

**From Deference to Dialogue: National Security and the Courts in the Post 9/11 Era**

Andrew C. Banfield

Michael Zekulin

Department of Political Science

University of Calgary

[acbanfie@ucalgary.ca](mailto:acbanfie@ucalgary.ca)

[mzekulin@ucalgary.ca](mailto:mzekulin@ucalgary.ca)

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Correspondence: Andrew Banfield, Department of Political Science, University of Calgary,  
[acbanfie@ucalgary.ca](mailto:acbanfie@ucalgary.ca)

## **From Deference to Dialogue: National Security and the Courts in the Post 9/11 Era**

In *Federalist* No. 8, Alexander Hamilton observes when national security is threatened, even the most liberal nations, “to be more safe, ... become willing to run the risk of being less free” (Hamilton, (1788) 2003, 40). In the aftermath of the 9/11 terrorist attacks in New York and Washington, we see the full flower of what Hamilton feared. In the months that followed the attacks the Government of Canada responded, in part, by passing Bill C-27: the *Immigration and Refugee Protection Act* (IRPA). One of the more contentious sections of C-27 dealt with the “security certificates” process (sections 33 and 77-85). The security certificate is the mechanism by which the Federal Government, on the advice of the Minister, may detain and deport foreign nationals and non-citizens based on the perception they represent a threat to national security.

Those who support the use of security certificates argue that it is a proactive and preventative mechanism designed to “disrupt and prevent terrorist activity, not to criminally sanction it after the fact when the damage will have been done” (Breitkreuz, 2007, 67). By contrast, critics contend the process tilts the balance in favour of national security over civil rights (Wark, 2006; Roach & Trotter, 2005). In most cases, this “all or nothing” approach forces the Court to strike the balance between the two.

This “security or rights dichotomy” provides the focus of this paper. On several occasions the Supreme Court of Canada has weighed in on the constitutionality of the security certificate process. By adopting Thomas Poole’s (2007) “three phase” approach we detect a shift in judicial philosophy from early deference to inter-institutional dialogue. In the months after 9/11 the Canadian Court adopted a liberal and deferential approach to balancing national security and civil liberties. In the absence of another terrorist attack on North America, the Court has embraced a more rigorous defence of civil liberties for detainees. We suggest this change can be attributed to two factors: first, shifting public opinion surrounding terrorism; and second, the strategic decision-making capacity of Supreme Court Justices.

Our discussion proceeds in the following manner. In part one, we situate Canada in the comparative perspective showing that Canada was not alone in our legislative response to the terrorist attacks. We then trace the history of the security certificate provisions in Canada, revealing that they are a long-standing policy in Canadian national security, not an impassioned parliamentary response in the days after 9/11. After setting the theoretical groundwork, we examine the Supreme Court of Canada’s first case, *Suresh v. Canada* (2002). We show that the Court backed away from earlier rulings in delivering a deferential decision. In part three, we note three significant events which occurred in the intervening period between *Suresh* and *Charkaoui*, when the Court revisited the security certificate provisions. We suggest that a number of clues can be found indicating that the Court, if given the chance, would cast the security certificate provisions in a more critical light. Finally we examine *Charkaoui v. Canada* (2007), and the parliamentary response to the findings.

### **Security Certificates In Canada**

The adoption of sweeping anti-terrorism laws in the days after 9/11 was not unique to Canada. Indeed, many of Canada's allies responded to the events with similar anti-terror legislation. For example, in the United States, the *PATRIOT Act* was passed in the days following 9/11. Similarly the United Kingdom (no stranger to terrorism) responded with the *Anti-Terrorism, Crime and Security Act* (ACTSA) 2001 (Breitkreuz, 2007). This itself was an evolution of the previously passed *Terrorism Act 2000* which acknowledged the new risks posed by international terrorism, and thus included new immigration provisions (United Kingdom Government: British Home Office, 2000), as well as making the provisions permanent.<sup>1</sup> In short, Canada was in good company in responding to 9/11 with sweeping anti-terror legislation.

After the initial storm surrounding the terrorism legislation had passed, civil rights groups and NGOs turned their attention to the security certificate provisions contained in *IRPA*. Critics suggest security certificates are a product of legislative overreaction in the weeks following 9/11. However, a close examination reveals that the security certificate process has been in existence since 1978, introduced to accompany the *Immigration Act 1976*. The government suggests there was a natural progression of legislative events leading to the adoption of the *IRPA*. Prior to the implementation of *IRPA* in 2002, the original *Immigration Act 1976* was overhauled twice and amended more than thirty times because it was considered "too complex, too difficult to understand and not flexible enough to allow for effective action" (Government of Canada, 2002). Despite these amendments, there have been no substantial changes to the security certificate provisions. Indeed, the sections within the legislation have remained virtually identical: Section 40.1 (1-11) of the *Immigration Act 1976* outlines the same process as Article 34(1) of *IRPA 2002*.<sup>2</sup> The only nominal change made came under the heading "Safety and Security of Canada," where Section 38.1 articulates new security procedures "designed to ensure that Canada does not become a safe haven for retired or active terrorists"

Other criticisms levelled at the government indicate that having passed vast and expansive anti-terror legislation (*C-36 the Anti-Terrorism Act*) left no reason to use security certificate provisions contained in the *IRPA*. However, as Roach and Trotter (2005, 4) note, Canada is not alone in relying on immigration law as a means of combating terrorism. Canada and her allies rely on the immigration provisions because they grant more procedural latitude than the combined effects of the criminal code and anti-terrorism legislation.<sup>3</sup> Further criticisms focus on the security certificate itself and call for them to be discontinued or at the very least substantially amended (Whitaker, 2002). This argument suggests that security certificates provide a poor balance between human and civil rights, on one hand, and national security on the other.

