Governing Non-Citizens as Security Threats: Canada's Security Certificate Regime[i]

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Introduction: "Protection" for Whom; from Whom?

In Oceana, the dystopian setting of George Orwell's *Nineteen Eighty-Four*, the official names of institutions and processes directly contradict their authoritarian character. The Ministry of Peace conducts perpetual war, the Ministry of Love identifies and tortures suspicious persons, and the Ministry of Truth creates and revises propaganda. In contemporary Canada, the *Immigration and Refugee Protection Act*[ii] (hereafter IRPA) empowers the state to indefinitely imprison without charge or trial, and on the basis of secret intelligence, those non-citizens it deems to represent potential threats to national security. This takes place through the issuing of a security certificate, which explicitly declares the subject to be "inadmissible" to Canada. On paper, this is intended to lead to the detention and subsequent deportation of the non-citizen, who may be a permanent resident or a refugee claimant. In practice, it can mean a prolonged, indefinite term of imprisonment on Canadian soil, described by the government as a "preventive measure" (Canada: CBSA 2006a: 9)[iii] to "ensure Canadians are protected" (Canada: CBSA 2006a: 4).

It is indeed Orwellian, but not extraordinary, that an act ostensibly for the protection *of* refugees has become part of an apparatus or *dispositif* of security (see Bigo 2005), where it is framed as a tool for the protection of citizens *from* risky non-citizens. As Bigo (2002) observes, the securitization of migration and the construction of foreigners as potential threats are central to the contemporary governmentality of unease, which is characterized by the de-differentiation of internal and transnational security (see also Bauman 2004; Larner and Walters 2004; Pratt 2005). This is particularly the case in the post-September 11 context, where prevailing (in)security narratives conflate notions of otherness and danger (Larsen 2006); where terrorism is simultaneously framed as an amorphous, transnational phenomenon and a locally experienced threat to the "homeland;" and where the rapid expansion of technologies of surveillance and control have have enhanced the state's ability to monitor, screen, and profile those groups deemed suspicious or potentially risky. By framing migration as a security problem, the state brings to bear a variety of discourses, techniques, laws, and governmental processes. This produces change in national legal and institutional landscapes, as the exceptionalizing impact of securitization (see Krause and Williams 1997; Fierke 2007) transcends and remakes rules and norms.

My intention with this paper is to trace a path between discourses and processes that govern migration as a security problem, and resultant shifts in institutional dynamics and everyday practice that take place within the Canadian (in)security field (Bigo 2002). This discussion emerges from an ongoing study of the Canadian security certificate regime and the institutional architecture that has recently emerged for the purpose of incarcerating security certificate subjects. I have strong normative objections to the security certificate regime, grounded in a commitment to a substantive understanding of the rule of law (see Dyzenhaus 2006) and a concomitant rejection of (in)security discourses that seek to legitimize serious derogations from legal principles on grounds of citizenship status. Alongside these objections, I admit to being fascinated by security certificates, primarily because they exemplify the mutagenic effects of security policies and discourses. By this, I mean the demonstrable capacity of the "expansion of what security is taken to include" (Bigo 2002: 63) to alter those institutions that it comes to encompass. The securitization of migration through the security certificate mechanism has

resulted in a unique intersection of security intelligence, citizenship and immigration, border control and correctional agencies and institutions, and in structural and operational shifts in the way these entities operate and are governed. This paper reflects the descriptive and analytic aspects of my engagement with security certificates, with less emphasis given to my normative arguments (but see Larsen and Piché 2007 and Deisman and Larsen 2008). The paper proceeds through two sections.

The first section outlines the security certificate process, and the discourses and legal regimes that enable it and seek to legitimize it. Security certificates are discussed as examples of the construction of migration as a security problem, and of the operation of counter-law, whereby "[n]ew laws are enacted and new uses of existing law are invented to erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of pre-empting imagined sources of harm" (Ericson 2007: 24-25).

The second section moves to the micro level, with an examination of the rules and arrangements that govern the operation of the Kingston Immigration Holding Centre (hereafter KIHC): a unique facility specially constructed for the preventive, long-term and indefinite imprisonment of security certificate subjects[iv] (Larsen and Piché 2007). Continuing the discussion of de-differentiation, I describe the collaborative relationship between the Canada Border Services Agency (hereafter CBSA) and the Correctional Service of Canada (hereafter CSC) that governs KIHC, and the resultant blurring of mandates and institutional boundaries. This relationship takes the form of a contractual arrangement governed by a Memorandum of Understanding, reproducing within the state a dynamic more commonly associated with the neoliberal expansion of outsourced, privatized security (see Valverde and Mopas 2004; Johnston 2006). I refer to this arrangement as the in-sourcing of security.

