

A Safe and Resilient Canada



Final Report

2009-2010 Evaluation of the Security Certificate Initiative

**Evaluation Directorate
Public Safety Canada**

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List of Acronyms

APR	Application for Permanent Residency
CAS	Courts Administration Service
CBSA	Canada Border Services Agency
CIC	Citizenship and Immigration Canada
CSIS	Canadian Security Intelligence Service
DFAIT	Department of Foreign Affairs and International Trade
DOJ	Department of Justice
IRPA	Immigration and Refugee Protection Act
PRRA	Pre-removal Risk Assessment
PS	Public Safety Canada
SA	Special Advocate
SC	Security Certificate
SCI	Security Certificate Initiative
SIR	Security Intelligence Report
TBS	Treasury Board of Canada Secretariat
UK	United Kingdom

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Executive Summary

Evaluation supports accountability to Parliament and Canadians by helping the Government of Canada to credibly report on the results achieved with resources invested in programs. Evaluation supports deputy heads in managing for results by informing them about whether their programs are producing the outcomes that they were designed to achieve, at an affordable cost; and, supports policy and program improvements by helping to identify lessons learned and best practices.

What we examined

This is the 2009-2010 Evaluation of the Security Certificate Initiative. In February 2007, the Supreme Court of Canada found certain aspects of the security certificate process to be unconstitutional. In response to the Supreme Court's decision, Parliament amended the *Immigration and Refugee Protection Act* in February 2008. Most notably, the new legislation introduced a Special Advocate into the Division 9 of *Immigration and Refugee Protection Act* proceedings, the right to appeal final judicial decisions, and the regular review of conditions of release or detention for foreign nationals.

For the purpose of this evaluation, the ensemble of activities undertaken to implement these amendments has been named the Security Certificate Initiative. Public Safety Canada leads the Initiative with the participation of the following six departments and/or agencies:

- Justice Canada;
- Canada Border Services Agency;
- Citizenship and Immigration Canada;
- Canadian Security Intelligence Service;
- Courts Administration Service; and,
- Department of Foreign Affairs and International Trade.

Why it's important

The security certificate process is an immigration proceeding used to detain and remove from Canada non-Canadians deemed inadmissible on grounds of security, violating human rights, serious criminality or organized criminality when the determination is based on classified evidence that, if disclosed publicly, would be injurious to national security or endanger the safety of any person. Since February 22, 2008, activities carried out under the Security Certificate Initiative continue to make use of the mechanisms in the *Immigration and Refugee Protection Act* that allow for the protection of information in immigration proceedings, while giving effect to the new provisions intended to better protect the rights of individuals subject to such proceedings, as called for by the Supreme Court of Canada.

The Security Certificate Initiative's purpose is to support the Government in achieving what can be termed an essential balance between values of freedom, democracy and respect for human rights and risks presented from inadmissible foreign nationals and permanent residents.

What we found

Since the inception of the Security Certificate Initiative, five security certificates were re-issued against individuals who had originally been subject to a certificate issued under the previous legislation. In addition, during the period covered by this evaluation, the Special Advocate Program was created and implemented, and security certificate subjects were either detained or monitored for compliance with terms and conditions of release. Processes to protect classified information have been put in place and federal employees have been trained.

The Security Certificate Initiative's continuing relevance in terms of the protection of classified information and national security must be premised on the notion that if the amendments to the *Immigration and Refugee Protection Act* had not been implemented through the Security Certificate Initiative, the security certificate process would no longer exist.

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Evidence shows that the establishment of the Special Advocates roster is an enhancement of previous practices. Many interviewees agreed that compared to prior mechanisms, security certificate subjects' interests are better protected through Special Advocate submissions and because someone advocates on behalf of the security certificate subjects during *in camera* proceedings. The extensive disclosure provided by Ministers to Special Advocates is further evidence of the improved protection of security certificate subjects' interests.

Risks presented by security certificate subjects have been well contained by the Canada Border Services Agency through the enforcement of the terms and conditions of release. However, responding to changes to terms and conditions prescribed by Federal Court rulings presents operational challenges. The Agency addresses these issues through regular conference calls and meetings between headquarters and regional staff. Nevertheless, the wording of orders and terms and conditions has been misinterpreted on some occasions, which has caused missteps by Canada Border Services Agency personnel, resulting in unfavourable court decisions.

Citizenship and Immigration Canada has improved its capacity for the protection of classified information by creating special units to process applications, upgrading its facilities and training its staff. Centralized Security Case Units in four Citizenship and Immigration Canada regions have been created and equipped with additional features that allowed Citizenship and Immigration Canada to meet the standards for storing classified information.

The unanticipated expansion of disclosure obligations resulting from the Supreme Court of Canada decision known as *Charkaoui II*, resulted in significant operational and litigation demands and has lengthened proceedings. The increased disclosure in the first instance has required the production of more records created by Canadian Security Intelligence Service which, in turn, has affected the work of Justice Canada and Special Advocates since they must review and litigate the disclosure of the material produced. Courts Administration Service has

also been implicated in this regard, since it provides support to the work of the Special Advocates.

Public Safety Canada has achieved a high degree of coordination through its working groups. However, further clarification of roles and responsibilities may be required. In addition, the governance structure must be flexible enough to respond to changing requirements in a timely manner.

Recommendations

Three recommendations emerge from the conduct of this evaluation. It is recommended that:

1. Public Safety Canada takes action to ensure that governance structures and horizontal coordination meet evolving requirements and address challenges raised by Partners.
2. Canada Border Services Agency continues to take action to improve its national coordination and level of support to front-line officers by ensuring that standard operating procedures for compliance-monitoring are updated on a regular basis and communicated to regional staff.
3. Canadian Security Intelligence Service, Department of Justice (including the Special Advocate Program) and Courts Administration Service take action to fully quantify the financial impact on the Security Certificate Initiative, including the *Charkaoui II* disclosure decision, in order to anticipate or inform future funding requirements. Further, all Partners should be mindful going forward of the true costs of the Security Certificate Initiative so that the impacts on other parts of their respective organizations can be quantified and appropriately assessed.

Management Response and Action Plan

This evaluation report has been reviewed and approved by deputy heads of all SCI Partner organizations. In addition to providing management action plans for Partners directly affected by the evaluation's recommendations, all Partners were provided the opportunity for responding or generally commenting on this report, the evaluation and participation in the Security Certificate Initiative. Additionally, all Partner organizations have noted the caveat attached to recommendation 3, and are taking efforts, accordingly, for quantifying resourcing-related matters. Partner input follows below.

– Public Safety Canada –

Response: Public Safety Canada accepts and fully supports recommendation 1.

Public Safety Canada will continue to work with its Government partners to develop and implement measures to improve the governance structure and horizontal coordination among key departments and agencies involved in the security certificates and related processes.

Public Safety Canada agrees that a clear governance structure and effective horizontal coordination is key to the management of the complex, multifaceted issues pertaining to cases of inadmissibility on security grounds. It is important to note that in the past months Public Safety Canada has been working within the current governance structure of the interdepartmental Assistant Deputy Minister Committee, in particular, to improve the interdepartmental coordination and management of these cases. As a result, certain improvements to the manner in which the Security Certificate Initiative is managed have already been made, such as the implementation of weekly teleconferences to permit faster information-sharing and consultation across agencies.

Public Safety Canada also recognizes that further, long-term changes are required to help ensure that the governance structure and horizontal coordination is well adapted to respond to evolving circumstances and requirements. As such, Public Safety Canada and its partners have been re-examining how the Government manages, from the outset, cases of inadmissible foreign nationals and permanent residents in Canada who are deemed inadmissible on the grounds of security. This process is still ongoing, and will result in specific recommendations for the Government's consideration.

– Canada Border Services Agency –

Response: Canada Border Services Agency accepts and fully supports Recommendation 2.

Canada Border Services Agency agrees that coordination and support provided to front-line staff is essential to effective compliance-monitoring and concurs with the recommendations made in this evaluation.

In consultation with the Department of Justice, Canada Border Services Agency has commenced steps to ensure that standard operating procedures are up-to-date. Revisions to standard operating procedures and policy manuals, with respect to security certificates monitoring, are being completed by September 2010 and will be distributed to the regions. Policies and standard operating procedures will continue to be updated as required.

– Canadian Security Intelligence Service –

Response: Canadian Security Intelligence Service accepts and fully supports recommendation 3.

The evaluation concluded that there is a continuing need to process security certificate cases through the Federal Court and that without the Security Certificate Initiative, there would be gaps in the protection of Charter rights, national security and classified information. It further concluded that the Security Certificate Initiative strikes the appropriate balance between protection of Canada and Canadians from risks presented by inadmissible foreign nationals and permanent residents while maintaining the core values of freedom, democracy, respect for human rights and the rule of law. It was also recognized that the Courts Administration Service and Canadian Security Intelligence Service, including the Canadian Security Intelligence Service litigation function, have resourcing issues that need to be addressed if they are to provide a similar level of support in the future.

A key recommendation, as it relates to Canadian Security Intelligence Service, is that Canadian Security Intelligence Service fully quantify the financial impact on the Security Certificate Initiative, since the *Charkaoui II* disclosure decision, in order to anticipate or inform future funding requirements.

Canadian Security Intelligence Service has now taken efforts to quantify both the human and financial resources required to continue to manage the workload for the current and future Security Certificate Initiative cases. Quantification of the financial impact of the Security Certificate Initiative has been done in cognizance of its implications for Canadian Security Intelligence Service in areas such as the Security Screening Branch, Information Management/Information Technology Services and administrative support.

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To mitigate risks associated with the impact of the Security Certificate Initiative, Canadian Security Intelligence Service will realign the organization in the best way it can by resource re-allocation from other areas within the organization. This course of action will ensure that Canadian Security Intelligence Service continues to support the ongoing litigation obligations under the *Immigration and Refugee Protection Act*.

– Department of Justice –

Response: Department of Justice accepts and fully supports recommendation 3.

The Special Advocate Program will continue to monitor financial implications associated with fulfilling the Minister of Justice's statutory obligations in relation to section 85 (1) and section 85 (3) of the *Immigration and Refugee Protection Act*. The Department's ability to appropriately support the Minister of Justice is dependent on securing ongoing resources for the Special Advocate Program

The Department of Justice has already taken steps to improve the tracking and reporting of costs related to litigation and advisory legal services. These costs have been monitored closely following the *Charkaoui II* decision and the information is used to inform the decisions regarding current and future funding requirements.

– Courts Administration Service –

Response: Courts Administration Service accepts and fully supports recommendation 3.

Courts Administration Service agrees with the recommendation that future funding requirements will need to be fully quantified. Courts Administration Service is participating in the horizontal funding request initiative process currently going forward to ensure that its requirements are all included.

There are currently three security certificates before the Federal Court and it is expected that all three will impact the Court's resources for the next fiscal year (2010-2011). According to Public Safety Canada, there are three active cases before the Immigration and Refugee Board of Canada pursuant to section 86 of the *Immigration and Refugee Protection Act* and a further six section 86 cases that are under consideration for which funding will be required.

Courts Administration Service will continue to monitor its caseload and all related activities on a weekly basis to identify all the requirements necessary to support the judiciary and the Special Advocate Program.

Courts Administration Service will also renew its memorandum of understanding with the Department of Justice for the administration of the Special Advocate Program before March 31, 2010. This will continue to provide administrative support and services to Special Advocates.