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<sup>1</sup> Laura Donohue (2001) points out that the provisions within the 1974 Act were temporary, although they were always renewed without any difficulties, the legislation required a re-visiting and approval by Parliament every year.

<sup>2</sup> See Appendix 1 from complete wording of the *Immigration Act 1976* and the *Immigration and Refugee Protection Act 2002*.

<sup>3</sup> *IRPA* provides officials with an indefinite period of detention while the combined effects of the criminal code and the anti-terrorism law allow only "preventative arrest" and is limited to 72 hours of detention. For more information see Roach and Trotter, 2005.

Finally, there are claims that security certificates are undermining the traditional multicultural values of Canadian society. Because they only apply to a small segment of the population, primarily non-citizens, there are claims of racial profiling. For example, the Muslim Council of Montreal point out that the process of security certificates not only damages Canada's political climate, it may also have unpredictable racial and societal repercussions (Bell, 2006, 79). Similar concerns are voiced by The Canadian Council on American Islamic Relations (The Canadian Council on American Islamic Relations, 2005).

The criticisms above may suggest that security certificates are an oft used provision by the government. Yet, from 1991 until the events of September 11th, only 22 security certificates were issued. Since 9/11, an additional six have been issued (Adelman, 2007, 142). The Government claims that the security certificates are a rarely used mechanism employed only in "extraordinary and exceptional circumstances." By way of illustration, Wesley Wark (2006, 18) suggests the government has "a high batting average" before the Federal Court. With twenty certificates found reasonable and upheld, three quashed and four still under review, evidence suggests that the certificates are not arbitrarily issued, but are a carefully measured decision.

For a security certificate to be issued, an investigation is first conducted by the Canadian Security Intelligence Service (CSIS) concerning a potential security risk. Upon completion, a brief is sent for review to both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. If the Ministers determine the individual to be a security risk, a certificate of inadmissibility is issued declaring the foreign national or permanent resident may not enter Canadian territory on grounds *inter alia* of national security (S. 77). In most cases, this leads to the detention of the person named in the certificate. Both the certificate and the detention are subject to review by a Federal Court judge. If the information on which the certificate is based contains material sensitive to national security, some or all of the information can be withheld from detainee (S. 78). Detention based on the certificate differs according to whether the person detained is a foreign national or a permanent citizen. Once a certificate is issued, a permanent resident could be detained as a discretionary measure, but the certificate had to be reviewed within forty-eight hours of detention. By contrast, for a foreign national detention is automatic and the person can not apply for review until 120 days after a judge determined the reasonableness of the certificate (SS. 82-84). If the certificate is deemed to be reasonable, it becomes a removal order with the possibility of immediate enforcement. This process is not subject to appeal in the judicial system (S. 81).

This provides the context for the Supreme Court's initial foray into national security matters. Using a judicial decision-making framework, we address the Court's deferential approach to provisions relating to national security. We suggest the reason lies in the Court being aware of outside factors, such as public opinion and other actors in the institutions of government.

### Early Deference: The Call for Balance

The strategic decision-making capacity of Supreme Court Justices is a well traveled road. Beginning with American political scientists, the study of judicial strategic behavior is dominated by the attitudinal model (for example see: Baum, 1988; Flemming, 2004; Segal and Spaeth, 1993, 2002; Spaeth and Segal, 1999). This model suggests that the justice's perceptions, attitudes and values play an important, perhaps pre-eminent role, in how judicial decisions are crafted and handed down. Segal and Spaeth (2002) argue that while Supreme Court decisions are cast in a legalistic style, this is merely a façade which covers the underlying values of the justices.

Leading theorists suggest that in addition to the attitudinal values above, Justices employ additional considerations when arriving at a decision. Epstein and Knight (1998) argue that Justices are “strategic actors who realize their ability to achieve their goals depend on a consideration of preferences of others, of the choices they expect to make, and of the institutional context in which they act” (Epstein and Knight, 1998, 10). James Gibson further asserts that judicial decisions are a function of “what judges prefer to do, tempered by what they ought to do, but constrained by what they think is feasible to do”(Gibson, 1998, 256). The “others” that Epstein and Knight and Gibson mention include: the public, judicial colleagues, and the institutions of government. In short, Supreme Court Justices are keenly aware that in order to have their decisions implemented, they need to account for the preferences of others in the political and private realms.

In the weeks after the 9/11 attacks, there was a public perception that the terror attacks on the World Trade Center and the Pentagon would have a lasting effect on people's daily lives. For example, a poll conducted on October 5<sup>th</sup>, 2001, revealed that Canadians perceived a real threat of terrorism. Over half (58 per cent) of respondents felt these threats ought to outweigh the protection of individual rights, freedoms and due process of law, and that police and intelligence agents should receive the tools they need to protect Canadians against terrorism (Ipsos-Reid Poll, 2001b). Moreover, the immediate government response to the events of 9/11 also seemed to satisfy the majority of Canadians. In a December 2001 poll, 57 per cent of Canadians responded that the federal government had done enough to protect civil rights while fighting terrorism (Ipsos-Reid Poll, 2001a).