The paper concludes with some brief remarks on the implications of blurred mandates and in-sourcing arrangements for critiques of policies like security certificates. I argue that critical scholarship can contribute to broader oppositional movements by uncovering and explaining the micro-dynamics that govern complex (in)security policies, and the relationships between official discourses, legal regimes, and everyday practice.

It is worth noting at the outset that this paper draws upon and engages with the growing body of interdisciplinary literature on global governmentality (see Larner and Walters 2004; Valverde and Mopas 2004), the criminological literature on the governance of security (Zedner 2007), and the sociological and international relations literature on migration and (in)security (Bauman 2004; Bigo 2002; 2005). The unifying threads here are transnational processes, security discourses and technologies, and the application of governmentality theory.

The concept of governmentality originates with Foucault's (1991) influential essay by that name, and has come to mean both "considerations of how governing involves particular representations, knowledges and often expertise regarding that which is to be governed" (Larner and Walters 2004: 2) and a dispositional regime of power and ensemble of institutions, procedures, analyses and reflections, calculations and tactics that target the population, mobilize political economy, and manipulate the apparatuses of security (Foucault 1991: 102). Butler notes that governmentality "operates through policies and departments, through manegerial and

bureaucratic institutions, through the law, when the law is understood as "a set of tactics," and through forms of state power, although not exclusively" (2006: 52). Foucault argues that governmentality has "become the main way that state power is vitalized," though it operates alongside both sovereign and disciplinary regimes of power (in Butler 2006: 51).

In *Global Governmentality*, Larner and Walters make the case for the "extension of governmentality [scholarship] to international concerns" (2004: 5). For a variety of reasons, governmentality work has traditionally tended to focus on activity within nation-states, and not above or between them (2004). Given the impact of globalization and transnationalization, contested as these concepts are, it is important for governmentality studies to direct their attention to the knowledges, discourses, tactics, and procedures that have emerged to govern processes and populations that transcend borders. Of particular interest to many scholars is the growing and complex field of professionals whose work is directed towards the management of (transnational) unease (Bigo 2005). This field operates at the local, national, and transnational levels, and occupies the space loosely defined by the intersection of crime control, immigration and border control, and security. The next section explores security certificates as an example of the operationalization of this intersection.

"A Danger to our nation": Certificates as Securitization of Migration

Security certificates are one mechanism in the Canadian government's national security toolkit. They are set apart from other anti-terrorism measures, such as the Anti-terrorism Act, by the specificity of their scope. While anti-terror laws apply equally to all persons within Canada's legal jurisdiction, security certificates apply to non-citizens only. There are presently only five persons - all Muslim men - subject to security certificates. To put this in perspective, the Canada Border Services Agency (hereafter CBSA) removed about 12,600 non-citizens from Canada in 2006-07 on various IRPA inadmissibility grounds (Office of the Auditor General of Canada 2008: 15).

Acting on intelligence provided by the Canadian Security Intelligence Service (hereafter CSIS), two Canadian Ministers can sign a certificate of inadmissibility, on grounds of "security, violating human or international rights, serious criminality or organized criminality" (Canada: Department of Justice 2001). If upheld by a Federal Court judge, the certificate becomes a detention and deportation order for the subject in question. The threshold for upholding a certificate is a finding of objectively reasonable suspicion. This is considerably lower that the "beyond a reasonable doubt" threshold associated with the criminal justice system. The certificate process is shrouded in secrecy, and critics have branded certificates "secret trials." This is a useful term of denunciation, and it highlights the problematic role of secrecy in the process, but it is also somewhat misleading; indeed, what makes security certificates so exceptional is precisely the fact that they are not trials, and have only superficial connections to the institutions of criminal justice. They are a component of immigration law, pressed into service as an instrument of national security (for additional legal detail, see Bell 2006; Larsen and Piché 2007; Deisman and Larsen 2008). I return to the legal nature of security certificates at the end of this section. First, though, it is important to discuss the significance of a national security mechanism that applies exclusively to non-citizens.

