to access top secret documents.

3.2.2. Key Informant Interviews

Key informant interviews were conducted to provide additional insights on activities undertaken by special advocates, and address evaluation questions related to the relevance and performance of the Program. A total of 11 individuals were interviewed, including special advocates, Minister's counsel, public counsel, and program representatives.

These interviews were conducted using a structured interview guide (included in Appendix B of this report), which key informants received in advance of the interview. With the permission of key informants, interviews were digitally recorded to assist in accurate note taking. Key informants were provided with the opportunity to review these notes.

¹² The *Code of Ethics* and the *Evaluation Standards* of the Canadian Evaluation Society are available at <http://www.evaluationcanada.ca/about-the-ce-designation>.

4. EVALUATION FINDINGS

This section of the report describes the evaluation findings related to SAP. The information is based on findings that emerged from both the document review and interviews.

4.1. Relevance of the Special Advocates Program

This first subsection explores the relevance of the SAP over the period covered by this evaluation, as well as the expected demand for the Program in the future. It also addresses the extent to which the Program aligns with both the *role* of the federal government, and its current *priorities*, particularly those related to national security.

4.1.1. The role of the Federal Government in Providing Special Advocates

When asked about the relevance of the SAP, key informants typically pointed to the legislative requirements included in section 85 of IRPA. As already noted, the Minister of Justice has a statutory obligation to maintain a list of individuals who may act as special advocates, to provide them with the support and resources they require, and to ensure that they are ready and able to provide a reasonable substitute for full disclosure to the named person involved in Division 9 proceedings.

Over the period covered by this evaluation, an important development has added a new dimension to the federal role related to special advocates. In its recent decision in the *Harkat* case, the Supreme Court of Canada concluded that the provisions of IRPA covering the role of special advocates meet the requirements of a fair process as protected by section 7 of the Charter by providing a “substantial substitute” to the direct participation of the named person and his or her counsel in closed proceedings.¹³

The confirmed legality of IRPA provisions related to special advocates is significant. It demonstrates that the federal response to the *Charakaoui* decision, through the set of legislative

¹³ Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37, par. 77.

amendments made to IRPA in 2008,¹⁴ is in fact appropriate. In *Charkaoui*, the Supreme Court of Canada had stated that, in order for the security certificate scheme to be Charter compliant, “either the person must be given the necessary information, or a substantial substitute for that information must be found”, before concluding that “neither is the case here”.¹⁵ At the time, the Court did not specify what the “substantial substitute” ought to be, leaving it to Parliament to proceed with legislative amendments that it deemed appropriate. This inevitably left the question open as to whether the 2008 amendments to IRPA were providing that sought-after “substantial substitute”. With the *Harkat* decision, this ambiguity can now be set aside.

This context of greater certainty logically extends to the actual role that the federal government is expected to play through the SAP. The Department of Justice Canada must plan its activities related to the Program knowing that it stands on firm ground that can only be shifted through legislative amendments.

4.1.2. Alignment of the SAP with Federal Priorities

In supporting the use of classified information in applicable proceedings under IRPA, the Program aligns with the current priorities of the federal government related to national security. Although the concept of detaining and removing non-citizens for security purposes dates back to the *Immigration Act* (1985), the security certificate process became a central component of the legislative changes introduced in 2001 in the wake of the terrorist attacks perpetrated in the United States on September 11, 2001. Since then, threats to national security have continued to remain a federal priority, as illustrated more recently by the tabling in Parliament, on January 30, 2015, of Bill C-51, the *Anti-Terrorism Act, 2015*.¹⁶ Among other things, the set of proposed legislative changes seeks to enhance the ability of federal agencies and departments to gather and share information pertaining to national security, some of which may ultimately be used as classified information in proceedings under IRPA.

The enhancement of anti-terrorism mechanisms further highlights the importance of ensuring that the Canadian justice system remains fair, relevant, and accessible, which is a core

¹⁴ *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocates) and to make a consequential amendment to another Act*, S.C. 2008, c.3.

¹⁵ *Charkaoui v. Canada* [2007] 1 S.C.R. 350, par. 61.

¹⁶ Office of the Prime Minister. (2015). *PM announces anti-terrorism measures to protect Canadians* (January 30). Available on line at <http://pm.gc.ca/eng/news/2015/01/30/pm-announces-anti-terrorism-measures-protect-canadians>. Information specific to Bill C-51 *Anti-Terrorism Act* (2015) available on line at <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=6842344>.

component of the role played by the Department and, as such, constitutes one of its strategic outcomes.¹⁷ By protecting the interests of non-citizens subject to inadmissibility and other related proceedings, the Program supports the integrity of the Canadian justice system, which ultimately supports the goal of ensuring that “Canada remains a recognized international leader in the fair administration of its justice system”.¹⁸

4.1.3. The Ongoing Need for Special Advocates

Beyond the fact that the SAP ought to operate due to a legislative requirement, the evaluation explored the expected needs for special advocates in future proceedings. Although there is a large speculative dimension to this question, it nonetheless provides important contextual information, which may ultimately affect not so much the existence of the Program itself, but rather how it is managed and the challenges that it may face in achieving its expected outcomes (i.e., the federal government can successfully use classified information in inadmissibility proceedings under IRPA, and named individuals involved in inadmissibility proceedings under IRPA are provided with a fair process, namely protection of their interests when information is heard in their or their lawyer’s absence).

The obvious trend that emerged during the period covered by the evaluation is illustrated in Figure 1 (next page). The total number of hours billed by special advocates has decreased steadily and significantly, shifting from 5,485 hours billed in 2010–11 to 551 hours billed in the current fiscal year (as of January 30, 2015).

Individuals interviewed as part of the evaluation were invited to comment on this trend. As noted during these interviews, a great deal of uncertainty surrounded the security certificate scheme during the court challenges that led to the *Charkaoui* decision in 2007, and the resulting amendments to IRPA introduced in 2008. The federal government reissued security certificates in what is referred to as the “five legacy cases”,¹⁹ which all proceeded in a context of further Charter-based court challenges that ultimately led to the *Harkat* decision issued by the Supreme Court of Canada in 2014. In most cases, these certificates were based on facts that had accumulated over an extended period of time, in some cases dating back to the mid-1990s. The procedural challenges in dealing with such significant volumes of evidence were therefore

¹⁷ Department of Justice Canada. (2014). *Report on Plans and Priorities 2014-2015*. Ottawa, p. 16.

¹⁸ *Ibid*, p. 17.

¹⁹ The five legacy cases refer to security certificates issued against Adil Charkaoui, Hassan Almei, Mohammad Zeki Mahjoub, Mahmoud Jaballah, and Mohamed Harkat.

compounded by the requirements associated with the Charter-based challenge to the security certificate scheme itself. Special advocates became heavily involved on both fronts. In particular, while dealing predominantly with substantive questions of law, hearings at the Supreme Court of Canada in the *Harkat* case did involve special advocates, as classified information whose disclosure was alleged to be injurious to national security was shared with the Court.