– Citizenship and Immigration Canada –

Citizenship and Immigration Canada is in agreement that the Security Certificate Initiative remains relevant in terms of complying with the Supreme Court of Canada decision. Citizenship and Immigration Canada further acknowledges that Division 9, which addresses identified gaps in the *Immigration and Refugee Protection Act*, supports its ability to assess applications received from individuals who may be inadmissible on national security grounds, and to consider classified information in rendering a decision on their admissibility. There is a need for continuous and increased capacity-building efforts as processing national security cases expands. As it moves forward, the ability for Citizenship and Immigration Canada to use such information in the processing of applications may lead to future needs in the areas of litigation and representation of the Government of Canada in court proceedings.

Citizenship and Immigration Canada further supports the horizontal approach of the Initiative as it has ensured that Partners were able to continue working on their respective activities, while collaborating on common program and/or policy concerns. There is a need to build on the existing foundation to carry out Partners' respective activities, as well as to work together on improving programs and policies related to the Initiative and the objectives of the *Immigration and Refugee Protection Act*; specifically, to protect the health and safety of Canadians and to maintain the security of Canadian society. Citizenship and Immigration Canada is pleased with the efforts and progress to date of all Partners and remains committed to the Security Certificate Initiative in conjunction with other participating Partners.

– Department of Foreign Affairs and International Trade –

Foreign Affairs and International Trade remains committed to the Security Certificate Initiative in conjunction with other participating Partners.

Foreign Affairs and International Trade has participated in several sharing exchanges on diplomatic assurances with likeminded countries and ongoing bilateral discussions have proven to be helpful in framing approaches to negotiations of assurances. [

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1. Introduction

This is the 2009-2010 Evaluation of the Security Certificate Initiative (SCI). This evaluation was conducted as prescribed by the Results-based Management and Accountability Framework for the SCI that was developed in collaboration with the participating departments.

Evaluation assesses the extent to which a program, policy or initiative addresses a demonstrable need, is appropriate to the federal government, and is responsive to the needs of Canadians. It also studies the extent to which effectiveness, efficiency and economy have been achieved by a program, policy or initiative.

The purpose of the SCI is to support the Government of Canada's responsibility to balance the protection of Canadians from risks presented by inadmissible foreign nationals and permanent residents, with the maintenance of core values of freedom, democracy, respect for human rights and the rule of law. The SCI involves immigration processes, such as the security certificate process, that use classified information. This is a multifaceted and difficult policy and operational challenge that many countries face.

2. Profile

2.1 Background

The SCI is a horizontal initiative led by Public Safety Canada (PS) that includes the participation of the following six departments and agencies:

- Justice Canada (DOJ);
- Canada Border Services Agency (CBSA);
- Citizenship and Immigration Canada (CIC);
- Canadian Security Intelligence Service (CSIS);
- Courts Administration Service (CAS); and,
- Foreign Affairs and International Trade (DFAIT).

Security Certificate and Other IRPA Division 9 Processes

Division 9 of the *Immigration and Refugee Protection Act* (IRPA) allows the Government to protect classified information in immigration proceedings if its disclosure would be injurious to national security or endanger the safety of any person. Section 77¹ of Division 9 defines the use of security certificates (SCs), which have existed in law for more than 30 years. SCs are used in exceptional circumstances to remove from Canada permanent residents and foreign nationals,

¹ Referral of certificate – section 77. (1) The Minister of Public Safety and the Minister of Citizenship and Immigration shall sign a certificate stating that a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and shall refer the certificate to the Federal Court.

who are inadmissible on grounds of serious criminality, organized criminality, security, or violation of human or international rights when the inadmissibility determination relies on classified information. Once signed by the Minister of Public Safety and the Minister of Citizenship and Immigration, a security certificate is referred to the Federal Court, which determines whether it is reasonable. If deemed reasonable, the security certificate constitutes a removal order against the named individual. Sections 86² and 87³ of Division 9 allow for the protection of information in other immigration proceedings heard by the Immigration and Refugee Board of Canada or during judicial review of such proceedings by the Federal Court, respectively.

The protection of classified information is necessary for national security as this information may identify or tend to identify:

- a) Interest in individuals, groups or issues, including the existence or absence of past or present files or investigations, the intensity of investigations, or the degree or lack of success of investigations;
- b) Human sources of information or the content of information provided by a human source; and,
- c) Relationships with foreign security and intelligence agencies and would disclose information received in confidence from such sources.⁴

In 2009, CSIS faced a fundamental dilemma: to disclose information related to its tradecraft and sources; or to withdraw that information from the case, causing a security certificate to collapse. It chose the path that it determined would cause the least long-term damage to Canada and withdrew the information, resulting in the security certificate being nullified by the Courts.

Security Certificate Initiative

On February 23, 2007, in *Charkaoui v. Canada*⁵ (often referred to as *Charkaoui I*), the Supreme Court of Canada found that certain aspects of the SC process did not comply with section 7 of the *Canadian Charter of Rights and Freedoms*. The Court reviewed a number of possible alternatives that provided increased procedural fairness. The Supreme Court found that the SC process did not sufficiently protect the interests of the individual subject to a security certificate or allow them to sufficiently know the case against them. Thus, in February 2008, Parliament amended IRPA to bring the SC process and other immigration proceedings that rely upon classified information in line with the Charter.

² Application for non-disclosure – section 86. The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to “judge” be read as a reference to the applicable Division of the Board.

³ Application for non-disclosure - judicial review: section 87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Special advocate - 87.1. If the judge during the judicial review, or a court on appeal from the judge’s decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.

⁴ CSIS affiant’s testimony, reported in *Khawaja v. Canada*, 2007 F.C. 490 at para. 132.

⁵ *Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350

These amendments introduced the following changes to IRPA:

- Appointment of Special Advocates (SAs) to protect the interests of foreign nationals and Permanent Residents *in camera* (closed) immigration proceedings (SCs, sections 86 or 87);
- Parallel processing of SC reasonableness decisions and Pre-removal Risk Assessment (PRRA)/Danger Opinions⁶;
- Regular detention reviews⁷ every 6 months for foreign nationals (this right had previously only been required for permanent residents);
- Right to appeal judges' final decisions, subject to the judge certifying a question of general importance;
- Arrest without warrant of SC subjects upon breach of conditions of release (with a legal requirement to be brought before a judge within 48 hours); and,
- Protection of classified information used to render decisions on in-Canada applications for permanent residence and extensions to temporary residence status.

A key feature of SCI is the introduction of the SA into security certificate and other *in camera* processes (section 86 or 87). SAs protect the individual's interests, but do not have a solicitor-client relationship with the SC subject in order to avoid any conflict of interest between their duty to the SC subject and the need to protect classified information. Thus, the SAs are expected to question witnesses and test whether information deemed as classified could be shared with the SC subject. They may communicate freely with the SC subject prior to seeing the classified information. SAs may see all relevant classified information on file, subject to privilege; however, after having seen the classified information, they may only communicate with another person (including the SC subject) about the proceedings upon authorization from the Federal Court judge. In addition to their role in SC cases, SAs are appointed in IRPA section 86 cases to participate in hearings before the Immigration and Refugee Board of Canada, and may be assigned in the judicial review of such hearings by the Federal Court (IRPA section 87).

Canada is a signatory to the *United Nations Security Council Resolution 1373*, which requires states to "Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens". Canada is also a signatory to the *United Nations Convention against Torture*, which explicitly prohibits state parties from returning a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In light of Canada's international obligations, the SCI sets out to facilitate the deportation of inadmissible individuals, through work on diplomatic assurances and support for other international efforts.

⁶ The Pre-Removal Risk Assessment (PRRA) provides an analysis of the risks faced by the subject upon removal from Canada and the Danger Opinion provides an assessment of the danger the person poses to the security of Canada.

⁷ Detention review - a formal review done by the Immigration Division of the Immigration and Refugee Board of Canada of the reasons for detention by CBSA of a foreign national or permanent resident under the *Immigration and Refugee Protection Act*.

2.2 Resources

Total funding for the SCI over two years is \$59.3 million.⁸

Table 1 summarizes the funding distribution. It is noted that this funding is not ongoing and will sunset on March 31, 2010.

Table 1: SCI Funding by Partner by Fiscal Year (in millions \$)		
Partner	2008-2009	2009-2010
Public Safety Canada (PS)	0.58	0.68
Justice Canada (DOJ)	9.59	8.16
Canada Border Services Agency (CBSA)	10.12	4.60
Canadian Security Intelligence Service (CSIS)	3.87	3.80
Citizenship and Immigration Canada (CIC)	4.47	3.56
Courts Administration Service (CAS)	3.19	2.74
Foreign Affairs and International Trade (DFAIT)	0.47	0.47
SUB-TOTAL	32.29	24.01
Accommodation (PWGSC) ⁹	1.71	1.29
TOTAL	34.00	25.30

2.3 Partner Roles and Responsibilities

Individual partner departments and agencies involved in immigration proceedings initiated under Division 9 of IRPA have specific roles and responsibilities, as represented in the summary of Partner activities in Table 2. At the working level, main interactions occur between CBSA, CIC and CSIS who use work agreements to delineate information-sharing responsibilities. In terms of cross-cutting participation, each department and agency (except for the Courts Administration Service) receives regular advice and direction from DOJ lawyers, who are assigned to them as departmental counsel. Another instance of cross-cutting participation has been between the DOJ Special Advocate Program and CAS, where responsibilities have been delineated via a memorandum of understanding. DOJ also coordinates the Government's position on the various cases and instructions from client departments, discusses litigation strategy, and reviews court submissions. PS manages and coordinates relationships as the policy and legislative lead of the horizontal initiative.

⁸ CBSA was allocated \$10.12 million to address expenditures for two years: \$5.37 million in 2007-2008; and, \$4.75 million in 2008-2009.

⁹ These amounts are included in the allocation instruments and transferred to Public Works and Government Services Canada.

Table 2: SCI Partner Core Activities	
Partner	Summary
PS	<ul style="list-style-type: none"> Coordinate policy development and act as legislative and policy lead. Coordinate with Partners on implementation, litigation-related developments and policy decision-making.
DOJ	<p>Advisory and Litigation Services:</p> <ul style="list-style-type: none"> Play integral role in the management and coordination of legal advice and litigation activities, respectively, for DOJ and the Government of Canada. Provide guidance, direction management, and legal and policy advice to Client Departments (SCI Partners - PS, CBSA, CSIS, and CIC). Participate in litigation coordination activities for litigation related to SCs and related IRPA proceedings before the Immigration and Refugee Board of Canada, Federal Court and Federal Court of Appeal, and Supreme Court of Canada. Litigate detention reviews, PRRA and Danger Opinion decisions and appeals, reasonableness hearings, challenges to indefinite detention, challenges to removal to torture, and complaints regarding the Kingston Immigration Holding Centre. Prepare responses to international complaints with DFAIT. <p>Special Advocate Program:</p> <ul style="list-style-type: none"> Establish and coordinate an independent process for the Minister of Justice's selection onto the list of persons who may act as SAs. Publish the list of persons who may be appointed as SAs as per the legislation and facilitate the communication with the choice of an SA by a foreign national or permanent resident. Coordinate the professional development for members of the SA roster. Provide support and resources to the SAs assigned to cases. Administer and pay SA fees, disbursements and travel-related expenses.
CBSA	<ul style="list-style-type: none"> Manage litigation and coordinate with Partners. Provide assessments to CIC regarding PRRA and Danger Opinions. Provide input, evidence and testimony for detention reviews and judicial reviews. Conduct compliance monitoring of SC subjects released on conditions after the <i>Charkaoui I</i> Supreme Court of Canada decision. Collaborate with DFAIT [*] Provide input to assist Justice in responding to Court or opposing counsel on legal and operational matters. Write individualized risk assessment reports on security certificate cases. Conduct security checks on individuals in direct contact with released security certificate cases. Collaborate with the Royal Canadian Mounted Police and Correctional Service Canada on security matters while security certificate subjects are in detention.
CSIS	<ul style="list-style-type: none"> Update and rewrite Security Intelligence Reports (SIRs) and unclassified summaries. Provide input to PRRA and Danger Opinions. Assist CBSA with monitoring of SC subjects released on conditions. Testify at reasonableness hearings, detention reviews, judicial reviews and other court proceedings. Security verification and recommendation for Special Advocates and CIC officers, who process APRs that include classified information.
CIC	<ul style="list-style-type: none"> Process PRRA and Danger Opinions. Process in-Canada APRs and temporary resident status extensions that include classified information. Participate in court hearings.
CAS	<ul style="list-style-type: none"> Support the hearing of detention reviews, applications to vary terms and conditions, PRRA/Danger Opinions and reasonableness hearings. Provide facilities for protection and review of secure material, and onsite support to SAs (in accordance with memorandum of understanding with DOJ).