Presented with a frightened public, and resolute political actors (Justice Minister Irwin Cotler (2001) called the legislation “legacy legislation”), the decision reached in *Suresh v. Canada* was predictable using rational decision-making. Manickavasagam Suresh was a United Nations Convention refugee who arrived from Sri Lanka in 1990 and applied for landed immigrant status. In 1995, the Canadian Government detained and began deportation proceeding against Suresh on the basis that he was a member and fundraiser for the Liberation Tiger of Tamil Eelam. The Tamil Tigers (as they are known) are considered to by the Sri Lankan government to be engaged in terrorist activity and are

thus, subject to torture if they apprehended.<sup>4</sup> The Federal Trial Court upheld the deportation order as reasonable. The Minister of Citizenship and Immigration issued an opinion declaring Suresh to be a danger to Canadian security (a security certificate under S. 53(1)(b)) and should be deported.

Because Suresh was not provided with an opportunity to respond to the charges that he constituted a danger to Canadian security, he challenged the deportation order with the contention that: the Minister's decision was unreasonable; the procedures under the Act (the security certificate) were unfair; and that the Act infringed sections 7, 2(b) and (d) of the Charter.<sup>5</sup> The decision in *Suresh v. Canada (Minister of Citizenship and Immigration)* was delivered January 11, 2002 *per curiam*. While the ruling specific to Suresh may seem anti-climactic, namely that he was entitled to a new deportation hearing, the additional substantive finding of the Court warrants a closer look, especially when it is suggested that the *Suresh* decision was a substantial retreat from earlier decisions.<sup>6</sup>

One of the key planks in Mr. Suresh's challenge was that if he were deported back to Sri Lanka, he would be subject to torture because of his political views. He claimed this was a violation of his section 2 and 7 Charter rights. While the Supreme Court has not developed jurisprudence surrounding deportation to torture, there is substantial case law regarding the extradition to torture. For example, in *Schmidt* (1987), Justice La Forest suggested that section 7 is concerned with the immediate consequences of an extradition order but also with the "manner in which the foreign state will deal with the fugitive on surrender" (at 47). In *Kindler* (1991) Justice McLachlin (as she was then), argued that a "social consensus" would be a useful barometer in determining whether extradition would violate section 7 rights, noting that the case of torture would be one such case (p. 851). Justice La Forest, concurring wrote "[t]here are, of course, situations where the punishment imposed following surrender – torture, for example – would be so outrageous to the values of the Canadian community that surrender would be unacceptable" (p. 832). In *Burns* (2001) the Court concluded that section 7 guarantees apply if "there is a sufficient causal connection between our government's participation and the deprivation ultimately effected" (at 54). In short, for section 7 rights to be engaged there needs to be a *sufficient* connection between Canada's actions the deprivation of life, liberty or security (at 55).

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<sup>4</sup> This claim was substantiated by the NGO Human Rights Watch who reports that the government of Sri Lanka is responsible for serious human rights abuses including torture by government security forces. Further, human rights lawyer N. Kandasamy indicates that some 18 000 people may have been arrested and detained without trial for more than two years on evidence against them which was secured from confessions extracted under torture (Human Rights Watch, 2002).

<sup>5</sup> Section 2 of the Charter guarantees fundamental freedoms. Section 2b is guarantees freedom of thought, belief and expression and 2d guarantees freedom of association. Section 7 of the Charter guarantees the right to life, liberty and the security of the person.

<sup>6</sup> In *Baker v Canada (Minister of Citizenship and Immigration)* (1999) the Supreme Court of Canada ruled that Baker, an illegal "overstayer" should be able to stay in Canada on compassionate and humanitarian grounds based on the fact she had four Canadian-born children.

In the case of *Suresh*, the Court ruled that section 7 does not require the Minister to conduct or a full oral hearing or judicial process when issues of national security arise. Moreover, the members suggested that the Court should adopt a deferential approach to national security matters as long as the Minister's decision is not "patently unreasonable in the sense that it was made arbitrarily or in bad faith, cannot be supported on the evidence" (at 29). Indeed, the Court emphasized that based on the *Pushpanathan* (1998) precedent, "the *ultimate question is always what the legislature intended*" (at 30, emphasis added). This deference stands in sharp contrast to most post-Charter decisions where the Court tends to provide oracle-like finality on all matters constitutional (for example: *Hiebert*, 2002; *Knopff and Morton*, 1992; *Manfredi*, 2001; *Morton and Knopff*, 2000).

The Court also ruled that "substantial risk [of torture]" is the threshold question when dealing with extradition of security threats. A number of issues should be weighed against deportation to torture (e.g. the human rights record of the state) but such issues are "outside the realm of expertise of the courts and possess a negligible legal dimension" (at 39) Moreover, "If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold this decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion" (at 38).

In short, Canadian jurisprudence does not suggest that extradition to potential torture would be automatically unconstitutional. However, the Court stressed that the state should err on the side of caution when extraditing to torture, and that perhaps the appropriate approach would "balance" the competing interests of the state combating terrorism and the rights of the individuals. This is a difficult position to reconcile when viewed through the lens of not extraditing criminals to countries where they would face the death penalty for their crimes (*Burns*). It appears, then that there may be some additional considerations at play in *Suresh*.