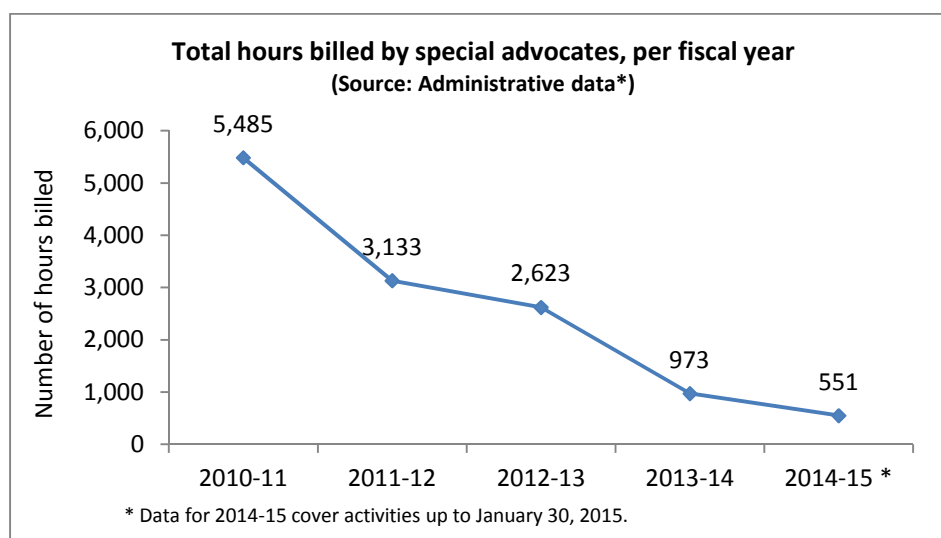


Figure 1

Individuals who were consulted noted that, in the wake of the *Harkat* decision, the federal government may be more readily disposed to using security certificates as new circumstances warrant, knowing that new cases will likely involve a lesser volume of evidence, and that sustained Charter-based challenges may be more limited.

The other aspect that may have an impact on the future use of special advocates is the extent to which non-disclosure applications will be made in other proceedings under IRPA. As noted in section 2.1 of this report, special advocates may be required during admissibility hearings and detention reviews heard by the Immigration and Refugee Board, during appeals before the Immigration Appeal Division, or during judicial reviews by the Federal Court of decisions or orders made by the Immigration Refugee Board, whenever applications of non-disclosure are made. Consultations held as part of this evaluation indicate that the experience gained to date with security certificates may lead to a greater use of classified information during these proceedings, which would trigger a greater involvement of special advocates.

Ultimately, however, it is worth observing that the demand for special advocates will be shaped by the strategic value attributed to security certificates and other related proceedings under IRPA to combat threats to national security, let alone the degree to which Canada will be targeted by terrorist activities, the assessment of which far exceeds the scope of this evaluation.

4.2. Achievement of the Special Advocates Program's Expected Outcomes

This subsection of the report assesses the extent to which the Program has achieved its expected results, notably in establishing a list of individuals who may act as special advocates and providing them with the required resources and support, in engaging special advocates in actual judicial proceedings, and in maintaining the administration of a fair process that is Charter compliant.

4.2.1. Establishment of the Special Advocate Roster

Initial Selection Process

At the time of this evaluation, the Department of Justice Canada had only issued one request for expression of interest in order to select individuals who may act as special advocates. Although this process precedes the period covered by the evaluation, it is summarized for reference purposes.

Following the *Charkaoui* decision from the Supreme Court of Canada (released on February 23, 2007) and the tabling of Bill C-3 to amend IRPA (introduced on October 22, 2007), the Department of Justice Canada, with the support of Public Safety Canada, issued a request for expression of interest on December 18, 2007.²⁰ The Department invited lawyers who had been members of the Bar for at least 10 years and who had significant litigation experience, preferably in immigration law, criminal law, national security law, or human rights law, to submit their application in order to be included in a list of individuals who may act as special advocates. The document was posted on the website of the Department of Justice Canada, in addition to being promoted by relevant stakeholders, such as the Canadian Bar Association.

The Department of Justice Canada mandated a committee presided by a retired judge from the Federal Court, and including representatives from the Federation of Law Societies of Canada and

²⁰ Department of Justice Canada. (2007). *Request for Expression of Interest (EOI: Special Advocates for Bill C-3 (Security Certificates under the Immigration and Refugee Protection Act)*. Ottawa.

the Canadian Bar Association, with the task of reviewing the applications and providing a list of names for consideration by the Minister of Justice. Over 100 individuals responded to this initial call, and the committee recommended 28 names to be included on the list. By the time the new legislative scheme related to special advocates came into force on February 22, 2008, the Minister of Justice had published a list containing an initial 15 recommended names. The rest of the recommended names were published shortly thereafter.

Current List of Special Advocates

As of February 2015, the list of individuals who may act as special advocates had 22 names. Some individuals initially included in the list were removed due to judicial or other appointments, or personal circumstances. In terms of regional distribution, the list had 16 names from Ontario, five from Quebec, and one from Alberta.

Findings from the consultations held as part of this evaluation point to a great level of support for the current roster of individuals who may act as special advocates. All individuals included in the list offer strong credentials that directly relate to the knowledge and competencies described in the initial call for expression of interest and, considered as a whole, the roster offers the capacity to operate in both official languages. More specifically, public counsel consulted as part of this evaluation voiced no concern regarding the current roster and were comfortable recommending names from it to their clients, for approval by the presiding judge or the applicable division of the Immigration and Refugee Board.

Considering the reduced demand for special advocates over the past five years (as illustrated in Figure 1 above), the evaluation explored whether the list should consequently be reduced. Evaluation findings indicate that the advantages of keeping the list at its current level outweigh any potential benefits that could come from removing some of the names. First, the ongoing expenditures associated with each member of the roster are minimal and are largely limited to their participation in professional development activities, which normally occurs once a year. Second, at a more substantive level, there must be a sufficient number of individuals on the roster to ensure that both the named person in an applicable proceeding under IRPA and his or her counsel may recommend individuals that satisfy the criteria established in paragraph 83. (1.2) of IRPA, particularly as it relates to the absence of any conflict of interest or any risk of inadvertent disclosure of classified information that requires protection for national security or personal safety purposes.

As for the current regional distribution of individuals who may act as special advocates, it leaves little doubt as to the high concentration of special advocates in Montréal, Ottawa and Toronto. Individuals consulted as part of this evaluation recognized that having a greater regional coverage could arguably be desirable, but they also noted that the nature of the work of special advocates limits the ability of individuals from other regions to engage in it. All evidence must be consulted and analyzed in the designated secure sites of the Federal Court and the Immigration and Refugee Board which are located in Ottawa, and multiple sessions are needed to complete any assignment.

4.2.2. Support and Resources Provided to Special Advocates

In assessing the support provided to special advocates, the evaluation focussed on both the assistance provided to those special advocates assigned to specific cases, and the ongoing professional development provided to all individuals who may act as special advocates. The evaluation has purposely excluded certain activities that were carried out when individuals were initially added to the list of those who may act as special advocates, as none of these activities were carried out during the period covered by this evaluation.²¹

Case-Specific Support

Evaluation findings indicate that the Program provides adequate support to special advocates assigned to specific cases. There are, however, challenges that special advocates continue to face in fulfilling their assigned mandate.