Table 2: SCI Partner Core Activities	
Partner	Summary
DFAIT	<ul style="list-style-type: none"> • [] * • Respond to international concerns. • [] *

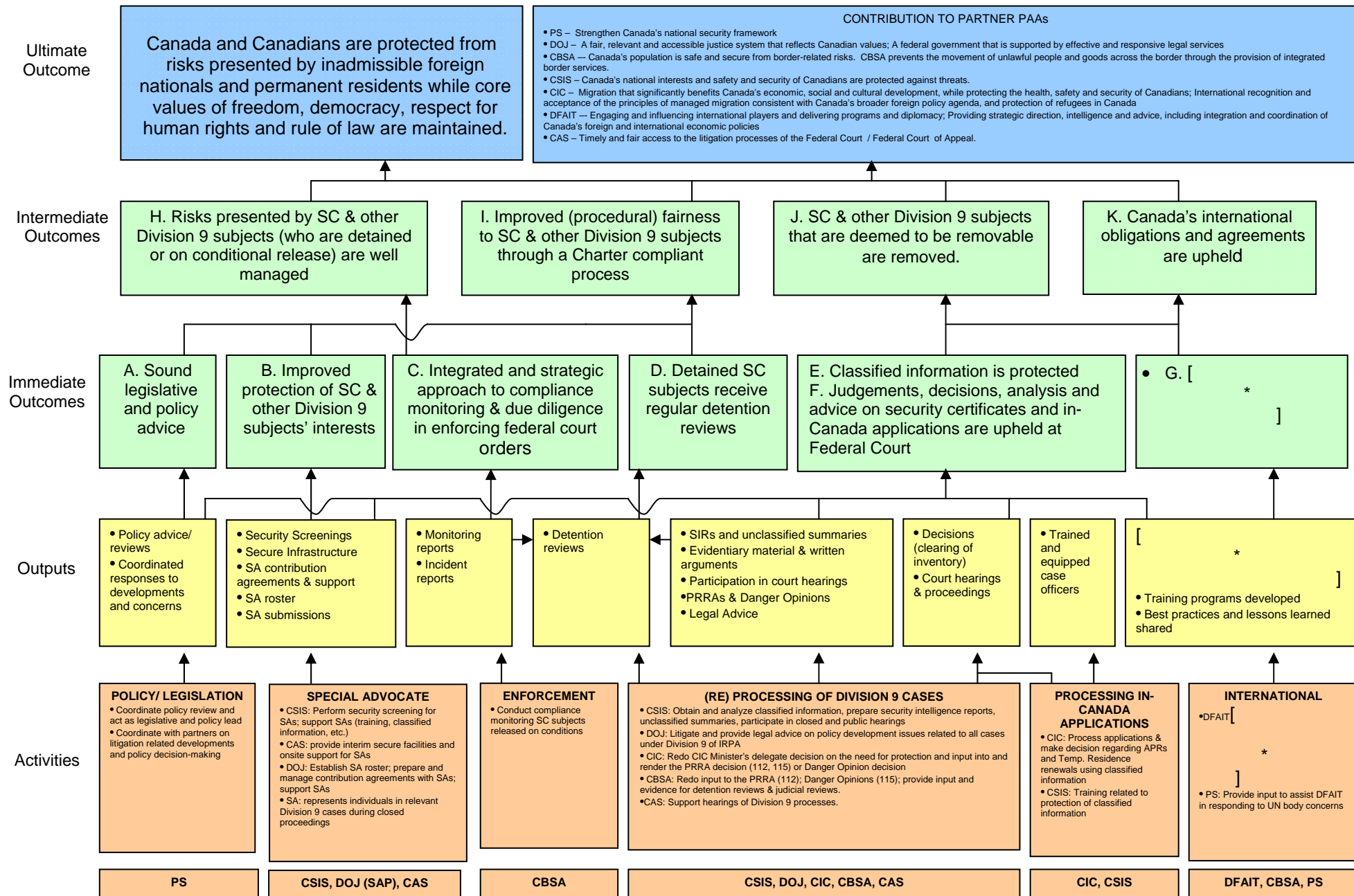
2.4 Horizontal Governance

PS fulfills its responsibility for managing and coordinating the relationship among Partners through a formal governance structure led by the Assistant Deputy Minister (ADM) Steering Committee on Security Certificates, established to oversee the implementation and operation of SCI-related activities, including overarching governance issues, case management and policy development. The ADM Steering Committee also provides a mechanism through which information can be referred upwards in a coordinated manner for information or decision.

2.5 Logic Model

The logic model for the SCI is presented in Exhibit 1. It is a visual representation that links the Initiative's activities, outputs and outcomes, provides a systematic and visual method of illustrating the program theory and shows the logic of how the SCI is expected to achieve its objectives. It also provides the basis for developing performance measurement and evaluation strategies. The logic model for the SCI was developed as part of the Results-based Management and Accountability Framework for the SCI that was finalized in January 2008 with the participation of all SCI Partners.

Exhibit 1: Logic Model for the Security Certificate Initiative



3. About the Evaluation

3.1 Objective

The objective of this evaluation is to provide Canadians, Parliamentarians, Ministers, central agencies and deputy heads an evidence-based, neutral assessment of the relevance and performance of the Security Certificate Initiative (SCI).

3.2 Scope and Context

Coverage for this evaluation includes only the SCI, the group of funded activities supporting the described amendments to IRPA. **An examination of the SC process itself is outside the scope of the evaluation.** This nuance is critical to the evaluation and it is important to note. The evaluation examines the continued relevance of the SCI and the performance of the SCI through the funded activities (shown in Table 2), leading to outputs and outcomes, as illustrated in the logic model at Exhibit 1. Notwithstanding this nuance, a discussion of SCI activities, in some cases, is impossible without also mentioning the SC process itself.

Public Safety Canada conducted this evaluation between May and December, 2009. It is noted that the evaluation provides insight into a moving target, meaning that the situation is not constant and further change could and likely will occur between the period covered by the evaluation and its reporting date. While the funding of the SCI sun-sets at the end of March, 2010, the legislative framework remains in place. Of the five security certificates re-issued in February 2008, only three remained by 2009 calendar year-end – one had been quashed in December while another had been nullified (cancelled) in October; neither decision is being appealed. The remaining three are scheduled to proceed beyond the expiry of the current funding initiative. Additionally at end of 2009, two cases currently before the Immigration Division (of the Immigration and Refugee Board of Canada) have required the appointment of SAs, and ongoing detention reviews in British Columbia have required the appointment of Special Advocates.

3.3 Issues

The following research questions formed the basis for the evaluation. Linkages to the core issues of the Treasury Board of Canada Secretariat (TBS) *Directive on the Evaluation Function* are shown in footnotes.

Relevance

1. Does the SCI continue to address a demonstrable need and is it responsive to the needs of Canadians?¹⁰

¹⁰ Links with Core Issue 1 – Continued Need for Program: an assessment of the extent to which the program continues to address a demonstrable need and is responsive to the needs of Canadians.

Performance

2. To what extent has progress been made toward expected outcomes and to what extent have SCI outputs contributed to these outcomes?¹¹
 - a. Are there challenges or unintended impacts inhibiting achievement of outcomes?
How should this inform the program theory and design?
3. Is the SCI being delivered efficiently to produce outputs and progress towards expected outcomes?¹²

The following two TBS core issues were not explicitly or formally included in the evaluation (that is, they do not form part of the evaluation matrix contained in Appendix A):

- Core issue 2: Alignment with Government Priorities - assesses the linkages between program objectives and i) federal government priorities and ii) departmental strategic outcomes
- Core issues 3: Alignment with Federal Roles and Responsibilities - assesses the role and responsibilities for the federal government in delivering the program.

Core issue 2 was not studied extensively during the evaluation because it is clear that national security remains a federal priority, and it is evident that the linkages to SCI Partners' strategic outcomes, noted in Table 3, remain valid, 18 months after the implementation of the SCI.

With reference to core issue 3, the roles of SCI partner departments/agencies such as: the protection of public safety, immigration processes, Federal Court processes, and international activities are clearly federal responsibilities that could not be undertaken by the provinces or the private sector.

Table 3: Security Certificate Initiative Partners – Linkages to PAA Structures	
Partner	Strategic Outcome / Operational Priority
PS	Strengthen Canada's national security framework.
DOJ	A fair, relevant and accessible justice system that reflects Canadian values. A federal government that is supported by effective and responsive legal services.
CBSA	Canada's population is safe and secure from border-related risks. CBSA prevents the movement of unlawful people and goods across the border through the provision of integrated border services.
CSIS	Canada's national interests and safety and security of Canadians are protected against threats.

¹¹ Links with Core Issue 4 – Achievement of Expected Outcomes: an assessment of progress toward expected outcomes (including immediate, intermediate and ultimate outcomes) with reference to performance targets and program reach, program design, including the linkage and contribution of outputs to outcomes

¹² Links with Core Issue 5 – Demonstration of Efficiency and Economy: Includes an assessment of resource utilization in relation to the production of outputs and progress toward expected outcomes.

Table 3: Security Certificate Initiative Partners – Linkages to PAA Structures

Partner	Strategic Outcome / Operational Priority
CIC	Migration that significantly benefits Canada's economic, social and cultural development, while protecting the health, safety and security of Canadians. International recognition and acceptance of the principles of managed migration consistent with Canada's broader foreign policy agenda, and protection of refugees in Canada.
CAS	The Public has timely and fair access, to the litigation processes of the Federal Court of Appeal and the Federal Court.
DFAIT	Engaging and influencing international players and delivering programs and diplomacy. Providing strategic direction, intelligence and advice, including integration and coordination of Canada's foreign and international economic policies.

3.4 Methodology

The evaluation was conducted in accordance with the TBS *Standard on Evaluation for the Government of Canada*. To assess the evaluation issues and questions, the evaluation team used the Evaluation Matrix at Appendix A, which prescribes the following lines of evidence:

Review of Federal Court Decisions

A total of 30 Federal Court decisions related to the current SC cases were reviewed. These include all publicly available decisions from February 2008 to September 2009, a list of which is contained at Appendix B.

Document Review

Seventy-six documents were reviewed including: program inception documents, legislation and legal statutes, relevant court cases, international agreements, program manuals, agendas, minutes of meetings, and address notes for a speech, a list of which is contained at Appendix C.

Literature Review

The literature review was used primarily in studying the relevant aspects of the evaluation. Documents included studies by subject matter experts, international comparisons by foreign governments and organizations and Senate Committee Reports. A list of these documents is contained in Appendix D.

Interviews

Thirty-nine interviews were conducted using interview guides tailored to particular perspectives. Interviewees were chosen based on their extensive knowledge of their domain within the SCI, and were considered key viewpoints with regard to the topics discussed during interviews.