On its face, the decision in *Suresh* runs counter to both *Burns* (death penalty) and *Baker* (compassionate grounds). The question becomes "what explains the about-face by the Court?" We suggest that the answer lies in the external constraints faced by the Court. As noted above, there was a legitimate public fear of additional terrorist attacks. Second, even if the Supreme Court was displeased with the security certificate process, in the months after 9/11 all governments were given a great deal of latitude to deal with national security.<sup>7</sup> Thus, it seems safe to suggest that the Canadian Court did not want to be seen either, domestically or internationally, as "soft" on terrorism, even at the expense of the detainees' civil liberties.

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<sup>7</sup> For example, the United Kingdom also deferred to government authority. UK Courts were deferential until a House of Lords Judicial Committee ruling suggested that Article IV of *Anti-Terrorism, Crime and Security Act* (ATCSA) 2001 was incompatible with articles of the EU Commission on Human Rights relative to "the right to liberty and the right from freedom of discrimination." The government repealed Part IV of ATCSA and replaced them with a system of control orders under a new legislation *Prevention of Terrorism Act 2005* (United Kingdom Government: British Home Office, 2005).

Of course, like all strategic calculations, the equilibrium only lasts for a finite period. Once the initial latitude given to governments subsides, there appears to be a recalculation of the competing interests of national security and civil liberties.

### **Reflective Caution: From Suresh to Charkaoui**

In the intervening period between *Suresh* was the Court's revisiting of security certificate provisions in *Charkaoui*, three developments are worthy of note. The first is a speech delivered by the Chief Justice of the Supreme Court of Canada to the Vietnam-Canada Business Association, where she outlines the problem of reconciling national security and civil liberties. Second is the United Nations Human Rights Committee's ruling on Canada's treatment of Mansour Ahani. Finally, the findings of Maher Arar inquiry provide some insight in to the shifting balance between national security and civil rights.

On November 28<sup>th</sup>, 2003, twenty months after the *Suresh* decision, the Chief Justice asked "how [do liberal democracies] maintain security *as well* as individual rights and the rule of law?" (emphasis in original) (McLachlin, 2003). She notes that it is tempting to abandon respect for human rights in order to fight terrorism with unrestricted force. However, she cautions that "we cannot choose between maintaining security and maintaining rights. We must have both" (ibid.). Again she evokes the image of balancing seen in the *Suresh* decision: "we must resort to balancing – finding the compromise that maintains the security without threatening the values on which our society is based" (ibid.).

In doing so, the Chief Justice appeared to reaffirm the decision in *Suresh*. However, only two paragraphs later she makes a bold claim: "let me make a vital qualification. It is not entirely a matter of balance. There are some values so basic that they must always be maintained – like the basic right of the people to chose who govern them and an open and independent court system. To these many would add basic human rights, like freedom from torture, murder and indefinite detention without the hope or promise of legal recourse" (ibid). This passage suggests that the Chief Justice was aware that the Court was giving latitude to Parliament in the *Suresh* decision. Moreover, we interpret this as suggesting the Court would not permit such latitudes in the future.

Chief Justice McLachlin's finds support in public opinion as well. In 2002, Pew Research polled Canadians, Britons and Americans asking how problematic each one felt terrorism was for their respective countries (Pew Research Centre, 2002). Canadians seemed less concerned then allies (19 per cent responded it was a very big problem; 30 per cent responded it was a moderately big problem; 35 per cent responded it was a small problem; and 14 per cent responded it was not a problem)<sup>8</sup>. Also in 2002, Environics

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<sup>8</sup> Those in the United Kingdom tended to feel it was "more of a threat" than less of one (23% responded it was a very big problem; 37% responded it was a moderately big problem; 30% responded it was a small problem; and 8% responded it was not a problem). The United States, in all likelihood due to being the victims of the terror attacks reported a much higher number who felt it was a problem (50% responded it was a very big problem; 37% responded it was a moderately big problem; 11% responded it was a small problem; and 1% responded it was not a problem).



Research Group asked Canadians about the “likelihood of terrorist attack (in Canada)” showing that immediately after 9/11, 55 per cent of Canadians that it was likely. By March 2002, however, only 37 per cent thought this would happen (Baker, 2002).

The second event is a ruling by the United Nations Human Rights Committee on the case of *Ahani v. Canada* (United Nations Human Rights Committee, 2004). The decision in *Ahani v. Canada (Minister of Citizenship and Immigration)* was delivered concurrently with the *Suresh* decision, but to less media attention. At issue in *Ahani* was the deportation of Ahani to Iran on a security certificate where he claimed he would be subject to torture. The Court ruled that the Minister followed proper procedure and that Ahani faced only “minimal risk” of torture upon his return to Iran.<sup>9</sup> He appealed to the Supreme Court of Canada arguing that the security certificate was invalid and he faced the threat of torture if he was deported back to Iran. The Supreme Court subsequently dismissed his appeal and Ahani was deported in June of 2002.

Before his deportation, Ahani’s lawyers petitioned the UN Committee in on January 10, 2002, arguing that Canada had violated the International Covenant on Civil and Political Rights (ICCPR) by failing to “afford Ahani timely judicial review of his detention and appropriate procedural safeguards in proceedings leading to his removal” (Heckman, 2005). On June 15<sup>th</sup>, 2004, the United Nations Committee on Human Rights issued a ruling March 29, 2004, in the Ahani case. The Committee found that Canada had indeed violated its international obligations under Articles 9 and 13 of the ICCPR.

