**Constitutional Learning and Secret Law in Comparative Perpsective**

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Executive secrecy has a long pedigree in Canadian law, and even deeper roots in English common law. Until relatively recently, it was not often invoked in courts, falling for the most part within the realm of the royal prerogative, cabinet confidences, and select administrative and bureaucratic quarters. But especially following 9/11, courts in both jurisdictions consider secret evidence on a day-to-day basis in such areas as immigration law, passport revocations, no-fly lists, security intelligence warrant applications, and, perhaps most controversially, criminal and civil proceedings. The nature of the state’s interest in national security confidentiality is as obvious as the damage secret hearings do to hallowed legal principles, including the open court/justice principle, procedural fairness, and the rule of law. And yet, secret hearings are not only fixtures of liberal democratic legal orders – they are expanding in scope and scale.

The normalization of secrecy has occurred in part through comparative constitutional learning. Borrowing from Canadian analogues, the UK has justified secret hearings using a “Special Advocate” system in 1997, whereby security-cleared lawyers represent excluded parties during secret hearings. Turning from its own legal traditions, Canada in turn transplanted core elements of the UK regime into its own Special Advocate system in 2008. Ever since, courts in each jurisdiction have referred to the judgments, practices, and norms of the other in resolving questions of procedural and substantive law, all the while finding such systems adequate substitutes for disclosure. But whereas the UK utilizes Special Advocates in virtually all security-based secret hearings, Canada has restricted its system to immigration law. There has been some speculation that Canada will, and even should, employ Special Advocates more often, including in civil suits concerned with deprivations of human rights in the context of national security. This question has arisen in cases relating to Maher Arar, Omar Khadr, Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin, and Abousfian Abdelrazik.

This paper will draw on the results of a two-year socio-legal study of the Special Advocate system in Canada and the UK in order to critically analyze the dynamics of comparative constitutional learning about secret trials. Drawing on interviews with judges, Special Advocates, administrators, and outside counsel, it inquires into whether Canada ought to follow the UK’s lead in utilizing Special Advocates to support secret civil trials. Careful attention will be paid to the legal, moral and theoretical lessons to be learned from recent (and ongoing) cases in both jurisdictions.