Several factors were considered in the choice of interviewees. In compiling the interview list, focus was placed on interviewees that represented target audiences for the outcomes shown on the logic model; whereas less focus was placed on interviewing program management (program management comprised only 7 of the 39 interviewees). For example, senior management was a target audience for outcome A, CIC and CBSA regional program staff members were target audiences for outcomes E, F and C, respectively, while law practitioners such as Special Advocates and external public counsel for SC subjects were target audiences for outcomes B and

I. Subject matter experts included those who have been involved with the SC process for a significant period of time and have published literature on the issue. Finally, in choosing the list of interviewees, attempts were made to achieve a full range of perspectives, including senior government officials, program staff, SAs that represent the SC subjects, and public counsel for the SC subjects. Interview perspective, group and distribution are shown in Table 4.

Table 4: List of Interviewees		
Interview Perspective	Interview Group	Number of Interviews
Senior Management	Senior Management – ADM level and above	11
Program Management	Program Management	7
Program Staff: • Decision-maker (program level) • CBSA Regional (enforcement)	Regional Program Staff CIC CBSA	7
Law Practitioner	Litigators for the Crown	3
	Special Advocates	3
	External Public Counsel for SC Subjects	3
	Subject Matter Experts	5
TOTAL		39

Analysis of Program and Cost Data

Program and cost data were analyzed as per the Evaluation Matrix contained in Appendix A.

Media Review

Approximately 400 pages of media articles were supplied to the evaluation team for inclusion in the study.

3.5 Limitations of the Methodology

1. Case Comparison: It had been envisioned that during the course of the evaluation one of the lines of evidence would be an analysis of files held within the Federal Court registry, including the review of proceedings prior to the amendments to IRPA and those that have occurred since, which includes hundreds of entries on each of the five SC cases. This exploration would have provided a comparison of the amount of disclosure that had been produced for the same five SC cases prior to the amendments and after under the new SC regime. Unfortunately, due to the volume of material, this analysis was not possible within the cost and time constraints of the evaluation.
2. Classified Information not Available: Classified court decisions did not form part of the analysis. In light of this, the evaluation has relied on the publicly available court decisions, which include unclassified summaries of the evidence, presented at *in camera* proceedings.

3.6 Limitations on Findings

The limitations noted below are those that occurred outside of the evaluation methodology. That is, despite best efforts to implement the evaluation methodology, the examination became limited by the following factors:

1. The SCI has only been in place for 18 months, thus limiting the data and not allowing for a discussion of trends.
2. Examination of SCI logic model outcomes (B, C, D, H and I) is related exclusively to SC cases. Assessment of these outcomes, as they relate to “other Division 9 subjects”, was possible only as they relate to the current Division 9 cases – these cases are currently in the pre-hearing phase.
3. Although the SC process involves both open court and *in camera* hearings, interviewee perspectives were limited to a discussion of unclassified material. Very few interviewees know the full extent of the information that surrounds the SC cases, so few could reflect on the entirety of the SCI and comment authoritatively. Additionally, in some cases, interviewees spoke of the SC in general instead of the SCI; this made the preparation of findings challenging, particularly with respect to the question of relevance and achievement of some outcomes.
4. Examination of logic model outcomes G, J and K does not form part of the findings or conclusions contained in this report as there have been no findings of reasonableness rendered; thus, there has been no need for removals or diplomatic assurances.

3.7 Protocols

Engagement and Collaboration

An interdepartmental working group was created to support the planning and conduct of this evaluation. Each SCI Partner department/agency had a representative from the two components of this working group: the policy/program management stream; and, the evaluation function stream. Public Safety Canada, as lead for the SCI, chaired this dual-discipline working group.

The working group forum was used to provide input to evaluation planning, and identify key stakeholders plus possible lines of evidence. The working group membership was also used to coordinate the review of draft reports to improve their quality. Collaborative participation, with its multi-party effort and engagement, greatly enriched the evaluation process and enhanced the reporting product.

Approvals

Each SCI Partner department/agency has accepted and approved the final draft evaluation report, including appropriate contribution to its combined management response and action plan, which was presented to the Public Safety Canada Evaluation Committee for consideration and recommendation to the Deputy Minister of Public Safety, for final approval.

4. Findings

The sub-sections that follow present key findings and conclusions related to relevance and performance of the SCI.

4.1 Relevance

The SCI's purpose is to support the Government in achieving what can be termed an "essential" balance"¹³ between values of freedom, democracy and respect for human rights and risks presented from inadmissible foreign nationals and permanent residents.

4.1.1 Values of Freedom, Democracy and Respect of Human Rights

In *Charkaoui I*, the Supreme Court of Canada found certain aspects of the SC process under the previous legislation to be in violation of the *Canadian Charter of Rights and Freedoms*. This ruling noted that the process "fails to assure the fair hearing that section 7¹⁴ of the *Canadian Charter of Rights and Freedoms* requires before the state deprives a person of life, liberty or security of the person . . . and does not conform to the principles of fundamental justice." In its design, the SCI provided the administrative, training and funding structures necessary to implement the SA program (role and roster) and comply with the Court's ruling. At this juncture, 18 months after the implementation of the SCI, the need for SAs still legally exists since SC cases continue to proceed through the courts, and there are pending cases in which section 86 of IRPA has been invoked and will include a role for an SA. Further, the statutory requirement remains in place under Division 9 of IRPA. Interviewees noted that there might be less disclosure without the SAs.

4.1.2 Canadians are Protected from Risks Presented by Inadmissible Foreign Nationals

A discussion of the SCI's continuing relevance in terms of the protection of classified information and national security must be premised on the notion that if the amendments to IRPA had not been implemented through the SCI, the SC process would no longer exist. The ability to protect classified information in other immigration proceedings, such as hearings before the Immigration and Refugee Board of Canada (section 86) would also not exist in such a scenario. As such, the continued relevance of protecting national security and classified information includes a discussion of both the SC and the SCI.

¹³ "National Security and Democratic Freedom: A False Dichotomy" – address by John H. Sims, Deputy Minister of Justice and Deputy Attorney General of Canada (Conference of the Canadian Association for Security and Intelligence Studies International Conference – 2008), wherein government actions in support of 'national security' and 'conformity with constitutional rights' create a tension that lies at the heart of modern democratic governance.

¹⁴ *Canadian Charter of Rights and Freedoms*, section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

4.1.2.1 Need to Protect Classified Information

Literature review notes that “intelligence cooperation and sharing are indispensable for effective counter-terrorism”, and Canada must rely on allied agencies to assist it in intelligence gathering.¹⁵ In many cases, these allied services demand that Canada reveal neither the content, nor the source of the information that they provide to Canada. As a net importer of classified information, it is paramount that Canada be perceived as a trustworthy partner. As such, Canada honours the “third-party rule,” whereby Canadian security agencies would not release another’s intelligence without prior authorization.

If security agencies that prepared the security certificates could not have been certain about the secure use of their information and that of third party agencies that provided the information, it is much more likely that such sensitive information would not have been available for use by Ministers than the likelihood that it would have been disclosed to the public. The extent to which the agencies will go to protect the information is demonstrated by the withdrawal of information in the Charkaoui security certificate case, which resulted in the nullifying of the security certificate rather than in the releasing of sensitive information.

4.1.2.2 Need to Control Threats

The SC process also provides for the detention and/or imposition of terms and conditions where there are reasonable grounds to believe the individual is a danger to national security, or to the safety of any person, or is unlikely to appear at a proceeding, or for removal, or for the imposition of terms and conditions if the individual is released. SCI foundation documents note that without the changes to IRPA and their implementation through the SCI, those who had been named in SCs may have been either released, or the classified information upon which the Government had built its case may have been made public. Therefore, the detention, monitoring and deportation of individuals inadmissible on grounds of security are ways in which the SCI addresses the need to reduce gaps in national security by controlling the threat posed by such individuals.

4.1.2.3 Need to Meet International Human Rights Obligations

Interviewees indicated that a number of different models in use around the world were studied during the development of then-Bill C-3 – *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*.

DFAIT has carefully followed developments in Canadian jurisprudence and international practice, which indicates that enhanced assurances, could be sought in appropriate cases (including SCI cases). Such assurances would be specific to individual cases, and may include objective means of verifying that the individual is not being subject to torture upon his/her return to his/her country of origin, such as monitoring of the individual by a third party, and/or independent medical exams.

¹⁵ Rudner, M. Challenge and Response: Canada's Intelligence Community and the War on Terrorism. *Canadian Foreign Policy*. Volume 11, Number 2 (Winter 2004). P..17-40.

In this regard, DFAIT has participated in several information-sharing exchanges with likeminded countries, such as [*], the United Kingdom (UK), [

] The UK has a relatively advanced Deportation with Assurances program, under which it has concluded memoranda of understanding on diplomatic assurances with several countries. [

*] These experiences have proven to be invaluable in terms of identifying challenges and lessons learned for Canada. The ability to continue international environmental scanning and engagement activities in order to learn and apply best practices will be necessary in the SCI context as the current SC cases and upcoming section 86 cases advance through the Federal Court and the immigration process.

While no diplomatic assurances have been obtained to date, DFAIT participated in a successful interdepartmental process [

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4.2 Performance – Effectiveness

Since the inception of the SCI, developed to implement the February 22, 2008, amendments to IRPA, five SCs were re-issued against individuals who had originally been subject to a certificate issued under the previous legislation. No new security certificates have been issued but two Special Advocates have been assigned to a proceeding before the Immigration Division (of the Immigration and Refugee Board of Canada) and another appointment is pending. In addition, during the period covered by this evaluation, the Special Advocate Program was created and implemented, and SC subjects were either detained or monitored for compliance with terms and conditions of release.¹⁶

4.2.1 Protection of SC Subjects' Interests

Some interviewees agreed that the SCI has succeeded in supporting the achievement of the “essential” balance referred to in section 4.1. Those who disagreed were evenly split in their sentiments with one half saying that the SCI leans toward being too protective of rights, while the other half indicated that it is too concerned with risks.

Some senior managers in the federal government indicated that balance is being achieved because risks presented by the SC subjects had been managed and, in some cases, conditions had been relaxed over time. They also indicated that SC subjects had full access to the courts, without compromising classified information. Responses from program management and staff echoed the sentiments of their superiors; however they also expressed concerns over the drawn-

¹⁶ To demonstrate the evolving nature of using sensitive information in IRPA proceedings, the Immigration Division of the IRB has appointed 4 special advocates in the detention review hearings of 25 applicants in British Columbia.

out court process, the loosening of conditions on SC subjects, and the possibility that once they are deemed inadmissible, it will not be possible to remove individuals that pose a risk.

The Minister of Justice has established a list of persons (roster), who may act as a Special Advocate, and has published the names on the Department of Justice website. The roster is perceived by many of the interviewees as adequate. Interviewees viewed SAs as being extremely reputable, competent and experienced lawyers. As at December 31, 2009, there were 24 lawyers on the roster, seven of whom are bilingual (English/French). Eight special advocates were appointed to proceedings before the Federal Court or the Immigration and Refugee Board of Canada. All of the active proceedings at the end of 2009 were proceeding in English. The legal experience of the Special Advocates roster ranges from 14 to 43 years and is drawn from the criminal, immigration and administrative law bars. Some interviewees believe language capabilities of the roster are adequate to represent the interests of foreign citizens and permanent residents involved in Division 9 of IRPA proceedings.