The Committee issued three findings in the case. First, they found that Canada had violated its obligations under the ICCPR by deporting Ahani to Iran when the Committee had issued a Rule 86 request that he not be removed until the allegation.<sup>10</sup> The Committee concluded that Canada had “flouted human rights” by ignoring the Committee’s request not to have Ahani deported “undermin[ing] the protection of Covenant rights through the Operational Protocol” (8.1-2). Second, the committee accepted the detention of Ahani based on the Ministerial certificate was not arbitrary, but the Committee ruled that the access to judicial review (of the certificate) had not been made “without delay.” They found the nine-and-one-half month period take to complete the initial hearing was too long. Finally, the Committee ruled that Ahani was not afforded the procedural safeguards guaranteed by the UN Convention. Divided in to two parts the Committee held that Federal Court did not violate the Protocol, but when Canada proceeded with extradition proceedings against Ahani, the committee found that Canada violated Ahani’s rights because he was not afforded procedural safeguards against being deported to torture. More generally, at least three committees within the United Nations - UN Committee against Torture, UN Working Group on Arbitrary Detention and, UN Human Rights Committee - have all condemned Canada’s security

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<sup>9</sup> Stewart Bell (Bell, 2006) of the National Post revealed that since his deportation in 2002 there was no evidence to suggest that Ahani had been harmed in any way since his arrival in Iran.

<sup>10</sup> The UN Human Rights Committee under Rule 86 of its rules of procedure may request a refrain from deporting a person pending further investigation. It informs the state in question to essentially refrain from acting, wait and asks them to conduct further inquiry “as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation”

certificate process and have called on Canada to use criminal law as an alternative (Amnesty International Canada, 2006).

Finally, the details of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (Arar Inquiry) are well known. Briefly, Arar was a Canadian citizen, born in Syria, who was arrested and detained by US officials in September, 2002. He was deported to Syria, where for the next year he was imprisoned and tortured by Syrian officials. In October, 2003, he was returned to Canada. He was not charged with any offence in the United States, Canada, or Syria, and there was no evidence that he ever constituted a terrorist threat (CBC News, 2007).

Concerns over the actions of Canadian security agencies (in particular their information sharing), led to the public investigation. The report released in September, 2006, was divided in to two sections: a report on the actions of Canadian officials, and a recommendation for a review mechanism for how the Royal Canadian Mounted Police dealt with security threats. The Factual Report was critical of the RCMP, and the Policy Review recommended enhanced review and accountability mechanisms for all agencies dealing with national security. Commissioner O'Connor noted that because of the sensitive nature of national security which (often) cannot be disclosed to the public, the ability of the courts to protect rights is impaired (see: Poole, 2007).

These three events show the beginnings of the shift toward the rebalancing of national security and civil liberties. After the initial panic of 9/11 had passed, Chief Justice McLachlin's speech revealed the Court's openness to a more "balanced" approach to reconciling national security and civil liberties. Her reflections made it clear that the Supreme Court of Canada (or at least the Chief Justice) were not prepared to remain observers at the expense of basic civil rights. Additional clues can be found in the fact that Canada was "scolded" by the UN for its handling of the Ahani case, and Commissioner O'Connor was very critical of national security agencies (including the Department of Citizenship and Immigration) for the treatment of Maher Arar.

These events coincided with a shift in public opinion surrounding the threat of terrorism. For example, an Ipsos-Reid Poll (2004) conducted in February 2004 revealed that 45 per cent of Canadians believed that police powers had gone too far in using anti-terror powers. Further, 41 per cent were worried that, if wrongly detained as terrorism suspects, they would not get a fair hearing and process. Indeed, as many as 75 per cent of Canadians disapproved of the Maher Arar deportation calling, it "not justified." By November of 2006 close to 50 per cent of Canadians now responded that they felt the laws aimed at protecting national security post 9/11 were intrusive (Ipsos-Reid Poll, 2006). Taken together, these trends and events provide context for the Court's decision in *Charkaoui*.

### **Return to Dialogue: Charkaoui**

Five years after the Court had engaged the constitutionality of the security certificate process in *Suresh*, the question was once again before the Court in *Charkaoui v. Canada*

(*Citizenship and Immigration*). As discussed, much had changed in the intervening period, including the legislative provisions that were challenged (from *Immigration Act* to *IRPA*).

At issue in this case were legal provisions of the security certificate process found in the *IRPA*. The process was challenged by Adil Charkaoui who was a permanent resident of Canada when he was arrested and detained as a suspected terrorist.<sup>11</sup> According to the security certificate executed in Montreal in May, 2003, Charkauoi was part of an *al-Qaida* network. Further details revealed by Martin Collacutt (2006, 12) identify CSIS sources indicating Charkaoui had been in contact with Montreal-based Islamic extremists including an al-Qaida recruiter. He also cites Anne McLellan as asserting that Charkaoui is “absolutely” a national security threat to Canada. The Moroccan government had also issued an arrest warrant for Charkaoui, but had also given Canadian officials assurances that he could be deported without “fear of reprisal” (Montgomery, 2005). At the time of the appeal, Mr. Charkaoui had been detained since 2003, and the reasonableness of the certificate had yet to be determined by a Federal judge. He challenged the security certificate process on the basis that it violated five provisions of the Charter: sections 7, 9, 10 (c), 12, and 15.<sup>12</sup> He further claimed the process violated unwritten constitutional principles such as the rule of law.