Pratt (2005) explores the diverse assemblage of institutions, technologies, knowledges and discretionary practices that govern the border according to a hybrid crime-security rationale. This assemblage can be understood as an immigration penality that operates at a variety of levels, ranging from discrete surveillance to the "extreme bodily sanctions" of detention and deportation (2005: 1). The border operates as an "asymmetric membrane" that distinguishes between citizens and non-citizens, insiders and outsiders (Bauman 2004: 68). Of course, the assemblage of immigration penality is not restricted to the geographic space of the national border, nor is the border itself a barrier that can be forgotten once crossed. The insider-outsider distinctions made possible by bordering processes such as security certificates can come into play at any point in time, provided the subject in question is a non-citizen.

Though the Canadian state rarely uses the certificate mechanism to formally brand non-citizens as threats to national security, the crime-security nexus drives immigration penality in general. Pratt argues that refugees are increasingly seen as posers of risks, as opposed to rights-bearing subjects (2005: 214). This is particularly the case in the post-September 11 context, although the securitization of migration is not a 21st Century development. Bigo (2002; 2005) explores the prevalence of discourses and practices that frame migration as a security problem. He proposes that

> securitization of the immigrant as a risk is based on our conception of the state as a body or a container for the polity. It is anchored in the fears of politicians about losing their symbolic control over the territorial boundaries. It is structured by the *habitus* of the security professionals and their new interests not only in the foreigner but in the "immigrant." [...] It is based, finally, on the "unease" that some citizens who feel discarded suffer because they cannot cope with the uncertainty of everyday life (Bigo 2002: 65).

Though Bigo bases his conclusions on a study of European Union immigration-security discourses, all of these observations are relevant to a discussion of the Canadian context, and of security certificates.

The myth of the state as a "body endangered by migrants" (Bigo 2002: 68) is particularly applicable to the official discourse on security certificates, which effectively operates according to an immunological logic: through certificates, the state identifies threats of foreign origin, isolates them, and ideally, purges them from the Canadian territorial body. Consider the following statements made by Canadian politicians during the recent debates on the C-3 security certificate bill:

> This is precisely about putting up those obstacles at the border to keep people out (MacKenzie 2008).

> We must always make the assumption that people are innocent until proven guilty, but this is a special case and surely we must have room in our justice system to protect ourselves against these people who would engage in such nefarious activities (Epp 2008).

> While we encourage immigration, Canadians also insist on vigilance against people and organizations taking advantage of our generosity and openness. They pose a danger to our nation and, in some cases, to other nations around the world. They have committed serious crimes, or violated human rights or even taken part in terrorism. These people are not welcome in Canada MacKenzie 2007).

> Is the hon. member saying to give the benefit of the doubt to somebody of whom a judge has said, and of whom a number of judges have said, that there is significant enough evidence to link this person, let us just say, to a terrorism network, so that person should not be put in some other

> jurisdiction, as he said, but sent back to their country of origin? He is saying that we should give the benefit of the doubt to the person who has evidence against him or her, certified by a judge, that shows him or her to be a possible imminent danger. He says to give the benefit of the doubt to that person instead of to Canadians who deserve to be protected (Day 2008).

These excerpts are representative of the narratives of proponents of security certificates. They operate according to a binary logic of "us" and "them," differentiating the Canadian deserving protection from the threatening immigrant. The border is framed as a security barrier, and suspected threats originating from outside are not subject to the mechanisms of procedural justice associated with internal criminality; rather, they are depicted as unwelcome and dangerous intruders, penetrating into a rights-bearing polity, but - by virtue of their foreignness - not rights-bearers themselves. Certificates can only ever be applied to non-citizens, and this point is emphasized as often as possible in official discourse, as the following statements illustrate:

> We must always remember that we are not dealing with Canadians. We are dealing with non-Canadians. The security certificate provisions do not involve Canadians, only non-Canadians (Lee 2007).

> I would encourage all colleagues to set aside partisanship to realize that the security certificates have been proven not to threaten the individual rights and freedoms of Canadians. As a matter of fact, the security certificate cannot even be applied against a Canadian citizen. It can only be used on foreign nationals or those who are not Canadian citizens (Day 2008).

> Mr. Speaker, I would like to point out with great clarity that the people addressed by this bill are not citizens of our country. Our primary responsibility is to protect Canadian citizens (Epp 2008).