Overall, consultations held with special advocates indicate that the Program has been providing strong support throughout the course of their assignments. This includes managing contribution agreements, processing payments, and providing any other assistance that special advocates may require. Program representatives have been described as accessible, professional, flexible and pro-active when it comes to supporting special advocates.

However, it is important to note that the case-specific support required by special advocates extends beyond the set of activities for which the Program has direct authority. In particular, the Courts Administration Service and the Immigration and Refugee Board must ensure that special

²¹ Examples of activities required when individuals are added to the list of those who may act as special advocates include ensuring that they possess the required security clearance, that they have been permanently bound to secrecy in accordance with the *Security Information Act*, and that they have attended the orientation training offered by the Department of Justice Canada, in collaboration with the Canadian Security Intelligence Service.

advocates are provided with adequate access to the classified information stored in their secure locations. In practical terms, adequate access must include the ability for special advocates to consult, analyze and safeguard the work they perform on the basis of the classified information.

Although the Program may, when circumstances warrant, advocate on behalf of special advocates — and evaluation findings indicate that they have done so — it can instruct neither the Courts Administration Service nor the Immigration and Refugee Board. This in itself raises questions as to the scope of the statutory obligation established in section 85. (3) of IRPA. If the Minister of Justice “shall ensure that special advocates are provided with adequate administrative support and resources”, but that some of this support ought to be provided by institutions that operate at arm’s length from the Government of Canada, it is unclear as to how the Minister of Justice may readily and fully address any shortcomings on the part of these arm’s length institutions.

Prior to the period covered by the evaluation, both the Courts Administration Service and the Immigration and Refugee Board had faced logistical and administrative challenges in integrating special advocates in the management of the applicable proceedings under IRPA. As such, evaluation findings indicate that an incremental approach has proven necessary to find proper space that could meet security requirements, and to establish procedures that could provide special advocates with a reasonable access to these facilities. For instance, the desire by some special advocates to work in these secure facilities well past normal business hours has required the establishment of new procedures that balance the needs of special advocates and the operational context within which these institutions must operate. Another example was provided when special advocates assigned to the *Mahjoub* case faced logistical issues that were brought to the attention of the presiding judge, who concluded that the special advocates “have not been provided with adequate administrative support” and ordered the Minister of Justice to “provide a progress report on how and when the technical issues identified herein will be resolved”.²² At the time of this evaluation, findings indicate that these various administrative and logistical challenges had been reasonably accommodated.

Assistance to Special Advocates

According to those consulted as part of this evaluation, what remains the most significant challenge for special advocates assigned to specific cases is the absence of any assistance during the execution of their various tasks performed in secure locations. In other and more typical

²² Minister of Public Safety v. Mahjoub, June 22, 2009 (unpublished), p. 3.

circumstances, senior law practitioners would work with junior practitioners to complete some of the work required on a file, and would also benefit from the assistance of an administrative assistant to complete clerical tasks (photocopying and assembling documents, for instance). This organization of the work cannot be readily applied to special advocates, since the material they work with in secure locations is information whose disclosure could be injurious to national security or could endanger the safety of individuals. As such, only those with the appropriate security clearance and who have been permanently bound to secrecy may come in contact with this material. Even if a junior practitioner or an administrative assistant could meet these security requirements, they are not officially part of the list of individuals who may act as special advocates and as such, they are not directly covered by the provision of IRPA applicable to the nomination of special advocates.

This challenge was brought to the attention of the Federal Court in the *Harkat* case, when the special advocates assigned to this file requested the appointment of an individual who was in a position to provide administrative assistance and who met all applicable security requirements. A significant dimension of this request was the fact that the volume of evidence that needed to be reviewed in this case had greatly expanded, as a result of the disclosure requirements set out in the 2008 *Charkaoui* decision from the Supreme Court of Canada.²³ The Federal Court proceeded with the appointment of the individual, noting that “it is consistent with the intent of the legislator to read ‘adequate administrative support and resources’ as encompassing limited forms of human support. Human support is a necessary part of an efficient office environment.”²⁴ The Court established strict parameters for the role of this appointed individual, specifying that she was not being appointed as a special advocate, was not to play any advocacy role, was not having any relationship with the named person, was not charged with representing his interest, and was not to be present during the closed hearing.²⁵

Consultations held with special advocates as part of this evaluation indicate that this appointment has proven to be the exception rather than the norm. These special advocates have systematically noted the inefficiency that results from having them spend several hours photocopying and assembling information, let alone having to do all the review of the evidence themselves, without any support from more junior practitioners. Citing the example of the Special Advocates Program in the United Kingdom, they recommended that more junior practitioners be added to the list of individuals who may act as special advocates. Such a change, combined with the

²³ *Charkaoui v. Canada* [2008] 2 S.C.R. 326.

²⁴ *Minister of Public Safety et al v. Harkat* 2009 FC 173, p. 6.

²⁵ *Ibid*, p. 7.

appointment of a junior counsel, as authorized by the Federal Court in the *Harkat* case, could arguably go a long way in addressing these concerns.

Professional Development

During the period covered by this evaluation, the SAP has offered professional development activities that have provided valuable knowledge and insights on matters relevant to the role of special advocates. These activities have covered substantive areas of the law related to a wide range of issues, such as intelligence and evidence gathering, terrorism, national security, and relevant case law. The Program has been alternating between in-person sessions and webinars. Consequently, in-person professional development sessions were held in 2011–12 (18 participants) and 2013–14 (13 participants), whereas webinar sessions were held in 2012–13 (11 participants) and in 2014–15 (12 participants).

In addition to these activities, the Program has been managing a web portal that contains a wide variety of resources related to the role of special advocates, including information pertaining to IRPA, relevant court decisions, and professional development activities. Administrative data indicate that in 2012–2013, 10 individuals included on the list of those who may act as special advocates spent a total of 69 hours consulting the portal for professional development purposes. The equivalent number in 2013–2014 stood at 72 hours among nine individuals.

It is worth noting that the web portal contains all public orders and decisions pertaining to security certificates and other related proceedings that were active at the time of the Program implementation. This is a significant achievement when one considers the fact that in the *Mahjoub* case alone, a total of 212 such decisions and orders had been issued at the time of this evaluation. As such, the web portal represents an important resource that acts, in some regard, as a corporate memory or repository that supports the ongoing management of the Program.

The SAP representatives have indicated that an upgrade to the software currently used to host these resources will be implemented to facilitate their search and access. The review of the portal undertaken as part of this evaluation confirms that such an upgrade would support a more efficient navigation of the portal's resources.

4.2.3. Involvement of Special Advocates in IRPA Proceedings

By establishing a list of individuals who may act as special advocates and providing them with the support they require, the Program is expected to set the stage for the actual involvement of

special advocates in specific inadmissibility and other related proceedings under IRPA. The experience gained during the period covered by this evaluation confirms that special advocates have, in fact, played a significant role in a number of proceedings. As illustrated in Table 1, special advocates have billed close to 13,000 hours related to six cases heard by the Immigration and Refugee Board, the Federal Court, the Federal Court of Appeal, or the Supreme Court of Canada.