The opinion of the Court was 9-0, delivered by Chief Justice McLachlin. She found that the provisions in *IRPA* which permitted the secret detention and judicial review of detainees’ certificates to be unconstitutional. It was held that deportation of non-citizens based on the security certificate procedure does not violate section 7 of the Charter. However, the review mechanisms which permit the judge to hear the Minister’s evidence *in camera* and *ex part* violated section 7. Because the detainee was given only summary information about the certificate, and was not invited to attend the hearing, the Chief Justice argued that this was a violation of due process which violated the detainee’s section 7 rights. She concluded the procedures in *IRPA* meet the judicial threshold of independence and impartiality, however, the “secrecy of the scheme denies the person named in a certificate the opportunity to know the case put against [them]” (at 65). This limits the judge’s ability to weight the body of evidence against the accused and, in turn, the person named in the certificate may not be able to raise objections to the evidence, as guaranteed by the adversarial process.

The Court concludes that this infringement of rights cannot be saved under the *Oakes* test. Chief Justice McLachlin agrees that the protection of national security and intelligence sources is a pressing and substantial concern, and the non-disclosure of evidence is rationally connected, the *IRPA* provisions do not minimally impair the rights of the persons named in the certificate. She specifically notes, the development of

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<sup>11</sup> The other two plaintiffs in the case Messrs. Harkat and Alrei were foreign nationals recognized as Convention refugees. Both were living in Canada when detained.

<sup>12</sup> Section 7 guarantees the right to “life liberty and the security of the person”; S.9 guarantees right against arbitrary detention; section 10 (c) guarantee of prompt review of detention; section 12 guarantee against cruel and unusual punishment; and section 15 guarantee of equal protection before the law.

“special council” most notably in the United Kingdom, can protect the rights of the accused more than IRPA. Indeed, Chief Justice McLachlin made a special point to note:

“Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person’s interest ...has not been explained. The special counsel system may not be perfect from the named person’s perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person’s s. 7 interests (at 86).

On the second question, the Chief Justice found that the detention of foreign nationals without a warrant does not violate section 9 of the Charter (arbitrary detention). She observed that the detention is not arbitrary because the “standards are rationally related to the purpose of the power of detention [quoting Peter Hogg]” (at 89). However, the delay of 120 days after the certificate is confirmed does violate section 9 and 10(c) of the Charter, and cannot be saved under section 1. Because permanent residents are guaranteed a hearing within forth-eight hours, the Court cannot justify waiting an additional 118 days for foreign nationals.<sup>13</sup> The fact the Court refused to make the changes to *IRPA*, can be interpreted as a subtle “you do your job, we’ll do ours” when it comes to balancing national security and civil liberties.

### **Moving Forward: After Charkaoui**

Critics of the security certificate process were quick to claim victory in the aftermath of the ruling. Mr. Charkaoui boldly said of his victory, “[t]he Supreme Court, by 9 to 0, has said no Guantanamo North in Canada” (Austen, 2007). Alex Neve, Secretary General of Amnesty International (an intervener) said, “[t]oday the Supreme Court of Canada has said, make sure you put human rights at the centre of how you prevent terrorism”(Ibid.). The Government of Canada took the advice of the Court in stride. Stockwell Day, Minister of Public Safety said, “it is our intention to follow the Supreme Court ruling [and] we will look at the changes that are necessary” (ibid.). He remained optimistic, however, about the future of security certificates and downplayed the impact of the Supreme Court decision suggesting that, while the government would review the decision, it should be read as upholding “the general principle” of security certificates (CTV News, 2007b). He has stated that the government would most likely move to adopt a meaningful review process, similar to the use of special counsel in the UK. The government re-introduced the legislation on October 22<sup>nd</sup>, 2007 with a new provision: the creation of special advocates who would represent those held on certificates (CTV News, 2007a). These changes should not necessarily be interpreted as the government conceding to the Courts. Stockwell Day (2007) maintains that he as well as other members of the government see no problem with the security certificate process and

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<sup>13</sup> In a series of interesting asides, the Court found that imprisonment until deportation does not constitute cruel and unusual punishment, and different treatment citizens and non-citizens is not unconstitutional. Moreover, the rule of law is not violated by the security certificate process. The Court suspended its judgment for one year in order for Parliament to respond to the Court’s findings (at140).

allude to the fact the certificates are “a three-sided cell,” where the individual named is free to leave Canada of their own accord.

The Canadian Court also stands in direct contrast to the United States Supreme Court where a deferential approach to national security and terrorism has been maintained. Laura Donohue (2008) argues that the political environment in the United States ensures that both the judicial and legislative branches remain subordinate to the executive. She claims, that in direct response to “the war on terror”, executive power has grown exponentially because the legislators fear disagreeing and being seen as soft on terror; as a result, Courts are at best only capable of checking the power of the executive at the margins. In, Canada, however, the Court began a not so subtle (but not hostile) push back against the over-reaching power of the executive branch in the area of national security. Indeed, the Court flexed its judicial muscle to assert the importance of “normal” public law in national security matters, while establishing a “bottom line” below which standards cannot sink (*Charkaoui* at 23).

Almost a year after the *Charkaoui* decision, the Government of Canada has responded to the quashed provision by passing *Bill C-3: An Act to Amend the Immigration and Refugee Protection Act (certificate and special advocates)*. The bill passed 196 to 71 in the House, and it currently awaits passage in the Senate. Of note in C-3, is the introduction of the “special advocate.” Briefly, special advocates are appointed by the Court to act on behalf of the accused, where matter of national security (security certificates) prevent the normal adversarial rules (Department of Justice, 2008).