In terms of providing services, potential conflicts of interest issues were resolved in April 2008, prior to the appointment of the SAs to the SC cases. *In camera* hearings commenced in September 2008. A significant number of hours have been billed by SAs, averaging 157 days per case in fiscal year 2008-2009, including attendances at both open and *in camera* hearings. The Ministers raised the issue of potential conflict of interest due to the SC subjects' selection of roster members who had either previously acted as public counsel or were engaged in related litigation against the federal government. Resolution of the Ministers' concerns involved the selected SAs withdrawing from further representation in the related litigation against the federal government.

The SAs interviewed for the evaluation noted that the Special Advocate Program (SAP) within the Programs Branch of the Department of Justice is doing an effective job. The SAs noted outstanding support issues when they were working on site with the secure information. These included the need for additional support staff, paralegals or junior lawyers; and, the need for a compatible electronic platform. The review of court decisions also supports the finding that administrative support is required by the SAs. Through an order on February 12, 2009, the Court appointed an individual to provide administrative assistance to the SAs – the provision of administrative assistance has been provided to SAs only in this case. In the decision the judge stated “that section 85(3) of IRPA requires the Minister of Justice to ensure that Special Advocates are provided with adequate administrative support and resources.”¹⁷ In the context of the *Charkaoui II* decision, which resulted in an unforeseen expansion of disclosure obligations after the coming-into-force of *Bill C-3*, “it is consistent with the intent of the legislator to read ‘adequate administrative support and resources’ as encompassing limited forms of human support. As acknowledged at the public hearing on February 12, 2009, counsel for the Ministers has access to support staff that is able to assist them in organizing the information in the holdings of the Service.”¹⁸

Evidence shows that the involvement of Special Advocates to protect the interests of the foreign national or permanent resident in Division 9 proceedings is an enhancement over previous

¹⁷ Source: paragraph 18 and 19 of Federal Court citation 2009fc173

¹⁸ Source: paragraph 18 and 19 of Federal Court citation 2009fc173.

practices. Many interviewees agreed that compared to the previous procedure under IRPA, interests are now better protected through SA interventions advocating on behalf of the SC subject during *in camera* proceedings. The extensive disclosure, to public counsel of summaries and information that is not a danger to national security from disclosure requests argued by the SAs and the *Charkaoui II* disclosure, is further evidence of the improved protection of SC subject's interests. Federal Court documents indicate that these requests for disclosure included the following themes: details of surveillance on the SC subject; consent from foreign intelligence services to disclose; and, details of conversations involving the subjects of SCs.

Another aspect of the protection of interests is whether or not the SA roster is adequate to protect the SC subjects' interests in court. This was assessed through examining the degree to which the pool of SAs meets the requirement for services. In this regard, the size of the Canadian SA roster meets the UK recommendations for capacity. This is relevant because the model adopted to implement the IRPA provisions concerning Special Advocates is based on the UK experience with that country's Special Advocates Support Office.

Some concerns were expressed about the fact that future requirements for SAs are unknown, so it is hard to gauge future needs and the risk of inadvertent disclosure due to "tainting." There are legislated conditions to determine whether a proposed SA should not be accepted, as listed in section 83(1.2) of IRPA – "appointment of special advocate" – which includes "tainting". Tainting occurs when an SA has become privy to classified information in one case, and therefore can no longer advocate on behalf of another individual where the same information is relevant for fear of inadvertent disclosure. Given the limited number of individuals who are sufficiently experienced to act as SAs, the roster of potential SAs shrinks over time as more SAs become tainted. Tainting is an issue which continues to be studied by countries such as the UK and has not yet been resolved.

In terms of the provision of adequate facilities for SAs to review the national security information and prepare their cases, SAs interviewed noted that there is a lack of photocopying facilities, office hours are not conducive to working overtime and the Ottawa location is less convenient for some cases. SAs have stated a preference for satellite offices being set up in Toronto or Montreal to make the preparation for cases easier. Paragraph 83(1) (d) of IRPA specifies that the judge shall ensure the confidentiality of information and evidence. Proceeding from Ottawa, as a rule, was deemed by the Court the most secure way of ensuring confidentiality since the Court's designated registry is located in Ottawa and has the appropriate facilities to house such classified documents.

4.2.2 Improved Procedural Fairness

In examining improvements in procedural fairness, Federal Court decisions note that the addition of the SA affords a substantial substitute (to an open court proceeding) and provides sufficient opportunity for the named person to meet the case against him. Most interviewees support this view, agreeing that SA submissions have improved procedural fairness for SC subjects.

Half of interviewees also agreed that having the right to regular detention reviews every six months has improved procedural fairness for foreign nationals subject to SCs; none disagreed. In terms of the provision of regular detention reviews, the Crown has met its statutory obligations in

this regard. However, a few interviewees noted that the detention review process is slower than anticipated due to adjournments and other procedural reasons. In addition, in the 30 Federal Court documents reviewed, 10 applications were brought forward by SC subjects to vary terms and conditions meaning that reviews of terms and conditions may be occurring with greater frequency than foreseen by legislation.

An objective assessment of procedural fairness in IRPA Division 9 proceedings could be found in judgements reviewing section 7 Charter challenges of Division 9 proceedings. In the course of the security certificates to date, section 7 Charter compliance of Division 9 of IRPA has been raised on at least 4 occasions. In each instance, the Federal Court either dismissed the constitutional challenge as premature or decided the issue without reference to the procedural fairness of the Division 9 regime. As such, it is too early to determine the fairness of the Division 9 regime based upon judicial treatment of Charter challenges. It is likely that similar challenges to the fairness of the proceedings will arise in the outstanding three security certificates.

4.2.3 Management of Risks

CBSA is responsible for monitoring the compliance of SC subjects with court-ordered terms and conditions. The Court has directed that individual risk assessments be conducted in order to determine the most effective method of monitoring and to support the assessment of whether risks are being neutralized.

The evaluation found that CBSA has completed three court-ordered risk assessments, which were filed with the Federal Court on May 27, 2009; July 9, 2009; and, August 17, 2009. An additional risk assessment was filed by the Agency on September 15, 2009, although this was not in response to a specific court order. CBSA interviewees noted the Agency's timeframes for completing risk assessments had to be accelerated as a result of Federal Court decisions and that this resulted in a significant unanticipated increase in CBSA's workload, and ultimately additional legal representation for the client agency by the Department of Justice.

4.2.3.1 Integrated and Strategic Approach to Monitoring Terms and Conditions of Release

CBSA devotes considerable enforcement resources to the monitoring and surveillance of SC subjects. Based on data available for three SC cases, there is evidence to suggest that the level of monitoring has increased as a result of additional funding received through SCI.

Table 5: Potential Breaches of Terms and Conditions Recorded by the CBSA By Fiscal Year and Category			
Category	Number		% change
	2007-2008	2008-2009	
Residential ¹⁹	25	75	200.0
Non-residential ²⁰	20	39	95.0
Telephone	9	51	466.7
Total	54	165	205.6
Referred to Courts	14	16	14.3

Integration of SC management, which includes cooperation, data-sharing and communication between CBSA Headquarters (Litigation Management, Counter Terrorism Unit, Inland Enforcement) and the Regions, is critical to achieving effective monitoring. Integration is also important to ensuring that materials prepared for Federal Court hearings are comprehensive and accurate.

CBSA interviewees indicated that improved cooperation between the Counterterrorism Unit at HQ and regional Intelligence Units and Monitoring Units has resulted in the Agency being better able to develop and support its position during reviews of SC terms and conditions. This finding is supported by Court decisions in which CBSA has successfully argued against changes to terms and conditions based on evidence collected via its monitoring and surveillance activities.²¹

CBSA interviewees indicated that there is a better level of integration at CBSA with respect to the management of SC cases since the implementation of SCI. They also noted areas for improvement. For example, while a national policy manual concerning compliance-monitoring was developed by headquarters, it did not adequately reflect regional operating procedures. At the time of the evaluation, the document was being re-written to better support a consistent, CBSA-wide standard operating procedures.

Federal Court decisions support interview findings that further integration at CBSA is required. While the Court has in some cases commended CBSA for ensuring that SC subjects are complying with the terms and conditions of their release²² and for successfully mitigating potential risks posed by SC subjects,²³ they have also criticized the Agency for lack of coordination and insufficient support provided by management and headquarters to front-line officers.²⁴ As well, the Court has expressed concern that regional operating procedures for monitoring and surveillance are sometimes inconsistent with the national policy manual.²⁵

The development of consistent and effective surveillance and monitoring procedures is complicated by the fact that terms of release vary based on the individual case. As a means to

¹⁹ Reported incidents and/or potential breaches of Terms and Conditions coded by Enforcement Branch staff at HQ as occurring inside or about residence of the SC subject.

²⁰ Reported incidents and/or potential breaches of Terms and Conditions coded by Enforcement Branch staff at HQ as occurring outside and not in close proximity to the residence of the SC subject.

²¹ Source: paragraph 26 of Federal Court citation 2008fc595.

²² Source: paragraph 125 of Federal Court citation number 2009fc284.

²³ Source: paragraph 151 of Federal Court citation number 2009fc3.

²⁴ Source: paragraph 29, Federal Court decision 2009fc659.

²⁵ Source: paragraph 136, Federal Court decision 2009fc284.

address this inherent challenge, CBSA conducts conference calls with regional staff each time there is a change in conditions as a result of a court order. During 2008-2009, approximately 200 such calls as well as five in-person meetings were held. The purpose of these calls is to ensure that front-line staff is made aware of the changes, and that surveillance and monitoring remains consistent with the Court's decisions.

4.2.4 Horizontal Governance and Policy Advice

Document review indicates that governance structures for the coordination of SCI activities have been established by PS and demonstrate a high level of coordination among Partners. Specifically, three committees have been established, as follows:

The **ADM Steering Committee - Security Certificates** was established and first met April 10, 2008. No terms of reference for this group were provided to the evaluation; however, document review indicates that the group has been active, with a total of ten meetings held between April 2008 and July 2009.

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The **IRPA Division 9 Working Group** was created to replace previous working groups established prior to the amendments to IRPA. Membership includes representatives from: DOJ, PS, CBSA, CSIS, CIC, and DFAIT. The group was created to ensure accountability and coherence of government actions across a broad number of issues related to the legislation, including the policies surrounding and supporting the legislation, litigation and the program elements, as well as implementation of performance monitoring for the Initiative. The IRPA Division 9 Working Group met 14 times between in March 2008 and May 2009.

In terms of the effectiveness of these committees at the senior management level, many interviewees offered positive comments as well and cited issues and challenges. Positive feedback included the sentiment that the necessary management and coordination structures are in place; that cooperation is very good because all Partners are seeking the same outcomes; and that the ADM Steering Committee is a good venue for productive and frank exchange enabling the committee to forge consensus and resolve issues. Informal interaction outside of regular meetings was seen as valuable since the same ADMs meet on many related subjects in the national security arena such as the ADM National Security Committee and the ADM Intelligence Committee. At the operational level, some interviewees noted that by working together on the SCI, PS has established relationships with the other security partners, and that the IRPA Division 9 Working Group is a great forum for discussing challenges Partners face in carrying out SCI activities and for addressing issues as they arise.

Issues and challenges were also noted by many senior management interviewees with respect to the usefulness of policy development activities. For example, it was noted that the ADM Steering Committee had focused primarily on the security certificate cases and *Charkaoui II* discussions, as opposed to longer-term strategic policy development and no plan as to how to proceed regarding alternatives to removal or other mechanisms had been formalized. The Steering Committee did, however, create two interdepartmental working groups to explore two areas of significant policy development, including alternatives to removal and diplomatic assurances. The Alternatives to Removal Working Group delivered the preliminary results of its research to the Committee in June 2009 and the Diplomatic Assurances Working Group delivered a discussion paper to the Committee, which was discussed in April 2009.