Table 1: Hours Billed by Special Advocates per Fiscal Year

Cases	2010–11	2011–12	2012–13	2013–14	2014–15	Totals
1. <i>Almrei</i>	17	0	0	0	0	17
2. <i>Harkat</i>	597	741	153	446	21	1,958
3. <i>Jaballah</i>	1,176	428	1,100	113	367	3,784
4. <i>Mahjoub</i>	1,793	1,373	1,156	272	92	4,686
5. <i>Suresh</i>	0	176	175	142	71	564
6. <i>Torres</i>	1,302	415	39	0	0	1,756
Total	5,485	3,133	2,623	973	551	12,765

Source: SAP performance information data

During the period covered by this evaluation, a total of five new appointments of special advocates were made, including two appointments in the *Harkat* proceedings before the Federal Court of Appeal (in 2011–12), two appointments in the *Harkat* proceedings before the Supreme Court of Canada (in 2013–14), and one appointment in the *Suresh* case before the Immigration and Refugee Board (in 2011–12). The remaining appointments were made prior to the period covered by this evaluation.

One unexpected development that was systematically noted throughout the consultations held as part of this evaluation relates to the appointment of individuals from the roster of special advocates to act as *amicus curiae* (friend of the court). Such appointment is made whenever a court is of the opinion that it “is necessary to permit a particular proceeding to be successfully and justly adjudicated”.²⁶ These appointments may relate to any areas of law, including proceedings other than those included in IRPA where classified information is being used, such as those involving section 38 of the *Canada Evidence Act*. In such cases, it appears that courts have, from time to time, turned to the list of special advocates to select *amici*, as these individuals possess the required expertise to manage classified information, in addition to meeting all security requirements.

²⁶ Ontario v. Criminal Lawyers’ Association [2013] 3 S.C.R. 3, par. 44.

This trend is, in principle, irrelevant for the purpose of this evaluation, unless it negatively affects the ability of the Program to meet its expected results. This would be the case, for instance, if the volume and intensity of the work done by individuals from the roster of special advocates who happen to be appointed as *amici* was such that it would, de facto, make it impossible for them to act as special advocates. Evidence gathered indicates that, to this day, such concern has not materialized, and it is unlikely to do so in the future. Individuals consulted noted that the number of appointments of *amici* remains limited and that, in any case, an individual could reasonably manage being appointed both as *amicus* and as special advocate, as any law practitioner is expected to manage multiple files at once.

4.2.4. The SAP's Contribution to Ensuring a Fair Judicial Process

The central goal of this evaluation was to assess the extent to which the SAP has assisted the Minister of Justice in successfully discharging his statutory obligation as established in section 85 of IRPA. As such, the focus of the evaluation has been the Program itself, and not the special advocate scheme as a whole. Keeping this in mind, the data collection process used in support of this evaluation has gathered some evidence that arguably relates more directly to the special advocate scheme. It is briefly summarized here for contextual purposes.

The overwhelming impression communicated by those consulted as part of this evaluation reflects the conclusion of the Supreme Court of Canada in *Harkat*, that the special advocate scheme as currently structured in IRPA, while not perfect, does constitute a substantial substitute to the direct participation of the named person and his or her counsel in closed proceedings. It appears that special advocates have, in fact, been in a position to challenge the Minister's claims related to the protection of certain information, and to challenge the relevance, reliability or sufficiency of the protected information. As a note of caution, it is worth adding that this assessment of the actual work performed by special advocates is bound to be of limited depth, as it is, by its very nature, secret and protected. As public counsel noted during the consultations, they have little choice but to trust that special advocates are performing well, as they have no means of assessing it directly.

The most pressing concern voiced by special advocates and public counsel related to the strict parameters that IRPA currently imposes on the communications between these two groups. As stated in section 85.4 (2) of IRPA:

After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

According to public counsel and special advocates interviewed, this framework has proven to be particularly challenging. However, as this is an issue that exceeds the scope of this evaluation, it is noted but not further analyzed.

4.3. Efficiency and Economy

This last subsection focuses on the extent to which resource use has been minimized in the implementation and delivery of SAP.

The evidence gathered indicates that the Program has been administered effectively and economically, as illustrated by the following developments:

- Although the Program was initially allocated a PM-05 position, it has elected not to fill that position in light of the level of activities experienced by the Program.
- The Program has made an increasing use of online technologies to deliver its professional development activities.
- The per diem offered to special advocates is well below what these law practitioners typically earn in their own practice. This could constitute a risk by acting as a disincentive among qualified law practitioner to apply to become part of those who may act as special advocates; however, the experience to date indicates that such a risk has not materialized.

As for the number of hours billed by special advocates, the Program cannot impose parameters that would limit their ability to adequately fulfill their mandate. The number of hours billed by special advocates is dependent on a number of factors, including the extent of disclosure to be reviewed and fluctuations in the number of proceedings involving special advocates, which will require ongoing monitoring and management on the part of the SAP.

Finally, this assessment of efficiency and economy must also consider the broader contribution of the SAP to Division 9 proceedings under IRPA. Various departments and agencies invest considerable resources to pursue security certificate and other related proceedings. The legislative scheme related to special advocates — which becomes operational through the

Program — ensures the constitutionality of these proceedings. As such, the SAP represents a well contained investment that provides essential support to a wider set of activities that involve far larger investments in resources.

5. CONCLUSIONS AND RECOMMENDATION

This section of the report provides conclusions on each of the evaluation issues addressed in this report.

5.1. Relevance

The primary pillar upon which the relevance of the SAP resides is the legislative framework established in IRPA. The Minister of Justice must establish a list of individuals who may act as special advocates and must provide them with adequate support. Now that the viability of this framework has been confirmed by the Supreme Court of Canada, the Minister of Justice must plan for the ongoing management and sustainability of this Program until such time as Parliament modifies this legislative framework.

Evidence gathered as part of this evaluation indicates that the relevance of the Program does, in fact, exceed the IRPA legislative framework. The federal government has placed national security, and the fight against terrorism in Canada and abroad, among its top priorities, with a range of commitments that include the strengthening of processes and tools to gather and share relevant information and intelligence. As this agenda moves forward, it is crucial that any proceedings related to the inadmissibility of non-citizens be fully compliant with the Charter. Having special advocates in place plays a vital role in that regard.

From an operational perspective, it is difficult to predict the extent to which special advocates will be appointed in future proceedings under IRPA. What the evaluation indicates, however, is that admissibility hearings and detention reviews heard by the Immigration and Refugee Board, appeals before the Immigration Appeal Division, or judicial reviews undertaken by the Federal Court may well play as important a role for special advocates as proceedings related to security certificates.

5.2. Performance

5.2.1. Outcome Achievement

The Program has succeeded in developing and maintaining a list of individuals who may act as special advocates. Individuals included in the list are experienced legal practitioners who possess the credentials required to act as special advocates. This list is readily accessible, and public counsel, along with their clients, do not appear to face any difficulty in accessing it and selecting names of individuals to be recommended to the presiding judge or the member of the applicable Division of the Immigration and Refugee Board.