Potential flaws have been indicated in the special advocate system employed by the United Kingdom. For example, the Joint Committee on Human Rights of the House of Lords wrote in July 2007 “we were left in no doubt by their evidence [four senior special advocates] that proceedings involving special advocates... fail to afford a ‘substantial measure of procedural justice’” (House of Lords Joint Committee On Human Rights, 2007). Especially damaging were the comparisons of special advocates to the “Star Chamber.” These findings left the committee with the opinion that the special advocate provisions were “offensive to the basic principles of adversarial justice [and] against the basic notions of fair play” (*ibid.*).

The findings of the House of Lords may be problematic for Canadian special advocates and a number of groups, lawyers, and law professors have suggested that Bill C-3 is still unconstitutional (Canadian Bar Association, 2008). Of course, if we only needed the opinion of the CBA and law professors, we would not need a Supreme Court to make constitutional rulings. The data further suggest that the Court will continue to take a more robust role in the protection of civil liberties, especially in the absence of additional terrorist attacks. Indeed, if the current judicial pattern holds and the constitutionality of Bill C-3 is challenged, we may see the Court take a more robust role in re-writing Canadian terror laws similar to the role taken by the Court in minority language or gay rights (see for example: Banfield, 2008; Manfredi, 1993; Morton, 1999). Of course, this is all speculation until the Bill is passed and challenged. Moving forward, the question

remains as to what we can expect from the Supreme Court of Canada in the realm of national security.

### **Conclusion**

The delicate act of balancing national security and civil rights has played out before the Supreme Court since the events of 9/11, and we seen a distinct a shift in jurisprudence of the high court. We suggest that this shift can be attributed to the strategic nature of judicial decision-making, specifically the unspoken calculations between the Justices and their external audiences. In this case, the shifting ground of public opinion towards terrorism has had a major impact.

In the days after 9/11, the Supreme Court, faced with a frightened public, adopts a deferential approach to national security. In the absence of additional attacks on North America, the initial public fear subsided. A number of high profile incidents which cast Canadian security policy in an unflattering light. When given a chance to revisit security certificates in *Chakaoui*, the Court took a much tougher stand against rights infringements. This shift was well-anticipated considering Justices of the Court are strategic actors cognizant of other external actors in the political system. We further suggest that, if given the chance to again revisit security certificates, the Court will continue this push-back against parliamentary over-reaching.

The “security versus civil liberties” dichotomy presented is not likely to end any time soon. What this means for Canadian jurisprudence lies in the potential for future attacks and the parliamentary response to those threats. This much is certain, the Supreme Court will continue to struggle find the balance between rights and security with a cautious eye turned to their external audiences.

## APPENDIX 1

### *Immigration Act 1976*

**40.** (1) Where, after considering a report made by the Review Committee referred to in subsection 39(9), the Governor in Council is satisfied that the person with respect to whom the report was made is a person described in paragraph 19(1)(c.2), subparagraph 19(1)(d)(ii), paragraph 19(1)(e), (f), (g), (k) or (l) or 27(1)(a.1), subparagraph 27(1)(a.3)(ii) or paragraph 27(1)(g) or (h), the Governor in Council may direct the Minister to issue a certificate to that effect.

(2) A certificate issued under subsection (1) is, in any prosecution or other proceeding under or arising out of this Act, conclusive proof of the matters stated therein without proof of the signature or official character of the person appearing to have signed the certificate unless called into question by the Minister.

**40.1** (1) Notwithstanding anything in this Act, where the Minister and the Solicitor General of Canada are of the opinion, based on security or criminal intelligence reports received and considered by them, that a person, other than a Canadian citizen or permanent resident, is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii), they may sign and file a certificate to that effect with an immigration officer, a senior immigration officer or an adjudicator.

(2) Where a certificate is signed and filed in accordance with subsection (1),

(a) an inquiry under this Act concerning the person in respect of whom the certificate is filed shall not be commenced, or if commenced shall be adjourned, until the determination referred to in paragraph (4)(d) has been made; and

(b) a senior immigration officer or an adjudicator shall, notwithstanding section 23 or 103 but subject to subsection (7.1), detain or make an order to detain the person named in the certificate until the making of the determination.

(3) Where a certificate referred to in subsection (1) is filed in accordance with that subsection, the Minister shall

(a) forthwith cause a copy of the certificate to be referred to the Federal Court for a determination as to whether the certificate should be quashed; and

(b) within three days after the certificate has been filed, cause a notice to be sent to the person named in the certificate informing the person that a certificate under this section has been filed and that following a reference to the Federal Court a deportation order may be made against the person.

(4) Where a certificate is referred to the Federal Court pursuant to subsection (3), the Chief Justice of that Court or a judge of that Court designated by the Chief Justice for the purposes of this section shall

(a) examine within seven days, *in camera*, the security or criminal intelligence reports considered by the Minister and the Solicitor General and hear any other evidence or information that may be presented by or on behalf of those Ministers and may, on the request of the Minister or the Solicitor General, hear all or part of such evidence or information in the absence of the person named in the certificate and any counsel representing the person where, in the opinion of the Chief Justice or the designated judge, as the case may be, the evidence or information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(b) provide the person named in the certificate with a statement summarizing such information available to the Chief Justice or the designated judge, as the case may be, as will enable the person to be reasonably informed of the circumstances giving rise to the issue of the certificate, having regard to whether, in the opinion of the Chief Justice or the designated judge, as the case may be, the information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) provide the person named in the certificate with a reasonable opportunity to be heard;

(d) determine whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available to the Chief Justice or the designated judge, as the case may be, and, if found not to be reasonable, quash the certificate; and

(e) notify the Minister, the Solicitor General and the person named in the certificate of the determination made pursuant to paragraph (d).

