Recent Developments in the ‘War on Terrorism’ in Canada

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We appear to have entered a ‘third phase’ in the worldwide legal reaction to the events of 11 September 2001. If the first phase was marked by a supine reaction on the part of courts to bold executive use of terrorist-related powers and by the passing of ‘copy-cat’ anti-terrorist laws in countries across the globe,¹ and the second by the uncertainty of the response of those bodies charged with supervising the implementation of these new laws,² the third phase seems to be characterised by an attitude of scepticism in courts and elsewhere and an increased willingness to delve into the often murky realities of the application of terrorism policies.³ This note concerns two recent developments in Canada which may be said to embody this trend, both of which deal with the paradigmatic (and problematic) connection between counter-terrorist policy and secret intelligence.


² See, for example, the first ‘trio’ of cases to come before the US Supreme Court: Rasul v Bush 542 US 466 (2004); Hamdi v Rumsfeld 542 US 507 (2004); Rumsfeld v Padilla 542 US 426 (2004). For critical commentary on these cases, see Fiss, ‘The War Against Terrorism and the Rule of Law’, (2006) 26 Oxford Journal of Legal Studies 235.

³ See, for example, A and others v Secretary of State for the Home Department [2004] UKHL 56; and A v Secretary of State for the Home Department [2005] UKHL 71.
1. The Maher Arar Inquiry

The first development addressed in this note is the findings of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (‘Arar Inquiry’).4 Arar was a Canadian citizen, born in Syria, who was arrested and detained by US authorities in the United States in September 2002. He was then removed to Syria where he was imprisoned for nearly a year, tortured and held in inhuman and degrading conditions. He was returned to Canada after his release in October 2003. Arar was not charged with any offence in the United States, Canada or Syria and there was no evidence to show that he had committed any offence or constituted a security threat.

Concerns about the way the Canadian government had dealt with US security agencies led to the instigation of a public inquiry. The Arar Inquiry was established in February 2004 to investigate and report on the actions of Canadian officials in relation to Maher Arar (‘Factual Inquiry’)5 and to recommend a review mechanism for the activities of the Royal Canadian Mounted Police (RCMP) with respect to national security (‘Policy Review’).6 The Factual Inquiry was critical of the behaviour of Canadian officials before, during and after Arar’s imprisonment in Syria.7 The Policy Review recommended enhanced review and accountability mechanisms for agencies dealing with national security, including the RCMP, Citizenship and Immigration Canada and the Canadian Border Services Agency.8 Commissioner Dennis O’Connor noted that

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4 The Commission consisted of just one Commissioner, Judge Dennis O’Connor, Ontario Court of Appeal, who had previously conducted a high profile public inquiry into the contamination of the water supply with E. coli in Walkerton, Ontario in 2000.
7 Specifically, prior to Arar’s detention, the RCMP provided American authorities with information about Arar that was inaccurate, portrayed him in an unfairly negative fashion and over-stated his importance in the RCMP investigation. It is very likely that, in making the decisions to detain and remove Arar to Syria, American authorities relied on this information. Whilst Arar was detained in Syria, there was a lack of communication among the Canadian agencies involved in Mr Arar’s case. There was also a lack of a single, coherent approach to efforts to obtain his release. Furthermore, both before and after Arar’s return to Canada, Canadian officials leaked confidential and sometimes inaccurate information about the case, including downplaying the mistreatment or torture to which Arar had been subjected during his detention in Syria, to the media for the purpose of damaging Arar’s reputation or protecting their self-interests or government interests. For more details see Chapter 1 (An Overview of My Findings), Factual Inquiry.
8 Recommendations included the following: the RCMP must only share information after appropriate screening for relevance, reliability and accuracy and with the inclusion of appropriate caveats; there must be an appropriate and independent civilian review body to review the national security activities of the RCMP; there must be appropriate training of the RCMP and other agencies regarding profiling of Muslim and Arab communities and citizens; and the Canadian government should register a formal objection with the United States and Syria regarding the treatment of Maher Arar.
these institutions have an important impact on individuals but their activities often lack transparency, since they deal with sensitive national security information that cannot be disclosed to the public. Moreover, the sensitive nature of the security information on which they rely means that their investigations lead to fewer prosecutions which restricts, in turn, the ability of courts to protect individual rights: ‘Unless charges are laid . . . the choice of investigative targets, methods of information collection and exchange, and means of investigation generally will not be subject to judicial scrutiny, media coverage or public debate.’