During the period covered by this evaluation, the SAP has also offered significant support to special advocates, including the required assistance to special advocates assigned to specific cases, as well as ongoing professional development activities to all those included in the list of individuals who may act as special advocates.

Despite these achievements, the evaluation indicates that other stakeholders, notably the Courts Administration Service and the Immigration and Refugee Board, do play a significant role in ensuring that special advocates have meaningful access to the classified information held in their secure locations. Initial challenges in fulfilling this role appear to have been addressed, although it remains unclear as to the role that the Minister of Justice could play in fulfilling his statutory obligation in the event that future issues emerge, as both institutions operate at arm's length from the federal government.

The more substantive challenge that special advocates continue to face in fulfilling their responsibility is the absence of assistance that would typically be provided by junior law practitioners and administrative assistants. At this point, special advocates largely operate in isolation, which is bound to create inefficiencies.

Although their overall involvement in specific proceedings has steadily decreased over the period covered by the evaluation, special advocates have been heavily involved in complex proceedings, where they collectively offered close to 13,000 hours of assistance, with the support of SAP.

5.2.2. Efficiency and Economy

The Program has been administered effectively and economically, engaging fewer FTEs than initially anticipated. It has also turned to online options to deliver some of its professional development activities. Finally, although it cannot anticipate the number of hours during which special advocates will be required to offer assistance in the future, the Program has been offering a per diem that continues to attract senior members of the bar, even though it represents a fraction of their normal hourly rate.

The SAP also represents a well contained investment that maintains the constitutionality of a wider set of activities undertaken by various departments and agencies involved in IRPA Division 9 proceedings.

5.3. Recommendation

In order to strengthen both the contribution of special advocates and the efficiency of the Program as a whole, and ensure its continued sustainability, the following recommendation is submitted:

It is recommended that the Department explore the possibility of diversifying the scope of resources and support that are provided to special advocates within the current legislative framework, including the provision of direct support from junior practitioners and administrative assistants to special advocates assigned to specific files.

Appendix A:
Evaluation Matrix

Questions	Indicators	Sources
Relevance (TB core issues 1–3)		
1. Do the activities of the SAP align with the Department of Justice’s strategic objectives?	1.1 Assessment of whether the activities of the SAP align with the Department of Justice’s strategic objectives and core expected results	<ul style="list-style-type: none"> • Key informant interviews • Document review
2. Do the activities of the SAP align with federal priorities?	2.1 Assessment of whether the activities of the SAP align with federal priorities	<ul style="list-style-type: none"> • Key informant interviews • Document review
3. What need is the SAP intended to address? Is there evidence of an ongoing need?	3.1 Assessment of the continued need for the SAP	<ul style="list-style-type: none"> • Key informant interviews
	3.2 Legal trends and emerging issues (identified needs based on case law, media scan, consultations)	<ul style="list-style-type: none"> • Key informant interviews • Document review
4. To what extent are the activities carried out through the SAP appropriate to the federal government and a core federal role?	4.1 Constitutional and statutory authority for federal involvement	<ul style="list-style-type: none"> • Document review
	4.2 Constitutional and statutory authority for Department of Justice involvement	<ul style="list-style-type: none"> • Document review
Achievement of Expected Outcomes (TB core issue 4)		
5. To what extent has the SAP achieved its expected outcomes?		
<u>Immediate Outcome (IRPA Division 9)</u> Fair representation of subjects through a Charter-compliant process	5.1 Number of contribution agreements with special advocates (by fiscal year)	<ul style="list-style-type: none"> • Document review
	5.2 Number of special advocates on roster (by fiscal year)	<ul style="list-style-type: none"> • Document review
	5.3 Adequacy/appropriateness of roster (e.g. language profiles, conflicts of interests, turnover rate)	<ul style="list-style-type: none"> • Key informant interviews • Document review
	5.4 Extent to which the roster is published in a manner that is considered appropriate to facilitate public access to it	<ul style="list-style-type: none"> • Key informant interviews • Document review
	5.5 Number of special advocates trained (by fiscal year)	<ul style="list-style-type: none"> • Document review
	5.6 Adequacy/appropriateness of training and support to special advocates	<ul style="list-style-type: none"> • Key informant interviews • Document review
	5.7 Number and type of complaints from special advocates pertaining to obstacles in the performance of their duties (by fiscal year)	<ul style="list-style-type: none"> • Document review
	5.8 Number of cases where special advocates appointed and number of hours billed (by fiscal year)	<ul style="list-style-type: none"> • Document review
	5.9 Assessment of whether IRPA Division 9 subjects’ interests are protected	<ul style="list-style-type: none"> • Key informant interviews

Questions	Indicators	Sources
Achievement of Expected Outcomes (TB core issue 4)		
<u>Intermediate Outcome (IRPA Division 9)</u> Foreign national and permanent residents inadmissible on serious grounds are denied status in Canada in a manner that respects international human rights and Charter obligations	5.10 The SAP's contribution to a process that respects international human rights and Charter obligations	<ul style="list-style-type: none"> • Key informant interviews
<u>Ultimate Outcome (Justice)</u> A fair, relevant and accessible Canadian justice system	5.11 The SAP's contribution to a fair, relevant and accessible Canadian justice system	<ul style="list-style-type: none"> • Key informant interviews
Efficiency and Economy (TB core issue 5)		
6. Could the work of the SAP be undertaken more efficiently and economically?	6.1 Evidence of strategies to achieve outputs and outcomes in the most cost-effective way	<ul style="list-style-type: none"> • Key informant interviews • Document review
	6.2 Measures in place to manage efficiency	<ul style="list-style-type: none"> • Key informant interviews • Document review
	6.3 Suggestions for improvement in efficiency of performance	<ul style="list-style-type: none"> • Key informant interviews
	6.4 Program administration ratio (total costs to administer the Program versus total contributions paid under the Program)	<ul style="list-style-type: none"> • Document review
	6.5 Alternative approaches to service delivery	<ul style="list-style-type: none"> • Key informant interviews • Document review
7. Are there any best practices or lessons learned in the delivery of the SAP?	7.1 Evidence of best practices and lessons learned	<ul style="list-style-type: none"> • Key informant interviews • Document review

Appendix B:
Interview Guides

Evaluation of the Special Advocates Program Interview Guide — Program Representatives

The Department of Justice has hired Prairie Research Associates Inc. (PRA), a research company, to support the evaluation of the Special Advocates Program. Justice Canada established the Program in response to the 2007 decision from the Supreme Court of Canada in *Charkaoui v. Canada*. The Program's purpose is to support the Minister of Justice in providing administrative support and resources to special advocates appointed to cases, and professional development to those persons on the list who may be appointed by the Court as special advocates. The participation of special advocates in the closed hearings constitutes a substantial substitute for personal participation by the persons involved in the proceeding or their counsel in order to meet the Charter concerns raised by the Supreme Court of Canada. Special advocates are an important tool in support of national security efforts undertaken by the federal government.