It was also noted that coordinated decision-making is difficult because of the complexity of the cases, the differing mandates of Partners and the fact that the pace at which issues are arising is almost unmanageable. Other comments included the need for better understanding by committee members of the lines of responsibility, e.g. the role of DOJ is unclear because they play both the strategic advisor role and day-to-day counsel role. At the operational level, many interviewees noted challenges associated with PS having had limited involvement in case management, and the need for more communication between the strategic and operational levels. It was also felt that Partners need to be encouraged to follow the management and coordination processes put into place such as the decision-making grid set up by the IRPA Division 9 Working Group.

When asked about the usefulness of policy advice in terms of its contribution to the SCI objectives of balancing human rights and protecting Canadians from risk, some managers indicated that policy development had not necessarily contributed to the objectives. There was a sentiment that policy advice had supported decision-making to date, but that successive judicial decisions had impacted the achievement of desired outcomes and required further policy development in response.

It was also noted by some interviewees that the information provided to the ADM Steering Committee may assist in shaping discussions on a particular issue, but that the Steering Committee approach did not result in the distillation of issues down to a smaller number of actionable items.

Some senior management interviewees suggested improvements in terms of providing policy advice and coordination. They suggested that PS remain engaged and keep pushing ahead with policy development such as the work of the Alternatives to Removal Working Group. It was also suggested that if and when the pace of the SCI slows, PS could focus on improving the governance among Partners, and provide guidance on strategic issues that require communication to the Deputy Minister level.

4.2.5 Protection of Classified Information

Most interviewees indicated that there have been no gaps in the protection of classified information during the SCI. Interviewees noted some concerns such as, a need for continuous training regarding how classified files should be treated, stored, accessed, and transferred between CBSA and CIC because of court rulings. A few interviewees noted risks to protection of

classified information due to concurrent open and *in camera* court processes and the handling of classified and unclassified materials simultaneously.

CIC processes applications for permanent residency (APRs); some of them have national security concerns. Before SCI, CIC had limited capacity to process such applications due to lack of specialized units, trained staff and protected facilities. CIC has now improved its capacity for the protection of classified information by creating special units to process such applications, upgrading its facilities and training its staff. Centralized Security Case Units in four CIC regions have been created (Quebec, Ontario, British Columbia/Yukon, Prairies/ Northwest Territories) and equipped with additional features that allowed CIC to meet the standards for storing classified information. Training has been delivered to 115 CIC employees involved in various aspects of these cases and has included modules on: the protection of information; CIC and its relationship with CSIS; national security inadmissibility; and, forming related inadmissibility decisions. Twenty-five full-time positions have been staffed and all incumbents have received secret security clearances.

4.2.6 Well-informed Immigration Judgements, Decision-Making and Advice

Senior managers indicated that various outputs by SCI Partners provide essential “pieces of the puzzle” in terms of analysis and decision-making. For example:

- Security Intelligence Reports help Ministers make decisions on security certificates;
- Threat Risk Assessments provide an update on changing circumstances; and,
- Distilled evidentiary material, written arguments and Special Advocate submissions help shape arguments and plan approaches.

In the case of processing APRs using classified information, most interviewees involved in the processing of APRs indicated that the ability to use classified information is a huge benefit, as it allows them to concentrate on the areas of concern, even though they may only use open source material in the actual processing. This has contributed to the efficiency and effectiveness in making decisions in these cases. Most interviewees felt that CIC’s new Central Processing Units have increased efficiency and reduced backlog, including as much as a ten-fold increase in processing. The backlog as of April 2008 was 426 cases. These files are now forwarded to one of the Security Case Units and are not only easier to track, but are assessed by specialized officers for stronger and more efficient decisions. During the evaluated SCI period, 145 decisions were made. As of September 2009, the case load was approximately 740 cases – the increase in the number of cases is due in part to the fact that CIC has changed the way it accounts for those cases. It is difficult to discern any trend because of the short duration of the Initiative and changes in classification of the cases.

Out of the 145 APR decisions rendered since April 2008, which were assessed for an inadmissibility on the grounds of national security under sections 34, 35, and/or 37 of IRPA²⁶, 21 have been challenged at the Federal Court. Of those, 14 have been granted leave for judicial

²⁶ These sections of IRPA allow for inadmissibility based on espionage, subversion, terrorism, danger to the security of Canada (section 34); crimes against humanity, violating human or international rights (section 35); and organized criminality (section 37).

review, two were denied, two were withdrawn, and three were awaiting decisions at the time of the evaluation. Of the 14 cases that were granted leave for judicial review, three were decided in favour of the applicant, three were decided in favour of the respondent, two have been withdrawn and six remained outstanding.

4.2.7 Unexpected Outcomes

Most interviewees noted challenges to the achievement of SCI objectives. The emergent theme was that court decisions have changed the Initiative landscape. This has, among other things, made it difficult for the bureaucracy to fully engage in a strategic approach.

A third of interviewees noted the drawn-out litigation and the overall duration of the process as having been unexpected, and one third noted the challenge of meeting increased disclosure obligations due to the *Charkaoui II* decision. The unanticipated expansion of disclosure obligations resulting from the Supreme Court of Canada decision on June 26, 2008, known as *Charkaoui II*, resulted in significant operational and litigation demands and has lengthened the SC proceedings. The increased disclosure in the first instance has required the production of more records created by CSIS which, in turn, has affected the work of DOJ and SAs since they must review and litigate the disclosure of the material produced. CAS has also been implicated in this regard, since it provides support to the work of the SAs.

The *Charkaoui II* obligations have been particularly challenging for CSIS and the DOJ resources appointed to the SC cases. Litigation costs have been higher than the allocated funding. All three DOJ offices with responsibility for litigation in this area report litigation spending above allocated amounts. The most significant of these is the CSIS Legal Services Unit, which has responsibility for the closed hearings, and therefore the conduct of litigation regarding the potential disclosure of classified information. That unit reports costs of \$1.15 million, versus an allocation of just over half a million dollars. For advisory and litigation costs globally, DOJ received an allocation of \$3.33 million for fiscal year 2008-2009, and reports expenditures of \$4.06 million.

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] These interviewees also noted a cultural “paradigm shift” within CSIS because, without giving up its position of needing to protect information due to national security concerns, CSIS must now think of the need to disclose and the need to understand its disclosure obligations. It was noted that CSIS is being driven back to a criminal or evidentiary model that is generally the duty of organizations like the Royal Canadian Mounted Police. Previously, according to CSIS policy,²⁷ operational notes were temporary in nature and they had to be destroyed after they had been transcribed into a report by the employee who took them. The Supreme Court found this policy invalid with respect to section 12 of the *Canadian Security Intelligence Service Act*, which defines CSIS as primarily responsible for collecting “information and intelligence respecting activities that may on reasonable grounds be suspected of constituting

²⁷ CSIS Policy OPS-217.

threats to the security of Canada.”²⁸ When this Act was initially tabled it was noted that there is a distinction between the policing function and the intelligence agency, yet the Supreme Court justices note that “the activities of the Royal Canadian Mounted Police and those of CSIS have in some respects been converging as they, and the country, have become increasingly concerned about domestic and international terrorism. The division of work between CSIS and the RCMP in the investigation of terrorist activities is tending to become less clear.”²⁹

4.3 Performance - Efficiency and Economy

Costs of SCI Activities based on the Logic Model

The evaluation also examined the costs of activities based on logic model components. The results are shown in Tables 6 and 7. While we were able to determine the costs of the SCI activities, the information was generally not readily available from financial systems, meaning that it was not coded and tracked as SCI expenditure *per se*. Table 6 compiles information on SCI-funded expenditures for 2008-2009, the only full fiscal year for which data is available.

Table 6: Program Expenditures of SCI by Logic Model Component (in millions \$)			
Logic Model Component	Departments	Sub-total	Total
Policy and Legislation	PS	0.30	0.30
Special Advocate Program	CSIS	0.02	3.57
	CAS	0.92	
	DOJ	2.63	
Enforcement	CBSA	3.43	3.43
Reprocessing of Division 9 Cases (Including Legal Advice and Litigation)	CSIS	3.08	9.50
	DOJ	5.11	
	CIC	0.00	
	CBSA	0.26	
	CAS	1.05	
Processing In-Canada Applications	CIC	1.83	1.85
	CSIS	0.02	
International	DFAIT	0.39	0.39
Totals			19.04

Table 7: Total Expenditures of SCI by Logic Model Component (in millions \$)				
Logic Model Component	Direct Program Costs		Indirect Costs (Internal Services & Accommodation) 24%	Total Costs
	SCI Funded	"Unfunded"		
Policy/ Legislation	0.30	0.00	0.07	0.37
Special Advocate	3.57	0.23	0.91	4.72
Enforcement	3.43	3.23	1.60	8.26
Re-processing of Division 9 Cases (Including Legal Advice and Litigation)	9.50	1.14	2.55	13.19
Processing In-Canada Applications	1.85	0.00	0.44	2.29
International	0.39	0.00	0.09	0.48
Totals	19.04	4.60	5.66	29.31

²⁸ Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23

²⁹ *Charkaoui v. Canada* (Citizenship and Immigration), [2008] 2 S.C.R. 326, 2008 SCC 38 [para 26]

The “unfunded” figures shown in Table 7 are based on data from both financial and non-financial sources (program estimates). These activities are referred to as “unfunded” for three principal reasons: 1) the activities occurred in 2007-2008 prior to the receipt of SCI funds; 2) the activities were outside of the SCI funding envelope; and/or, 3) the activities required additional levels of effort in 2008-2009 that were unanticipated at the outset. These “unfunded” costs have been included to provide a better indication of the full cost of the SCI. Specifically, the “unfunded” costs incurred included SCI activities such as:

- Special Advocate Program: The “unfunded” expenses incurred by DOJ include costs for the establishment and management of the SA roster in 2007-2008.
- Enforcement: Compliance-monitoring activities conducted by CBSA for SC subjects in the Northern Ontario (including the operation of the Kingston Immigration Holding Facility) and Quebec Regions were not provided for in the SCI; however, these activities were required to ensure compliance with the terms and conditions ordered by the Court.
- Re-processing of Division 9 Cases: CIC did not re-process PRRAs and Danger Opinions, for the five security certificate subjects, since no reasonableness decisions had been made by the Court; however, considerable expenses were incurred by DOJ, CBSA and CSIS associated with SCI legal activities. As indicated previously in this report, the levels of preparation and participation in court, the provision of input and evidence for detention reviews/ judicial reviews, and challenges for 2008-2009 exceeded expectations of CBSA and DOJ. In terms of CSIS, activities to support re-processing of SC cases prior to the receipt of SCI funding such as the preparation of security intelligence reports, unclassified summaries and the provision of legal advice incurred costs above and beyond funding provided through the SCI.

Interviews and document review evidence indicate that SCI Partners have had difficulty quantifying their efforts and resource requirements because of evolving case law and court decisions, notably *Charkaoui II*. CAS has indicated that its Registry and related administrative costs are significantly higher than the amount it received in SCI funding. There is also evidence that costs are also significantly greater than the level of funding received for DOJ litigation and CSIS.

5. Conclusions

Although SCI partner departments and agencies had previously been involved directly or indirectly with strategic and operational issues surrounding SCs, the SCI has permitted the Government to make significant progress on multiple fronts in a very short period. The following section presents conclusions and recommendations related to the evaluation issues.

5.1 Relevance

As described earlier, the impetus for the amendments to IRPA and the associated activities under the SCI was the *Charkaoui I* decision, which found that the SC process resulted in Charter violations. All of the lines of evidence indicate that without the legislative amendments to IRPA, and the SCI activities in support of the legislative requirements, the SC process itself would no longer exist.