Issuing a security certificate is both a speech act and a legal maneuver (on speech acts, see Krause and Williams 1997; Bigo 2002; Fierke 2007). The signing process itself is as explicit an example of the securitization of migration through discourse as one is likely to find, in that it (1) declares a non-citizen to be a threat to Canadian national security, (2) subsequently deems a them to be inadmissible to Canada, and (3) requires the signatures of both the Minister of Public Safety and the Minister of Citizenship and Immigration. This latter requirement foreshadows the inter-departmental dynamics that follow from the securitization of migration through the certificate process, discussed in the next section.

The first objective of this section was to demonstrate how security certificates reflect the securitization of migration, and to highlight their discursive framing as mechanisms designed to protect Canadians from non-citizen threats. The operationalization of this framing - that is, the technical transformation of discursive principles into policy and practice - occurs through the creative manipulation of law.

Security certificates are a form of counter-law, which is characterized by a precautionary logic, a preventive approach, and the alteration of legal standards according to these principles (Ericson 2007). The aim of counter-law is to manage uncertainty, and uncertainty is future-oriented. Zedner proposes that we are moving towards a pre-crime society, characterized by a shift in the "temporal perspective to anticipate and forestall that which has not yet occurred and may never do so" (Zedner 2007: 262). Along the same lines, Ericson suggests that we are increasingly engaged in the "criminalization of the merely suspicious" (2007: 2). Such forward-looking attempts to manage uncertainty run into problems when they encounter the norms and procedures of the traditional criminal justice system, which generally preclude the imposition of sanctions for acts that might occur in the future. The goal of the modern state in such situations is

to achieve the ends of criminalization, through non-traditional means. Accordingly, as Ericson documents in *Crime in an Insecure World* (2007), a roster of new laws and processes have emerged to govern suspicious conduct, and existing laws have been re-tasked to coincide with the precautionary - as opposed to prosecutory - agenda. With security certificates, this involves the use of immigration law to address a national security concern. Certificate proceedings under the IRPA allow for arrest, an official declaration of dangerousness, long-term indefinite detention, the imposition of sanctions, and potentially deportation - but they do not require the state to adhere to those standards and norms of the criminal justice process designed to protect the rights of individuals, notably the right of *habeas corpus* (see Bell 2006; Larsen and Piché 2007; Deisman and Larsen 2008).

To recap: Security certificates are an exceptional, counter-legal mechanism that allows for the detention and deportation of non-citizens deemed to represent threats to Canada's national security. As components of immigration law, they operate according to a legal threshold that is considerably lower than that of the criminal justice system, and as tools of national security, they are shrouded in secrecy - to the extent that certificate subjects are only partially informed of the allegations against them. Certificates are issued at the recommendation of Canada's intelligence agency, but they must be formally signed by the Ministers of Public Safety and Citizenship and Immigration, which is illustrative of the blurring of national and transnational security. The next section moves beyond law and discourse, to examine the transformative effects of this hybrid process on institutions within the Canadian (in)security field.

In-Sourced Detention and the Blurring of Mandates

Although the government maintains that security certificates are intended to facilitate deportation, in some cases, this is practically impossible. As a signatory to the UN Convention against Torture, and pursuant to Article 3 of that Convention, Canada cannot "expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (UNHCR 1987) . In the cases of the current security certificate subjects, whose countries of provenance are Syria, Egypt, and Algeria, there are substantial grounds for believing that deportation could result in torture, and counsel for the men have launched numerous court appeals based on this. When deportation becomes legally impermissible, detention pending deportation turns into long-term, indefinite imprisonment.

While the IRPA provides a legal basis for the imprisonment of certificate subjects, it does not provide details on where this ought to take place. Prior to April 2006, security certificate imprisonment took place in a provincial correction facility, such as the Metro West Detention Centre (see Pratt 2005). The conditions at these facilities - which were never designed for long-term improsonment - were the subject of numerous hunger strikes by security certificate subjects, and the construction of the Kingston Immigration Holding Centre – a facility designed exclusively to house security certificate detainees – was a response to mounting public pressure on the subject.