The evaluation includes interviews with Minister's counsel, public counsel for a person involved in an *Immigration and Refugee Protection Act* (IRPA) proceeding, special advocates and program representatives from Justice Canada. The evaluation covers a four-year period (2010-11 to 2013-14) and focuses on the relevance and performance (effectiveness, efficiency and economy) of the Program.

The information we gather through this interview will be summarized in aggregate form only. You will have an opportunity to review our written summary of the interview and make any corrections and/or additions. With your permission, we would like to digitally record the interview to ensure the accuracy of our notes. The audio file will be deleted after the completion of the study.

Please note that the evaluation of the Special Advocates Program is part of the *2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative*. As such, some of the information gathered through interviews will be used to address questions covered by the horizontal evaluation as well.

Finally, some questions may not be applicable to your work. Please let us know, and we will skip those questions.

Introduction

1. What are your current roles and responsibilities in relation to the management of the Special Advocates Program?

Relevance of the Special Advocates Program

2. Considering the legislative framework included in the IRPA and the Supreme Court of Canada's decisions related to security certificates, how would you describe the current relevance of the Special Advocates Program? [Q3]
3. Based on your experience to date, what factors could, in your view, affect the future demand for special advocates? [Q3]
4. How does the Special Advocates Program relate to the strategic objectives of the Department of Justice Canada? [Q1]
5. How does the Program relate to the broader governmental agenda on national security? [Q2]

Performance — Effectiveness and Efficiency

6. At this point, the list of persons who may act as special advocates includes 22 names (16 from Ontario, 5 from Quebec, and 1 from Alberta). Considering the purpose of the Program, how would you describe the appropriateness of this roster? [Q5]
7. The list of persons who may act as special advocates was created through a *Request for Expression of Interest* process, whereby Justice Canada invited those wishing to be considered for the roster to submit an application. [Q5]
 - a. Please describe the process you used to develop this *Request for Expression of Interest*. How did you determine the applicable eligibility criteria? What strategy did you use to distribute this request?
 - b. How satisfied are you with the responses you received as a result of this process? Are there any gaps in the current list that you intend to address? If so, please describe these gaps and how you intend to address them.
 - c. Please describe the administrative challenges, if any, that you encountered during the *Request for Expression of Interest* process.

8. Paragraph 85. (3) of IRPA states that the “Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources.” [Q5]
 - a. Please describe the initial support you provide once individuals are added to the list of persons who may act as special advocates. How satisfied are you with the support you have provided to date? What changes, if any, could improve this process?
 - b. Please describe the professional development activities you have offered thus far to those on the list of individuals who may act as special advocates. What do you consider to be the key strengths of these activities? What changes, if any, could improve this process?
 - c. How satisfied are you with the current web portal offered to those on the list of individuals who may act as special advocates? What changes, if any, could improve this tool?
 - d. How satisfied are you with the current process for reimbursing expenditures or paying professional fees? What changes, if any, could improve this process?
9. Considering the limited number of procedures to date that have involved special advocates, what do you consider to be the most appropriate strategy to maintain both the interest and the capacity of those included on the list of individuals who may act as special advocates? [Q5]
10. Please describe the role that you play once the court appoints a special advocate. To date, have you encountered any administrative or procedural challenges that could have limited the ability of special advocates to efficiently fulfill their role? If so, could you describe these challenges? What changes, if any, could be done to address these challenges? [Q6]
11. Without addressing any specifics related to individual cases, how would you describe the overall effectiveness of special advocates in protecting the interests of permanent residents or foreign nationals involved in proceedings under the IRPA? [Q5]
12. In your opinion, is there an alternative process to the special advocate scheme that could achieve the same results more efficiently? If so, please describe. [Q6]

Performance – IRPA Division 9 and the National Security Inadmissibility Initiative

The following questions relate more generally to the IRPA Division 9 and the National Security Inadmissibility Initiative and assess the effectiveness of the Initiative as a whole.

13. To what extent has the Initiative facilitated or hindered the use of classified information in security inadmissibility cases?
14. What challenges/risks and opportunities in the past five years have had an impact (either positive or negative) on the achievement of the Initiative's overall objectives?

Conclusion

15. Do you have any further comments relating to this evaluation?

Thank you for your participation.

Evaluation of the Special Advocates Program Interview Guide — Special Advocates

The Department of Justice has hired Prairie Research Associates Inc. (PRA), a research company, to support the evaluation of the Special Advocates Program. Justice Canada established the Program in response to the 2007 decision from the Supreme Court of Canada in *Charkaoui v. Canada*. The Program's purpose is to support the Minister of Justice in providing administrative support and resources to special advocates appointed to cases, and professional development to those persons on the list who may be appointed by the Court as special advocates. The participation of special advocates in closed hearings constitutes a substantial substitute for personal participation by the persons involved in the proceeding or their counsel in order to meet the Charter concerns raised by the Supreme Court of Canada. Special advocates are an important tool in support of national security efforts undertaken by the federal government.

The evaluation includes interviews with Minister's counsel, public counsel for a person involved in an *Immigration and Refugee Protection Act* (IRPA) proceeding, special advocates and program representatives from Justice Canada. The evaluation covers a four-year period (2010-11 to 2013-14) and focuses on the relevance and performance (effectiveness, efficiency and economy) of the Program.

The information we gather through this interview will be summarized in aggregate form only. You will have an opportunity to review our written summary of the interview and make any corrections and/or additions. With your permission, we would like to digitally record the interview to ensure the accuracy of our notes. The audio file will be deleted after the completion of the study.

Please note that the evaluation of the Special Advocates Program is part of the *2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative*. As such, some of the information gathered through interviews will be used to address questions covered by the horizontal evaluation as well.

Finally, some questions may not be applicable to your work. Please let us know, and we will skip those questions.

Introduction

1. What are your current roles and responsibilities? In which security certificate processes have you been involved?

Relevance of the Special Advocates Program

2. Considering the legislative framework included in the IRPA and the Supreme Court of Canada's decisions related to security certificates, how would you describe the current relevance of the Special Advocates Program? [Q3]
3. Based on your experience to date, what factors could, in your view, affect the future demand for special advocates? [Q3]

Performance — Effectiveness and Efficiency

4. At this point, the list of persons who may act as special advocates includes 22 names (16 from Ontario, 5 from Quebec, and 1 from Alberta). Considering the purpose of the Program, how would you describe the appropriateness of this roster? [Q5]
5. The list of persons who may act as special advocates was created through a *Request for Expression of Interest* process, whereby Justice Canada invited those wishing to be considered for the roster to submit an application. [Q5]
 - a. How did you become aware of this *Request for Expression of Interest*?
 - b. Were the provisions included in this request clear? What changes, if any, could have improved this document?
 - c. What were the key considerations that led you to submit an application to be added to the list of persons who may act as special advocates?
 - d. What was your level of satisfaction with the process used to review your application? (please consider factors such as timeliness, responsiveness and clarity)
6. Paragraph 85. (3) of IRPA states that the “Minister of Justice shall ensure that special advocates are provided with adequate administrative support and resources.” [Q5]