There is a continuing need to litigate SC cases through the Federal Courts; there are pending IRPA section 86 cases; and there is a continuing need to process applications for permanent residency using classified information. Without the SCI, which is meant to assure Charter-compliance for the security certificates process, there would be gaps in the protection of national security and classified information.

In the current global context, other countries are dealing with similar issues of how to balance individual rights with protection of national security. However, there is no easy or single solution and Canada must operate within its own legal context; thus under the SCI, there is an ongoing need to examine the suite of tools that will help address this issue.

There is an ongoing need to support international agreements that protect the safety of Canadians and uphold Canada's domestic and international human rights obligations.

5.2 Performance – Effectiveness

Interview perceptions indicate that the SCI strikes the appropriate balance between protection of Canada and Canadians from risks presented by inadmissible foreign nationals and permanent residents while maintaining the core values of freedom, democracy, respect for human rights and rule of law.

Although many opinions were expressed as to whether the SCI is on the right track to achieving its ultimate objective, no conclusion can be drawn. SCs are still being litigated and the amendments to IRPA are still being tested through the Federal Court. Decisions from any pending or future constitutional challenges will inform the ultimate outcome.

SC subjects' interests are perceived to be better protected compared to prior mechanisms as evidenced by the extensive disclosure of information, and the role of the SA, who advocates directly on behalf of the SC subject during *in camera* proceedings.

The SA roster meets the requirements and the SA Program is seen as providing an excellent service; however, outstanding support issues include the need for additional support staff, paralegals or junior lawyers, and the need for a compatible electronic disclosure platform.

The SAs and regular detention reviews for foreign nationals are achieving intended outcomes of providing improved procedural fairness.

Risks presented by SC subjects have been well contained by CBSA through the enforcement of the terms and conditions of release, which are prescribed by the Federal Court. CBSA has, to some extent, achieved strategic positioning during detention reviews, as it has been able to argue against changes to terms and conditions based on solid evidence. When risk assessments have been ordered by the Federal Court they have been completed and on schedule when a deadline was specified. However, the Court has expressed concern that ongoing risk assessments were not being conducted, and that this had hampered the Agency's ability to adjust monitoring strategies and provide guidance to regional staff.

Responding to changes to terms and conditions prescribed by Federal Court rulings presents operational challenges to CBSA. The Agency addresses these issues through regular conference calls and meetings between headquarters and regional staff. Nevertheless, the wording of orders and terms and conditions has been misinterpreted on some occasions, which has caused missteps by CBSA personnel, resulting in unfavourable court decisions. CBSA has indicated that it would benefit from additional legal advisory services from DOJ regarding the interpretation of terms and conditions and orders.

PS has achieved a high degree of policy and legislation coordination through its working groups. However, further clarification of roles and responsibilities may be required. In addition, the governance structure must be flexible enough to respond to changing requirements in a timely manner.

Court decisions have changed the Initiative landscape making it challenging for the bureaucracy to adopt a strategic policy approach. In particular, the Supreme Court of Canada decision related to *Charkaoui II* and the associated demands of disclosure has caused a "paradigm shift" and resource pressures within CSIS, CAS and DOJ.

5.3 Performance – Economy and Efficiency

Although costing of program activities and outputs based on logic model component is available, it cannot be determined if the SCI has been delivered efficiently as no trend data or comparators are available.

The *Charkaoui II* decision greatly expanded disclosure obligations for CSIS, a requirement that had not been anticipated in the SCI's development. This unanticipated development resulted in significant [*] litigation burdens, and has delayed the progress of cases considerably.

As Table 7 demonstrates, in the first year of the SCI, CAS and CSIS, including DOJ litigation on behalf of CSIS, have incurred costs in excess of what was planned under the SCI. These resource pressures will need to be addressed if these departments are to provide a similar level of support in the future.

6. Recommendations

Three recommendations emerge from the conduct of this evaluation. It is recommended that:

1. Public Safety Canada takes action to ensure that governance structures and horizontal coordination meet evolving requirements and address challenges raised by Partners.
2. Canada Border Services Agency continues to take action to improve its national coordination and level of support to front-line officers by ensuring that standard operating procedures for compliance-monitoring are updated on a regular basis and communicated to regional staff.
3. Canadian Security Intelligence Service, Department of Justice (including the Special Advocate Program) and Courts Administration Service take action to fully quantify the financial impact on the Security Certificate Initiative, including the *Charkaoui II* disclosure decision, in order to anticipate or inform future funding requirements. Further, all Partners should be mindful going forward of the true costs of the SCI so that the impacts on other parts of their respective organizations can be quantified and appropriately assessed.

7. Management Response and Action Plans

This evaluation report has been reviewed and approved by deputy heads of all SCI Partner organizations. In addition to providing management action plans for Partners directly affected by the evaluation's recommendations, all Partners were provided the opportunity for responding or generally commenting on this report, the evaluation and participation in the Security Certificate Initiative. Additionally, all Partner organizations have noted the caveat attached to recommendation 3, and are taking efforts, accordingly, for quantifying resourcing-related matters. Partner input follows below.

– Public Safety Canada –

Response: Public Safety Canada accepts and fully supports recommendation 1.

Public Safety Canada will continue to work with its Government partners to develop and implement measures to improve the governance structure and horizontal coordination among key departments and agencies involved in the security certificates and related processes.

Public Safety Canada agrees that a clear governance structure and effective horizontal coordination is key to the management of the complex, multifaceted issues pertaining to cases of inadmissibility on security grounds. It is important to note that in the past months Public Safety Canada has been working within the current governance structure of the interdepartmental Assistant Deputy Minister Committee, in particular, to improve the interdepartmental coordination and management of these cases. As a result, certain improvements to the manner in which the Security Certificate Initiative is managed have already been made, such as the

implementation of weekly teleconferences to permit faster information-sharing and consultation across agencies.

Public Safety Canada also recognizes that further, long-term changes are required to help ensure that the governance structure and horizontal coordination is well adapted to respond to evolving circumstances and requirements. As such, Public Safety Canada and its partners have been re-examining how the Government manages, from the outset, cases of inadmissible foreign nationals and permanent residents in Canada who are deemed inadmissible on the grounds of security. This process is still ongoing, and will result in specific recommendations for the Government's consideration.

– Canada Border Services Agency –

Response: Canada Border Services Agency accepts and fully supports Recommendation 2.

Canada Border Services Agency agrees that coordination and support provided to front-line staff is essential to effective compliance-monitoring and concurs with the recommendations made in this evaluation.

In consultation with the Department of Justice, Canada Border Services Agency has commenced steps to ensure that standard operating procedures are up-to-date. Revisions to standard operating procedures and policy manuals, with respect to security certificates monitoring, are being completed by September 2010 and will be distributed to the regions. Policies and standard operating procedures will continue to be updated as required.

– Canadian Security Intelligence Service –

Response: Canadian Security Intelligence Service accepts and fully supports recommendation 3.

The evaluation concluded that there is a continuing need to process security certificate cases through the Federal Court and that without the Security Certificate Initiative, there would be gaps in the protection of Charter rights, national security and classified information. It further concluded that the Security Certificate Initiative strikes the appropriate balance between protection of Canada and Canadians from risks presented by inadmissible foreign nationals and permanent residents while maintaining the core values of freedom, democracy, respect for human rights and the rule of law. It was also recognized that the Courts Administration Service and Canadian Security Intelligence Service, including the Canadian Security Intelligence Service litigation function, have resourcing issues that need to be addressed if they are to provide a similar level of support in the future.

A key recommendation, as it relates to Canadian Security Intelligence Service, is that Canadian Security Intelligence Service fully quantify the financial impact on the Security Certificate Initiative, since the *Charkaoui II* disclosure decision, in order to anticipate or inform future funding requirements.

Canadian Security Intelligence Service has now taken efforts to quantify both the human and financial resources required to continue to manage the workload for the current and future

Security Certificate Initiative cases. Quantification of the financial impact of the Security Certificate Initiative has been done in cognizance of its implications for Canadian Security Intelligence Service in areas such as the Security Screening Branch, Information Management/Information Technology Services and administrative support.

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To mitigate risks associated with the impact of the Security Certificate Initiative, Canadian Security Intelligence Service will realign the organization in the best way it can by resource re-allocation from other areas within the organization. This course of action will ensure that Canadian Security Intelligence Service continues to support the ongoing litigation obligations under the *Immigration and Refugee Protection Act*.

– Department of Justice –

Response: Department of Justice accepts and fully supports recommendation 3.

The Special Advocate Program will continue to monitor financial implications associated with fulfilling the Minister of Justice's statutory obligations in relation to section 85 (1) and section 85 (3) of the *Immigration and Refugee Protection Act*. The Department's ability to appropriately support the Minister of Justice is dependent on securing ongoing resources for the Special Advocate Program

The Department of Justice has already taken steps to improve the tracking and reporting of costs related to litigation and advisory legal services. These costs have been monitored closely following the *Charkaoui II* decision and the information is used to inform the decisions regarding current and future funding requirements.

– Courts Administration Service –

Response: Courts Administration Service accepts and fully supports recommendation 3.

Courts Administration Service agrees with the recommendation that future funding requirements will need to be fully quantified. Courts Administration Service is participating in the horizontal funding request initiative process currently going forward to ensure that its requirements are all included.

There are currently three security certificates before the Federal Court and it is expected that all three will impact the Court's resources for the next fiscal year (2010-2011). According to Public Safety Canada, there are three active cases before the Immigration and Refugee Board of Canada pursuant to section 86 of the *Immigration and Refugee Protection Act* and a further six section 86 cases that are under consideration for which funding will be required.

Courts Administration Service will continue to monitor its caseload and all related activities on a weekly basis to identify all the requirements necessary to support the judiciary and the Special Advocate Program.

Courts Administration Service will also renew its memorandum of understanding with the Department of Justice for the administration of the Special Advocate Program before March 31, 2010. This will continue to provide administrative support and services to Special Advocates.

– Citizenship and Immigration Canada –

Citizenship and Immigration Canada is in agreement that the Security Certificate Initiative remains relevant in terms of complying with the Supreme Court of Canada decision. Citizenship and Immigration Canada further acknowledges that Division 9, which addresses identified gaps in the *Immigration and Refugee Protection Act*, supports its ability to assess applications received from individuals who may be inadmissible on national security grounds, and to consider classified information in rendering a decision on their admissibility. There is a need for continuous and increased capacity-building efforts as processing national security cases expands. As it moves forward, the ability for Citizenship and Immigration Canada to use such information in the processing of applications may lead to future needs in the areas of litigation and representation of the Government of Canada in court proceedings.

Citizenship and Immigration Canada further supports the horizontal approach of the Initiative as it has ensured that Partners were able to continue working on their respective activities, while collaborating on common program and/or policy concerns. There is a need to build on the existing foundation to carry out Partners' respective activities, as well as to work together on improving programs and policies related to the Initiative and the objectives of the *Immigration and Refugee Protection Act*; specifically, to protect the health and safety of Canadians and to maintain the security of Canadian society. Citizenship and Immigration Canada is pleased with the efforts and progress to date of all Partners and remains committed to the Security Certificate Initiative in conjunction with other participating Partners.

– Department of Foreign Affairs and International Trade –

Foreign Affairs and International Trade remains committed to the Security Certificate Initiative in conjunction with other participating Partners.