Two aspects of the Arar Inquiry merit particular attention. The first relates to the way in which the Factual Inquiry devised a process that enabled it to produce a thorough (and highly critical) report into an area marked by uncertainty and secrecy. As the Report observed, the Inquiry operated in a context in which much of the evidence could only be heard in closed proceedings and where ‘[e]veryone appearing [in in camera proceedings] had interests that were identical or similar to the Government’s.’ Various methods were established in order to counteract these structural difficulties. In his Report, Commissioner O’Connor articulated a set of principles which he saw as central to the conduct of public inquiries: thoroughness, expeditiousness, openness to the public and fairness. He also noted the observations of Iacobucci and Arbour JJ in the Vancouver Sun case that it is ‘difficult . . . to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate’. In the application of these general principles to the context at hand, Commission counsel were instructed to test in camera evidence where necessary by means of cross-examination, whether or not the government agreed, since, as the Commissioner observed, ‘when parties affected by the proceedings are not present to perform the cross-examination role, it is extremely helpful and even essential that there be an independent person able to do so’. The Inquiry was also assisted by the appointment of amici curiae, the aim being to appoint persons ‘independent of the Government, with extensive expertise in national security matters’ to assist. Amici had access to all documents received, as well as to transcripts of the entire in camera evidence. The Arar Inquiry also sought to prepare a
summary of the in camera evidence that could be disclosed publicly, since it considered it important to make as much information as possible available to the public.\textsuperscript{17}

A second noteworthy aspect of the Factual Inquiry relates to the misuse by government of classified information. First, the Commissioner concluded that ‘Government of Canada officials intentionally released selected classified information about Mr Arar or his case to the media.’ The purpose of so doing was to use ‘the media to put a spin on [the] affair and unfairly damage Arar’s reputation.’\textsuperscript{18} Several of the leaks were inaccurate, unsupported by intelligence information, and grossly unfair to Mr Arar. This pattern of behaviour was regarded as particularly egregious since, in this context, ‘government authorities with access to classified or confidential information are in a position to sway public opinion by selectively divulging information to the media.’\textsuperscript{19} Second, the Commissioner was highly critical of the practice of government ‘over-claiming’ while the Inquiry was in progress. (That is to say, the tendency of government to make unjustified claims that intelligence material should be immune from disclosure to the public on security grounds.) The government had ‘for over a year, asserted NSC [National Security Confidentiality] claims over a good deal of information that eventually was made public, either as a result of the Government’s decision to re-redact certain documents . . . or through this report’. This over-claiming occurred despite government assurances that its initial NSC claims reflected its ‘considered’ position and would be directed at maximising public disclosure.\textsuperscript{20} Citing examples, the Commissioner said that the government only withdrew its position that information was subject to a claim of NSC after the hearings were completed. Generalising from this course of affairs, the Commissioner concluded that:

In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the

\textsuperscript{17} The Canadian government responded to this aspect of the Arar Inquiry by instituting Federal Court proceedings challenging the disclosure of some information the Inquiry considered could be made public. Wishing to avoid the considerable delay that would result should litigation occur, the Inquiry discontinued the approach of producing summaries of the in camera evidence, and decided to defer further rulings on this issue until after the hearing had been completed. The government then withdrew its litigation and the Inquiry proceeded.

\textsuperscript{18} This is not an isolated occurrence. After their release from Guantanamo Bay, three British detainees (Shafiq Rasul, Asif Iqbal and Ruheh Ahmed) were subject to false accusations. ‘In the week after their release, the tabloid Sun newspaper published claims by a US Embassy spokesman, Lee McClenny, who said that they had, after all, trained at an al-Qaeda camp in 2000, notwithstanding the fact that MI5 had already proved that none of them had left the United Kingdom that year’, Rose, Guantanamo: America’s War on Human Rights (London: Faber & Faber, 2004) at 130.

\textsuperscript{19} Factual Inquiry at 255–7.