- a. Please describe the initial support you received once you were added to the list of persons who may act as special advocates. How satisfied were you with the support you received? What changes, if any, could have improved this support?
 - b. Please describe the professional development activities in which you have participated thus far in your role as potential special advocate. What do you consider to be the key strengths of these activities? What changes, if any, could improve this process?
 - c. How efficient is the current web portal offered to those on the list of individuals who may act as special advocates? What changes, if any, could improve this tool?
 - d. How efficient is the current process for reimbursing expenditures or paying professional fees?
 - e. If you acted as special advocate, please describe your level of satisfaction with the administrative support you received. What changes, if any, could be made to improve this support?
7. Considering the limited number of procedures to date that have involved special advocates, what do you consider to be the most appropriate strategy to maintain both the interest and the capacity of those included in the list of individuals who may act as special advocates? [Q5]
 8. [*For those who have acted as special advocate*] Once the court appointed you as special advocate, have you encountered any administrative or procedural challenges that could have limited your ability to efficiently fulfill your role? If so, could you describe these challenges? What changes, if any, could be done to address these challenges? [Q6]
 9. Without addressing any specifics related to individual cases, how would you describe the overall effectiveness of special advocates in protecting the interests of permanent residents or foreign nationals involved in proceedings under the IRPA? [Q5]
 10. Based on your experience, what challenges, if any, have been encountered with regard to the special advocate scheme as established in the IRPA? As applicable, how could these challenges be addressed? [Q5]
 11. In your opinion, is there an alternative process to the special advocate scheme that could achieve the same results more efficiently? If so, please describe. [Q6]

Conclusion

12. Do you have any further comments relating to this evaluation?

Thank you for your participation.

Evaluation of the Special Advocates Program Interview Guide — Public Counsel

The Department of Justice has hired Prairie Research Associates Inc. (PRA), a research company, to support the evaluation of the Special Advocates Program. Justice Canada established the Program in response to the 2007 decision from the Supreme Court of Canada in *Charkaoui v. Canada*. The Program's purpose is to support the Minister of Justice in providing administrative support and resources to special advocates appointed to cases and professional development to those individuals on the list of persons who may be appointed by the Court as special advocates. The participation of special advocates in closed hearings constitutes a substantial substitute for personal participation by the persons involved in the proceeding or their counsel in order to meet the Charter concerns raised by the Supreme Court of Canada. Special advocates are an important tool in support of national security efforts undertaken by the federal government.

The evaluation includes interviews with Minister's counsel, public counsel for a person involved in an *Immigration and Refugee Protection Act* (IRPA) proceeding, special advocates and program representatives from Justice Canada. The evaluation covers a four-year period (2010-11 to 2013-14) and focuses on the relevance and performance (effectiveness, efficiency and economy) of the Program.

The information we gather through this interview will be summarized in aggregate form only. You will have an opportunity to review our written summary of the interview and make any corrections and/or additions. With your permission, we would like to digitally record the interview to ensure the accuracy of our notes. The audio file will be deleted after the completion of the study.

Please note that the evaluation of the Special Advocates Program is part of the *2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative*. As such, some of the information gathered through interviews will be used to address questions covered by the horizontal evaluation as well.

Finally, some questions may not be applicable to your work. Please let us know, and we will skip those questions.

Introduction

1. What are your current roles and responsibilities? In which security certificate processes have you been involved?

Relevance of the Special Advocates Program

2. Considering the legislative framework included in the IRPA and the Supreme Court of Canada's decisions related to security certificates, how would you describe the current relevance of the Special Advocates Program? [Q3]
3. Based on your experience to date, what factors could, in your view, affect the future demand for special advocates? [Q3]

Performance — Effectiveness

4. At this point, the list of persons who may act as special advocates includes 22 names (16 from Ontario, 5 from Quebec, and 1 from Alberta). Considering the purpose of the Program, how would you describe the appropriateness of this roster? [Q5]
5. The list of persons who may act as special advocates was created through a *Request for Expression of Interest* process, whereby Justice Canada invited those wishing to be considered for the roster to submit an application. How would you describe the adequacy of this process? What changes, if any, could be made to improve this process? [Q5]
6. As applicable, what were the key considerations that lead you to request that a particular person be appointed as special advocate? (in accordance with paragraph 83. (1.2) of IRPA)
7. Once the court appointed the special advocate, did you encounter any administrative or procedural challenges related to his or her role as special advocate? If so, could you describe these challenges? What changes, if any, could address these challenges?
8. Without addressing any specifics related to individual cases, how would you describe the overall effectiveness of special advocates in protecting the interests of permanent residents or foreign nationals involved in proceedings under the IRPA? [Q5]

9. Based on your experience, what challenges, if any, have been encountered with regard to the special advocate scheme as established in the IRPA? As applicable, how could these challenges be addressed? [Q5]

Performance — Efficiency and Economy

10. In your opinion, is there an alternative process to the special advocate scheme that could achieve the same results more efficiently? If so, please describe. [Q6]

Conclusion

11. Do you have any further comments relating to this evaluation?

Thank you for your participation.

Evaluation of the Special Advocates Program Interview Guide — Minister's Counsel

The Department of Justice has hired Prairie Research Associates Inc. (PRA), a research company, to support the evaluation of the Special Advocates Program. Justice Canada established the Program in response to the 2007 decision from the Supreme Court of Canada in *Charkaoui v. Canada*. The Program's purpose is to support the Minister of Justice in providing administrative support and resources to special advocates appointed to cases, and professional development to those individuals on the list of persons who may be appointed by the Court as special advocates. The participation of special advocates constitutes a substantial substitute for personal participation by the persons involved in the proceeding, or their counsel, in order to meet the Charter concerns raised by the Supreme Court of Canada. Special advocates are an important tool in support of national security efforts undertaken by the federal government.

The evaluation includes interviews with Minister's counsel, public counsel for a person involved in an *Immigration and Refugee Protection Act* (IRPA) proceeding, special advocates and program representatives from Justice Canada. The evaluation covers a four-year period (2010-11 to 2013-14) and focuses on the relevance and performance (effectiveness, efficiency and economy) of the Program.

The information we gather through this interview will be summarized in aggregate form only. You will have an opportunity to review our written summary of the interview and make any corrections and/or additions. With your permission, we would like to digitally record the interview to ensure the accuracy of our notes. The audio file will be deleted after the completion of the study.

Please note that the evaluation of the Special Advocates Program is part of the *2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative*. As such, some of the information gathered through interviews will be used to address questions covered by the horizontal evaluation as well.

Finally, some questions may not be applicable to your work. Please let us know, and we will skip those questions.