On April 24, 2006, the CBSA issued a press release announcing the opening of KIHC on the grounds of Millhaven Institution, and reporting that the four individuals who were - at the time - subject to security certificate detention had been transferred to the new facility. Millhaven is a maximum security prison located in Bath, Ontario, and as such, is staffed and administered by CSC. KIHC is not technically a CSC facility, though; as an immigration holding centre, it falls under the authority of the CBSA. It is unique and exceptional in this regard, both because it is currently the only facility of its type and because, historically, no federal prison has previously housed such a structure.

The Memorandum of Understanding governing the relationship between CSC and CBSA as it relates to KIHC is a noteworthy artifact, in that it resembles the type of arrangement normally associated with the neoliberal outsourcing of security, despite the fact that both parties to the contract are government departments. This intra-governmental contracting or in-sourcing makes possible merging of mandates and capacities. It recognizes CSC as "the main provider of federal detention services at the present time" and notes that while CBSA has the authority under the IRPA to detain persons "for administrative purposes", it "does not have the capacity to detain those persons at the present time" (Canada: CBSA-CSC 2006: 1). Through this arrangement, CSC lands and services are contracted out to CBSA, which remains the "detaining authority" (Canada: CBSA-CSC 2006: 2). This arrangement is highly selective in nature, providing for the incarceration of security certificate detainees, but specifically recognizing them as a category of individuals wholly separate from the 'normal' inmates supervised by CSC. The government has routinely reminded critics that KIHC is not a correctional facility, and that the imprisoned certificate subjects are not technically inmates. Some documents refer to them as detainees, while others (Canada: CBSA 2006b) refer to individuals subject to security certificates, or ISSCs. Additionally, the operational guidelines in place at KIHC include specific policies to ensure that detainees do not come into contact with the "convicted population" serving sentences at Millhaven, and, save for visits to the Millhaven medical facilities (during which time inmates are placed in lockdown), security certificate detainees do not leave the fenced-in KIHC compound.

Security certificate subjects held at KIHC occupy an ambiguous space created by the overlapping mandates of CSC and CBSA. This overlap has definite implications for the individuals imprisoned at the facility, particularly when their special status acts to limit their access to resources that would be available to 'normal' inmates at Millhaven. For example, as ISSCs, security certificate subjects are not detained for purposes of rehabilitation. As such, they have no access to CSC educational programs. Nor do they fall under the jurisdiction of the Office of the Correctional Investigator (hereafter OCI), an arms-length ombudsman mandated by the Corrections and Conditional Release Act to respond to the grievances of CSC inmates. Instead, the certificate subjects have their own redress process, outlined by KIHC President's Directive 081, which appears robust on paper but nevertheless stands apart from the OCI process in that it does not involve a neutral third party (Canada: CBSA 2006b).

The ambiguity associated with KIHC's overlapping mandates seems to consistently work against the imprisoned certificate subjects, constructing them as beings without the rights enjoyed by inmates while simultaneously subjecting them to the modes of observation and control associated with the prison setting. It is a hybrid facility where the sovereign power to deny admissibility

associated with the border (see Pratt 2005) meets and merges with the space of the prison and the governmental and disciplinary modes of power that operate there. This hybridization, the product of the de-differentiation of internal and transnational security, has a transformative impact on the institutions involved - particularly CSC.

Immigration detention has nothing to do with a correctional mandate. KIHC and Millhaven exist, according to the Government of Canada, for entirely different purposes, with the common denominator being prolonged, officially-sanctioned deprivation of liberty. At first glance, the location of KIHC on the grounds of Millhaven may seem unremarkable, even logical. It allows CBSA to take advantage of the existing security infrastructure of a federal penitentiary, and it allows one government agency to meet the needs of another, through in-sourcing. Closer examination, however, raises a number of issues. First and foremost, it encourages us to consider the scope of CSC's mandate. With the construction of a single facility and the signing of an MOU, the Correctional Service of Canada effectively became the Detention Service of Canada, able to contract its expertise in detention to other federal departments. This is a significant shift in direction for CSC, which is technically "the federal government agency responsible for administering sentences of a term of two years or more, as imposed by the courts" (Canada: CSC 2007). In fact, all CSC literature references the location of the agency within the Canadian criminal justice system, the goal of rehabilitating offenders, and the importance of the rule of law. The staffing of KIHC by CSC "Multi-functional detention officers" (Canada: CBSA 2006c) is significant, in that it does not involve the criminal justice system, has no rehabilitative goals, does not deal with offenders, and, for reasons outlined in the previous section, has a questionable relationship with the rule of law. Indeed, KIHC is the institutional reflection of counter-law.