(5) For the purposes of subsection (4), the Chief Justice or the designated judge may, subject to subsection (5.1), receive, accept and base the determination referred to in paragraph (4)(d) on such evidence or information as the Chief Justice or the designated judge sees fit, whether or not the evidence or information is or would be admissible in a court of law.

(5.1) For the purposes of subsection (4),

(a) the Minister or the Solicitor General of Canada may make an application, *in camera* and in the absence of the person named in the certificate and any counsel representing the person, to the Chief Justice or the designated judge for the admission of information obtained in confidence from the government or an institution of a foreign state or from an international organization of states or an institution thereof;



(b) the Chief Justice or the designated judge shall, *in camera* and in the absence of the person named in the certificate and any counsel representing the person,

(i) examine that information, and

(ii) provide counsel representing the Minister or the Solicitor General of Canada with a reasonable opportunity to be heard as to whether the information is relevant but should not be disclosed to the person named in the certificate on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) that information shall be returned to counsel representing the Minister or the Solicitor General of Canada and shall not be considered by the Chief Justice or the designated judge in making the determination referred to in paragraph (4)(d), if

(i) the Chief Justice or the designated judge determines

(A) that the information is not relevant, or

(B) that the information is relevant and should be summarized in the statement to be provided pursuant to paragraph (4)(b) to the person named in the certificate, or

(ii) the Minister or the Solicitor General of Canada withdraws the application; and

(d) if the Chief Justice or the designated judge determines that the information is relevant but should not be disclosed to the person named in the certificate on the grounds that the disclosure would be injurious to national security or to the safety of persons, the information shall not be summarized in the statement provided pursuant to paragraph (4)(b) to the person named in the certificate but may be considered by the Chief Justice or the designated judge in making the determination referred to in paragraph (4)(d).

(6) A determination under paragraph (4)(d) is not subject to appeal or review by any court.

(7) Where a certificate has been reviewed by the Federal Court pursuant to subsection (4) and has not been quashed pursuant to paragraph (4)(d),

(a) the certificate is conclusive proof that the person named in the certificate is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii); and

(b) the person named in the certificate shall, notwithstanding section 23 or 103 but subject to subsection (7.1), continue to be detained until the person is removed from Canada.

(7.1) The Minister may order the release of a person who is named in a certificate that is signed and filed in accordance with subsection (1) in order to permit the departure from Canada of the person, regardless of whether the Chief Justice or the designated judge has yet made the determination referred to in paragraph (4)(d).

(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days after the making of the removal order relating to that person, the person may apply to the Chief Justice of the Federal Court or to a judge of the Federal Court designated by the Chief Justice for the purposes of this section for an order under subsection (9).

(9) On an application referred to in subsection (8) the Chief Justice or the designated judge may, subject to such terms and conditions as the Chief Justice or designated judge deems appropriate, order that the person be released from detention if the Chief Justice or designated judge is satisfied that

(a) the person will not be removed from Canada within a reasonable time; and

(b) the person's release would not be injurious to national security or to the safety of persons.

(10) On the hearing of an application referred to in subsection (8), the Chief Justice or the designated judge shall

(a) examine, in camera, and in the absence of the person making the application and any counsel representing that person, any evidence or information presented to the Minister in relation to national security or the safety of persons;

(b) provide the person making the application with a statement summarizing the evidence or information available to the Chief Justice or designated judge in relation to national security or the safety of persons having regard to whether, in the opinion of the Chief Justice or the designated judge, as the case may be, the evidence or information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons; and

(c) provide the person making the application with a reasonable opportunity to be heard.

(11) For the purposes of subsection (10), the Chief Justice or the designated judge may receive and accept such evidence or information as the Chief Justice or the designated judge sees fit, whether or not the evidence or information is or would be admissible in a court of law.

*Immigration and Refugee Protection Act 2002*

**Section 77:** Allows the Ministers to sign a certificate deeming that a permanent resident or foreign national is inadmissible to Canada on grounds of security. It is immediately referred to the Federal Court.

**Section 80:** Requires the Federal Court judge to whom the certificate has been referred to determine, based on the evidence and information provided, whether the certificate is reasonable. Once a certificate has been determined reasonable by the judge, it may be neither appealed nor judicially reviewed.

**Section 78:** Outlines the procedure whereby the Federal Judge considers the information in the submitted application. This is one of the focuses of challenges to the security certificate process. Although it will be elaborated on below it questions the type of information and the manner in which it is reviewed by the Judge.

**Section 81:** Once a certificate has been deemed reasonable, the effect under Section 81 is to make the individual named in the certificate ineligible for protection under Section 112.

**Section 82:** Declares that a warrant and subsequent detention of an individual named in a security certificate pending the determination of the reasonableness of the certificate. It allows for indefinite detention and the detention may continue after a certificate has been deemed reasonable until that individual is deported. This is also one of the main focuses of Court challenges.

**Section 112:** Allows an individual named in a security certificate to apply to the Minister of Citizenship and Immigration for protection. Such an application can be made if an individual is at risk of torture or persecution if they are deported. However, this application must be made prior to a Federal Judge deeming a security certificate reasonable otherwise this avenue of appeal is immediately closed.

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