Introduction

1. What are your current roles and responsibilities? In which security certificate processes have you been involved?

Relevance of the Special Advocates Program

2. Considering the legislative framework included in the IRPA and the Supreme Court of Canada's decisions related to security certificates, how would you describe the current relevance of the Special Advocates Program? [Q3]
3. Based on your experience to date, what factors could, in your view, affect the future demand for special advocates? [Q3]

Performance — Effectiveness

4. At this point, the list of persons who may act as special advocates includes 22 names (16 from Ontario, 5 from Quebec, and 1 from Alberta). Considering the purpose of the Program, how would you describe the appropriateness of this roster? [Q5]
5. What challenges, if any, have been encountered in including special advocates in IRPA proceedings? [Q5]
6. Without addressing any specifics related to individual cases, how would you describe the overall effectiveness of special advocates in protecting the interests of permanent residents or foreign nationals involved in proceedings under the IRPA? [Q5]

Performance — Efficiency and Economy

7. In your opinion, is there an alternative process to the special advocate scheme that could achieve the same results more efficiently? If so, please describe. [Q6]

Performance – IRPA Division 9 and the National Security Inadmissibility Initiative

The following questions relate more generally to the IRPA Division 9 and the National Security Inadmissibility Initiative and assess the effectiveness of the Initiative as a whole.

8. In your opinion, has the evolution of the Initiative over the past five years been an appropriate response to the changing national security context? Please explain.

9. To what extent has the Initiative facilitated or hindered the use of classified information in security inadmissibility cases?
10. In the past five years, how has the level of capacity to manage disclosure obligations changed? What practical measures or best practices have been put in place to reduce or manage disclosure obligations?
11. What challenges/risks and opportunities in the past five years have had an impact (either positive or negative) on the achievement of the Initiative's overall objectives?
12. In the absence of the Initiative activities, what impacts are likely to occur? Please describe.

Conclusion

13. Do you have any further comments relating to this evaluation?

Thank you for your participation.

Evaluation of the Special Advocates Program Interview Guide — Courts Administration Service

The Department of Justice has hired Prairie Research Associates Inc. (PRA), a research company, to support the evaluation of the Special Advocates Program. Justice Canada established the Program in response to the 2007 decision from the Supreme Court of Canada in *Charkaoui v. Canada*. The Program's purpose is to support the Minister of Justice in providing administrative support and resources to special advocates appointed to cases and professional development to those individuals on the list of persons who may be appointed by the Court as special advocates. The participation of special advocates in closed hearings constitutes a substantial substitute for personal participation by the persons involved in the proceeding or their counsel in order to meet the Charter concerns raised by the Supreme Court of Canada. Special advocates are an important tool in support of national security efforts undertaken by the federal government.

The evaluation includes interviews with Minister's counsel, public counsel for persons involved in an *Immigration and Refugee Protection Act* (IRPA) proceeding, special advocates and program representatives from Justice Canada, as well as representatives from the Courts Administration Service and the Immigration and Refugee Board of Canada. The evaluation covers a four-year period (2010-11 to 2013-14) and focuses on the relevance and performance (effectiveness, efficiency and economy) of the Program.

The information we gather through this interview will be summarized in aggregate form only. You will have an opportunity to review our written summary of the interview and make any corrections and/or additions. With your permission, we would like to digitally record the interview to ensure the accuracy of our notes. The audio file will be deleted after the completion of the study.

Please note that the evaluation of the Special Advocates Program is part of the *2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative*. As such, some of the information gathered through interviews will be used to address questions covered by the horizontal evaluation as well.

Finally, some questions may not be applicable to your work. Please let us know, and we will skip those questions.

Introduction

1. What are your current roles and responsibilities?

Services Provided

2. Please describe the range of services you provide to special advocates involved in IRPA proceedings.
3. What challenges, if any, have you encountered in offering this support?
4. What changes, if any, could be considered to better support your current role and responsibilities relating to special advocates?

Performance – IRPA Division 9 and the National Security Inadmissibility Initiative

The following questions relate more generally to the IRPA Division 9 and the National Security Inadmissibility Initiative and assess the effectiveness of the Initiative as a whole.

5. To what extent have the Initiative activities facilitated or hindered:
 - a. The use of classified information in security inadmissibility cases (IRPA, section 34) in hearings and proceedings before your respective institutions (i.e., the IRB and Federal Court)?
 - b. Your respective institution's decision making in cases that involve the use and protection of classified information?
6. What challenges/risks and opportunities in the past five years have had an impact (either positive or negative) on the achievement of the Initiative's objective to provide balance between managing risks to Canada and providing fairness to individuals in admissibility assessment processes?
7. In the absence of the Initiative activities, what impacts are likely to occur? Please describe.

Conclusion

8. Do you have any further comments relating to this evaluation?

Thank you for your participation.

Evaluation of the Special Advocates Program Interview Guide — Immigration and Refugee Board of Canada

The Department of Justice has hired Prairie Research Associates Inc. (PRA), a research company, to support the evaluation of the Special Advocates Program. Justice Canada established the Program in response to the 2007 decision from the Supreme Court of Canada in *Charkaoui v. Canada*. The Program's purpose is to support the Minister of Justice in providing administrative support and resources to special advocates appointed to cases and professional development to those persons on the list of persons who may be appointed by the Court as special advocates. The participation of special advocates in closed hearings constitutes a substantial substitute for personal participation by the persons involved in the proceeding or their counsel in order to meet the Charter concerns raised by the Supreme Court of Canada. Special advocates are an important tool in support of national security efforts undertaken by the federal government.

The evaluation includes interviews with Minister's counsel, public counsel for persons involved in an *Immigration and Refugee Protection Act* (IRPA) proceeding, special advocates and program representatives from Justice Canada, as well as representatives from the Courts Administration Service and the Immigration and Refugee Board of Canada. The evaluation covers a four-year period (2010-11 to 2013-14) and focuses on the relevance and performance (effectiveness, efficiency and economy) of the Program.

The information we gather through this interview will be summarized in aggregate form only. You will have an opportunity to review our written summary of the interview and make any corrections and/or additions. With your permission, we would like to digitally record the interview to ensure the accuracy of our notes. The audio file will be deleted after the completion of the study.

Please note that the evaluation of the Special Advocates Program is part of the *2014-2015 Horizontal Evaluation of the IRPA Division 9 and the National Security Inadmissibility Initiative*. As such, some of the information gathered through interviews will be used to address questions covered by the horizontal evaluation as well.

Finally, some questions may not be applicable to your work. Please let us know, and we will skip those questions.

Introduction

1. What are your current roles and responsibilities?

Services Provided

2. Please describe the range of services you provide to special advocates involved in IRPA proceedings.
3. What challenges, if any, have you encountered in offering this support?
4. What changes, if any, could be considered to better support your current role and responsibilities relating to special advocates?

Performance – IRPA Division 9 and the National Security Inadmissibility Initiative

The following questions relate more generally to the IRPA Division 9 and the National Security Inadmissibility Initiative and assess the effectiveness of the Initiative as a whole.

5. To what extent have the Initiative activities facilitated or hindered:
 - a. The use of classified information in hearings and proceedings before the Immigration and Refugee Board of Canada?
 - b. Your decision making in cases that involve the use and protection of classified information?
6. What challenges/risks and opportunities in the past five years have had an impact (either positive or negative) on the achievement of the Initiative's objective to provide balance between managing risks to Canada and providing fairness to individuals in admissibility assessment processes?
7. In the absence of the Initiative activities, what impacts are likely to occur? Please describe.

Conclusion

8. Do you have any further comments relating to this evaluation?

Thank you for your participation.