81號意見書
Submission No.81

Bills Committee on
National Security (Legislative Provisions) Bill

Submissions of Michael Blanchflower, SC

1. When considering the provisions in paragraph 15 of the Bill, it is important to keep in mind the context - they relate to matters of national security. Such matters require different procedures then are found in usual court procedures. Courts recognize that different procedures must be implemented when matters of national security are at stake.

Section 8A

2. Section 8A(1) sets out three conditions before the Secretary for Security proscribes a local organization:

(i) she must "reasonably believe",

(ii) that the proscription is "necessary in the interests of national security", and

(iii) the proscription is "proportionate".

The need to balance the right of an individual guaranteed by the Basic Law or Bill of Rights Ordinance (Cap.383) and the public may justify a limitation on the right - the competing right and interests being balanced by the principle of proportionality.

Attorney-General of Hong Kong v. Lee Kwong-kut and Others
[1993] AC 951 (P.C.) at p.973 A

The application of the principle of proportionality requires an examination of the decision or legislation, to ensure the limitation of the right is proportionate to the aim it is intended to achieve. The relevant question is: has a fair balance been struck between the wider interests of society and the individual's right?

Section 8B

3. The procedural requirements for proscription set out in s.8B(1) incorporate important rules of natural justice: (i) an opportunity to be heard, and (ii) the

right to make representations; unless, under s.8B(2) the circumstances are such, eg urgency, that it is not possible for s.8B(1) to be followed.

Section 8D

4. Section 8D sets out the procedure for appeals against the Secretary for Security's decision to proscribe a local organization. Section 8D(1) refers to "appeal" - which gives the Court of First Instance a wider jurisdiction to review the Secretary's decision than would be the case in judicial review proceedings. The broad jurisdiction is found in s.8D(3) which allows the Court to look at:

(i) whether the Secretary erred in the procedure for proscription or the relevant conditions for proscription

(ii) whether the evidence is sufficient to show that the local organization ran afoul of s.8A(2)

(iii) whether the evidence is sufficient for the Secretary to justify a reasonable belief that proscription was necessary or proportionate.

Section 8E

5. Section 8E sets out the power of the Chief Justice to make rules for appeals from the Secretary's decision.

6. In my opinion it is not appropriate for the Chief Justice to make the rules; instead, they should be made by the Chief Executive in Council.

Having the Chief Justice make rules raises questions about:

(i) separation of powers - the Chief Justice should not make rules which may affect rights under the Basic Law or Bill of Rights Ordinance. The judiciary's role is to review and interpret laws, not make them. Furthermore, the separation of powers is blurred when the rules are to be scrutinized by the Legislative Council.

(ii) human rights law - if the rules were challenged on the ground that they infringe a guaranteed

right, then the reviewing court would consider the "margin of appreciation" afforded to a decision-maker or legislature in determining publicly acceptable policies and laws. The court would have to ask the question: what "margin of appreciation" is to be accorded to the Chief Justice? This would be difficult for the reviewing court to answer.

7. Section 8E(3) provides that the rules may make provision for:

(i) the appeal proceedings taking place without the appellant being given full particulars of the reasons for the proscription

(ii) the appeal proceedings taking place in the absence of the appellant and his legal representatives

(iii) the Court of First Instance giving the appellant a summary of the evidence taken in his absence.

There are precedents elsewhere for such provisions, but I will only address provisions found in Canadian legislation.

8. Canadian courts have considered similar provisions in the context of immigration and privacy legislation, and whether the provisions infringe the Canadian Charter of Rights and Freedoms.

9. The courts applied the following principles:

(1) The scope of principles of fundamental justice will vary with the context and interests at stake.

Re Chiarelli and Minister of Employment & Immigration; Security Intelligence Review Committee, Intervenor, (1992) 90 D.L.R. (4th) 289 (S.C.C.), at p.311 b-d

In Re Chiarelli the Supreme Court of Canada held that the *in camera* hearing of Security Intelligence Review Committee and the provision to an affected person of a summary of the evidence presented to the Committee when it considered the person's criminal background in a case of an appeal from a deportation order, was not contrary to s.7 of the Charter (ie not to be deprived of life,

liberty, or security of the person, except in accordance with fundamental justice)

> (2) While fundamental justice demands a fair procedure, it does not demand a perfect system of full disclosure and a full hearing in every case.

Re Chan and Minister of Citizenship and Immigration, (1996) 136 D.L.R. (4th) 433 (F.C.), at p.442 g

In Re Chan the Federal Court held that the applicant for a permanent visa whose application was denied on the ground that he was a member of a criminal organization, was not permitted on the judicial review of the refusal to be present at the hearing or to be provided with the material, or even a summary, which was examined by the reviewing judge. Mr. Justice Cullen said at p.443 a-b:

> *There is nothing which prevents the applicant from seeking judicial review of the visa officer's decision and of leading affidavit evidence to show that she is not a member of the triad. Again, I accept that this is not "perfect justice", but when disclosure could be injurious to national security or to the safety of persons, the applicant's rights must be balanced against the state's legitimate interests.*

In Ruby v. Solicitor General of Canada (2002) 219 D.L.R. (4th) 385, the Supreme Court of Canada considered provisions in the Privacy Act which permitted the withholding of information held by a government department on the grounds of national security. The provisions allowed for mandatory *in camera* and *ex parte* proceedings before the Federal Court hearing a judicial review of the government's denial of an applicant's request for access to his personal information. When the Federal Court heard the matter *ex parte* there was no obligation to provide the applicant with a summary of the evidence. The Supreme Court of Canada found at paras.42-43:

> 42. *For all the exemptions in the Act other than s.19(1)(a) or (b) or s.21 the government's ability to make ex parte submissions is subject to the discretion of the reviewing court. Through the mandatory ex parte provision in s.51(3), Parliament has seen fit to assert the special sensitive nature of the information*

involved and has provided added protection and assurance against inadvertent disclosure. Even though the adversarial challenge to the claim of exemptions in such cases is limited, recourse to the Privacy Commissioner and to two levels of court who will have access to the information sought and to the evidence supporting the claimed exemption is sufficient, in my view, to meet the constitutional requirements of procedural fairness in this context.

43. *The purpose of the exemption contained in s.19(1)(a) and (b) is to prevent an inadvertent disclosure of information obtained in confidence from foreign governments or institutions. This provision is directly aimed at the state's interest in preserving Canada's present supply of intelligence information received from foreign sources. Section 21 is aimed at Canada's national security interests. The appellant acknowledges that the state's legitimate interest in protection of information which, if released, would significantly injure national security is a pressing and substantial concern. This Court recognized the interest of the state in protecting national security and the need for confidentiality in national security matters in Chiarelli, supra, at p.745.*

The Supreme Court of Canada found at para.51 that in view of the exceptional state and social interests in the protection of the information involved, the mandatory *ex parte* and *in camera* provisions did "not fall below the level of fairness required by s.7". However, the Court held that the provision would be "read down" in order that those parts of the proceedings which are not *ex parte* need not be heard *in camera*.[paras.59-60]

10. Finally, the appointment of a legal representative under s.8E(4) to "act in the interests of the appellant" will help to ensure that the appeal proceedings are fair to the appellant and the statutory provisions and rules are complied with.

Dated 22 April 2003.

Michael Blanchflower, SC