Foreign Affairs and International Trade has participated in several sharing exchanges on diplomatic assurances with likeminded countries and ongoing bilateral discussions have proven to be helpful in framing approaches to negotiations of assurances. [

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Appendix A: Evaluation Matrix

Questions		Indicators	Document/ Media Review	Federal Court Decisions	Literature Review	Program Data	Interviews
RELEVANCE							
1	Does the Security Certificate Initiative continue to address a demonstrable need and is it responsive to the needs of Canadians? (TBS core issue 1)	1.1	Degree to which there is an ongoing need in Canadian society: - Existence of gaps in the protection of human rights or national security without the SCI	X		X	
		1.1a	- Projected trend in APR backlog without SCI			X	
		1.2	Degree to which there is an on-going need for the SCI activities to meet Canada's international obligations	X	X	X	
		1.3	Description of other approaches	X	X		
PERFORMANCE – ACHIEVEMENT OF OUTCOMES							
2	To what extent has progress been made toward expected outcomes and to what extent have Security Certificate Initiative outputs contributed to these outcomes? (TBS core issue 4)						
	- sound legislative and policy advice provided (outcome A)	2.1	Degree to which legislative and policy advice has been provided	X			
		2.2	Perceptions of the usefulness of legislative and policy advice				X

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Questions			Indicators	Document/ Media Review	Federal Court Decisions	Literature Review	Program Data	Interviews
		2.3	Level of coordination among Partners and leadership by PS in providing policy and legislative advice	X				X
	-interests of SC and other Division 9 subjects protected (outcome B)	2.4	Perceptions of whether SC and other Division 9 subjects' interests are well protected	X		X		X
		2.5	Degree to which SC subjects' interests are represented compared to prior mechanisms					
			- # of requests for further disclosure (pre and post C-3) - # of hearings to move docs from closed to open (pre and post C-3)		Information could not be collected within time/ budget of the evaluation			
			- # of days spent in closed session versus open (pre and post C-3)	X				
		2.6	Degree to which the pool of SAs meets requirement for services					
			- # of SAs on roster - language profiles - # of hours billed by SAs - SA turnover rate - adequacy of SA training and support				X	
			- perceived adequacy/appropriateness of SA roster (inc. adequacy of language profiles; conflict of interests; adequacy of training and support)					X

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Questions			Indicators	Document/ Media Review	Federal Court Decisions	Literature Review	Program Data	Interviews
	- Integrated and strategic approach to compliance monitoring and due diligence in enforcing Federal Court orders (outcome C)	2.7	Level of integration among CBSA Litigation Management, Inland Enforcement, Counterterrorism		X			X
		2.8	Number of times CBSA has advised on non-compliance				X	
		2.9	Degree of enforcement of court orders					
			- # of letters of challenge to monitoring - # of letters of challenge resolved outside of court				Information not available - manual data collection not feasible	
			- existence and usefulness of Directives to monitoring officers in the field after court rulings	X				X
			- % of court decisions ruling in favour of challenge to monitoring (% of unsuccessful motions to vary conditions)		Information could not be collected within time/ budget of the evaluation			
			- examples of court decisions regarding enforcement of court orders		X			
	- regular detention reviews provided (outcome D)	2.10	Frequency of detention reviews in comparison to frequency prescribed by legislation				X	

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Questions			Indicators	Document/ Media Review	Federal Court Decisions	Literature Review	Program Data	Interviews
	- protection of classified information (outcome E)	2.11	Level of capacity for the protection of classified information (facilities, staff, training)					
			<ul style="list-style-type: none"> - # of screened SAs - description of work performed to secure facilities - # of security checks of infrastructure performed - rating of usefulness of SA training to protect classified information 				X (No information available on Facility Threat Risk Assessments or certification of facilities). Usefulness of training info provided.	
		2.12	Degree to which classified information is protected/ handled according to security protocols					
			- examples of court decisions regarding handling of information		X			
			- # of investigations launched/ notifications of breaches regarding classified information				Information not available - no breaches.	
			- perceptions of the level of security compliance					X
	- well-informed judgements, decision-making and advice through use of classified information (outcome F)	2.13	Trend in size of APR and in-Canada applications inventory (that have national security implications)				X (Trend information not available)	

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Questions			Indicators	Document/ Media Review	Federal Court Decisions	Literature Review	Program Data	Interviews
		2.14	Degree of progress/ status in re-processing SC cases				X	
		2.15	Perception of decision makers (e.g. CIC officers)					X
		2.16	Number and % of Admissibility and Final Decisions that have stood up in court				Information provided by CIC.	
	[*]	2.17	[*]					X
			- # of engagements/ consultations/ overtures with other governments # of Partners [*]					X
	- risks are well managed (outcome H)	2.18	Number of incidents of non-compliance detected and reported compared to those before SC initiative (using prior methods)				X	
			Perceptions of whether risks are well managed		X			X

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Questions			Indicators	Document/ Media Review	Federal Court Decisions	Literature Review	Program Data	Interviews
	- improved procedural fairness (outcome I)	2.19	- degree to which SA submissions have assisted in providing procedural fairness		X			X
		2.20	- # of unsuccessful Charter challenges or continued soundness of C-3		X			
	- Canada & Canadians are protected from risks presented by foreign nationals and permanent residents while maintaining core values of Canadians (freedom, democracy, respect for human rights and rule of law) (ultimate outcome)	2.21	Perceptions of the SCI's contribution to the protection of Canada & Canadians from risks presented by foreign nationals and permanent residents while maintaining the core values of Canadians (freedom, democracy, respect for human rights and rule of law)	X				X
2a	Are there challenges or unintended impacts inhibiting achievement of outcomes? How should this inform the program theory and design?	2.22	Perceptions and examples of challenges and suggestions for improvement					X
PERFORMANCE – EFFICIENCY AND ECONOMY								
3	Is the Security Certificate Initiative being delivered efficiently to produce outputs and progress towards expected outcomes? (TBS core issue 5)	3.1	Description of “full costs” of the program activities and outputs carried out as per the existing Logic Model				X	

Appendix B: List of Federal Court Decisions Reviewed

These court decisions are available at <http://decisions.fct-cf.gc.ca/en/index.html>.

Case	Docket Number for Designated Proceeding ³⁰	Citation Number	Date
Almrei	DES-3-08	2008fc1216	20081103
Almrei	DES-3-08	2009fc3	20090102
Almrei	DES-3-08	2009fc314	20090324
Almrei	DES-3-08	2009fc322	20090327
Almrei	DES-3-08	2008fc	20080414
Almrei	DES-3-08	2009fc240	20090305
Charkaoui	DES-4-08	2008cf765	20080619
Charkaoui	DES-4-08	2009cf175	20090220
Charkaoui	DES-4-08	2009cf342	20090402
Charkaoui	DES-4-08	2009cf476	20090507
Charkaoui	DES-4-08	2009cf546	20090527
Harkat	DES-5-08	2008fc595	20080514
Harkat	DES-5-08	2008fc1288	20081103
Harkat	DES-5-08	2009fc203	20081128
Harkat	DES-5-08	2009fc204	20081222
Harkat	DES-5-08	2009fc59	20090122
Harkat	DES-5-08	2009fc167	20090218
Harkat	DES-5-08	2009fc173	20090218
Harkat	DES-5-08	2009fc241	20090306
Harkat	DES-5-08	2009fc340	20090331
Harkat	DES-5-08	2009fc553	20090527
Harkat	DES-5-08	2009fc659	20090623
Jaballah	DES-6-08	2009fc279	20090114
Jaballah	DES-6-08	2009fc33	20090115
Jaballah	DES-6-08	2009fc284	20090320
Jaballah	DES-6-08	2009fc645	20090618
Mahjoub	DES-7-08	2009fc34	20090115
Mahjoub	DES-7-08	2009fc248	20090309
Mahjoub	DES-7-08	2009fc316	20090325
Mahjoub	DES-7-08	2009fc439	20090430

³⁰ In the table, DES stands for designated proceeding. It refers to a judicial proceeding wherein the legislative authority has a provision which specifies that only the Chief Justice of the Federal Court or a judge designated by the Chief Justice of the Federal Court can handle the adjudication of a matter. In these cases, the matter involves national security considerations the disclosure of which is considered sensitive.

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2010-02-24

DOCUMENT NAME
2009-05-06 ID9-WG Agenda.doc
Terms of Reference - April 24, 2008.doc
2008-03-12 ID9-WG Minutes.doc
2008-03-12 ID9-WG Minutes.rtf
2008-03-26 ID9-WG Minutes.doc
2008-04-09 ID9-WG Minutes.doc
2008-04-23 ID9-WG Minutes.doc
2008-05-07 ID9-WG Minutes.doc
2008-05-21 ID9-WG Minutes.doc
2008-06-03 ID9-WG Minutes.doc
2008-06-18 ID9-WG Minutes.doc
2008-07-16 ID9-WG Minutes.doc
2008-10-07 ID9-WG Minutes.doc
Other PS
[*]
Areas of Focus - Preliminary Analysis - Draft 8 2009-06-18.xls
[*]
[*]
DOJ
[*]
[*]
[*]
<i>National Security and Democratic Freedom: A False Dichotomy</i> – address by John H. Sims, Deputy Minister of Justice and Deputy Attorney General of Canada (Conference of the Canadian Association for Security and Intelligence Studies International Conference – 2008)
CIC
ENF1 Inadmissibility Manual
ENF2/OP 18 Evaluating Inadmissibility Manual
Instrument of Designation & Delegation - IRPA & Regulations
DFAIT
Contribution Agreement between DFAIT and International Rehabilitation Council for Torture Victims
Legislation and Legal Statutes
Immigration & Refugee Protection Act (s.34, 35, 37, 55, 57, 77-87, 112, 115)
Criminal Code (s.83)
Canada Evidence Act (s.38)
Canadian Charter of Rights and Freedoms (s.1, 7 & 8)
United Nations Resolution 1373
Relevant Court Cases
Suresh v. Canada 2002 SCC 1, 1 S.C.R. 3
<i>Charkaoui v. Canada</i> (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350
<i>Charkaoui v. Canada</i> (Citizenship and Immigration), 2008 SCC 38, [2008] 2 S.C.R. 326
<i>Khawaja v. Canada</i> 2007 F.C. 490

Appendix D: Literature Reviewed

Author	Title	Year
Government of Canada	Bill C-3: An act to amend the IRPA	2008
Library of Canada	Legislative Summary of Bill C-3	2008
Senate of Canada	Second reading debate of C-3	2008
Senate - Special Senate Committee on the <i>Anti-Terrorism Act</i>	Fundamental Justice in Extraordinary Times: Main report of the special senate committee on the Anti-Terrorism Act	2007
Zdzislaw Galicki	The Obligation to Extradite or Prosecute (" <i>aut dedere aut judicare</i> ")	2004
Eminent Jurist Panel	EJP Canada Hearing Summary	2007
Eminent Jurist Panel	EJP Report	2009
Danish Ministry for Refugees, Immigrants and Integration	Report on Administrative Expulsion of Aliens Deemed to be a Danger to National Security	2009
Jeremy Patrick-Justice	Section 38 and the Open Courts Principle	2005
Kent Roach	The 3-year Review of Canada's Anti-Terrorism Act: The need for Greater restraint and Fairness, Non-Discrimination and Special Advocates	2005
Martin Rudner	Intelligence Review and Democratic Governance	2005
Kent Roach	A Comparison of Australian and Canadian Anti-Terrorism Laws	2007
Craig Forcese & Lorne Waldman	Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the use of "special advocates" in National Security Proceedings	2007
Craig Forcese	Canada's National Security "Complex": Assessing the Secrecy Rules	2009
Martin Rudner	Canada's Communications Security Establishment, Signals Intelligence and Counter-Terrorism	2007
Audrey Macklin	The Canadian Security Certificate Regime	2009
Kent Roach	Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislature	2008
Martin Rudner	Challenge and Response: Canada's Intelligence Community and the War on Terrorism	2004