Conclusion

In this short paper, I have outlined the Canadian security certificate process, reviewed some of the main elements of the discourse associated with it, and explored the ways in which the operationalization of this discourse in practice has a transformative effect on the institutions involved. Although security certificates are rarely used, their continued existence presents an extreme example of the broader and ongoing securitization of migration. Through certificates, anxieties about immigration and otherness merge with future-oriented concerns about public safety, and the result is a counter-legal hybrid. Dealing with the long-term detention that results from this process of securitization brings the CBSA into close contact with CSC, resulting in a blurring of mandates and the creation of another hybrid, this time physical and architectural as opposed to legal.

This paper has provided a cursory sketch of the interrelationships between discourses, laws, and institutions and practices associated with security certificates. At the risk of depicting too tidy a picture, I suggest that the certificate example is illustrative of the transformative, mutagenic effects of contemporary forms of securitization; exceptional measures and extraordinary (counter-)laws quickly become normalized and entrenched in institutional frameworks, and boundaries between mandates are blurred and remade in the process (see Agamben 1998; 2005). As time passes, I find the existence of KIHC less and less surprising, despite the break it represents from historical forms of Canadian federal imprisonment (Larsen and Piché 2007). Instead, the creation and operation of the facility appears as the logical consequence of a

discourse and associated set of laws and policies that are characterized by de-differentiation - of internal and transnational security, and of the mandates of the federal agencies that are part of the (in)security field. Paradoxically, this institutional de-differentiation and blurring is operationalized through the reinforcement of distinctions between citizens and non-citizens, insiders and outsiders.

Moving forward, I hope that this discussion highlights the importance of understanding and critiquing securitization processes in a holistic manner, with particular emphasis on their relationship to individuals, institutions, and everyday practice. Critical engagement that targets only one aspect of the discourse-law-practice triangle is by definition partial and incomplete, and the state is able to respond and adapt. The history of challenges to the security certificate process bears this out. A comprehensive approach must engage all three aspects - and the relationships between them - simultaneously. Such an approach would have to critique both the substantive and the procedural aspects of the security certificate process as they relate to law and counter-law; it would have to reflect an in-depth understanding of the practice of security certificate imprisonment, and of the range of actors and institutions involved in each stage of the certificate process; and, in order to avoid becoming too myopic and, it would have to actively and publicly question the underlying logics and mentalities of legal-governmental regimes such as IRPA. In particular, this would involve challenging the deeply problematic idea that citizens and non-citizens possess and deserve radically different sets of rights and that the security of the former group can be achieved through the precautionary exclusion of members of the latter.

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[i] This paper began as a discussion of the discourses surrounding Canada's new security certificate bill, prepared for the YCISS Violent Interventions conference. It has undergone substantial revisions since then, and I would like to thank Justin Piché and Kevin Walby for their comments, and Didier Bigo for providing extensive feedback when I presented an updated version of the paper at the University of Toronto's Workshop on *Justice and Security in Canada and the EU*. I would also like to acknowledge the support of the Social Sciences and Humanities Research Council (SSHRC), Award # 767-2006-1677.

[ii] The long title of the IRPA is *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger* (Canada: Department of Justice 2001).

[iii] Security certificates are characterized by secrecy. While there is a great deal of open-source information available on the legal aspects of the security certificate process, there is almost no open-source information on the policies and processes that govern the everyday aspects of security certificate imprisonment. Accordingly, I have made extensive use of the federal Access to Information Act (ATI) as a methodological tool (see Yeager 2006). Some of the documents referred to in this paper, and particularly those dealing with the Kingston Immigration Holding Centre, were obtained through ATI requests, and are not publicly available. Where this is the case, a parenthetical note [Obtained through the Access to Information Act] has been made at the end of the relevant entry in the references section. Please feel free to contact me for more information on these documents.

[iv] It is always difficult to decide which term(s) to use when naming individuals subject to security certificates, and the decision inevitably reflects both political and descriptive commitments. I opt for the term "prisoner" when describing those individuals formally held in custody under security certificates. For a broader descriptor that encompasses both imprisoned persons and those on highly restrictive bail conditions, I use "certificate subjects" or "security certificate subjects."