\textsuperscript{20} Ibid. at 302.
Government to limit, from the outset, the breadth of those claims to what is truly necessary.\textsuperscript{21}

2. Charkaoui v Canada

The second development addressed in this note is a recent case decided by the Supreme Court of Canada, \textit{Charkaoui v Canada (Citizenship and Immigration)}.\textsuperscript{22} Broadly speaking, terrorism cases decided by the Supreme Court since September 11 had, before this case, followed the general international pattern of granting broad areas of latitude to governments charged, as they saw it, with dealing with the terrorist threat. For example, \textit{Suresh v Canada (Minister of Citizenship and Immigration)}\textsuperscript{23} concerned a refugee from Sri Lanka. Intelligence sources concluded that Suresh was a member of and fundraiser for the Liberation Tigers of Tamil Eelam, an organisation which conducted terrorist activities in Sri Lanka. On the basis of this information, the Minister issued an opinion under the Immigration Act 1985 that Suresh was a danger to the security of Canada and should be deported. Suresh sought judicial review of this opinion, arguing both that the Minister's decision was unreasonable and that the Immigration Act was contrary to the Canadian Charter of Rights and Freedoms. Although the Supreme Court held that Suresh was entitled to a new deportation hearing on the basis that he had made a \textit{prima facie} case for showing that there was a substantial risk of torture if he were deported—an action which the Court said would violate the Charter—its decision is regarded as a retreat from a more assertive position staked out before September 11 in \textit{Baker}.\textsuperscript{24} In particular, the Supreme Court articulated a deferential standard for the review of executive decision-making in the national security context,\textsuperscript{25} referring quite extensively in so doing to the judgment of Lord Hoffmann in \textit{Rehman}.\textsuperscript{26}

\textsuperscript{21} Ibid. at 304.
\textsuperscript{22} 2007 SCC 9.
\textsuperscript{23} [2002] 1 SCR 3; 2002 SCC 1.
\textsuperscript{24} \textit{Baker v Canada (Minister of Citizenship and Immigration)} [1999] 2 SCR 817. The case concerned the decision of front-line immigration officials that Baker, an illegal ' overstayer', should not be permitted to stay in Canada on humanitarian and compassionate grounds, despite the fact that Baker had four Canadian-born children. The Supreme Court overturned the decision, which, it transpired, was marked by bias, stereotyping and crass prejudice. For an analysis of the case see Dyzenhaus, 'Baker: The Unity of Public Law', in Dyzenhaus (ed.), \textit{The Unity of Public Law} (Oxford: Hart Publishing, 2004) 1.
\textsuperscript{25} Suresh, supra n. 23 at para. 29: a decision in this context can only be impugned if it was 'patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors'.
\textsuperscript{26} Rehman, supra n. 1 at para. 62:
As Dyzenhaus observes, ‘it is no accident that this retreat from Baker took place in the first major decision in the national security area given by the Supreme Court after 9/11’.27

Charkaoui concerned provisions of the Immigration and Refugee Protection Act (IRPA) 2001,28 which allowed the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate of inadmissibility declaring that a foreign national or permanent resident may not enter Canadian territory on grounds inter alia of national security (section 77), leading in most cases to the detention of the person named in the certificate. The certificate and detention were both subject to review by a judge of the Federal Court, in a process that might deprive the person named in the certificate of some or all of the information on the basis of which the certificate was issued or the detention ordered (section 78). The rules concerning detention differed according to whether the person concerned was a permanent resident or a foreign national. Once a certificate was issued, a permanent resident could be detained as a matter of discretion, although the detention had to be reviewed within 48 hours; in the case of a foreign national, the detention was automatic and the person concerned could not apply for review until 120 days after a judge determined that the exclusion certificate was reasonable (sections 82–84). The judge’s determination on the reasonableness of the certificate could not be appealed or judicially reviewed (section 80(3)). If the judge found the certificate to be reasonable, it became a removal order, which could not be appealed and which could be immediately enforced (section 81).

The case was brought by a permanent resident (Charkaoui) and two foreign nationals who had been recognised as refugees (Harkat and Almrei). All had been issued with certificates of inadmissibility on the basis that they constituted a threat to the security of Canada on account of their involvement in terrorist activities. By the time the case had reached the Canadian Supreme Court, Charkaoui and Harkat had been released on conditions, while Almrei remained in detention. Both the Federal Court and the Federal Court of Appeal had upheld the constitutional validity of the IRPA’s certification scheme. The case concerned, as McLachlin C.J. (who delivered the judgment of the Court) observed, a basic tension lying at the heart of modern democratic governance between the imperative of security—which may require government to act on information it cannot disclose—and the imperative of accountable constitutional governance.29

in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.

28 In particular, sections 33 and 77–85, IRPA, S.C. 2001, c. 27.
29 Charkaoui, supra n. 22 at para. 1.
The appellants argued that the scheme was unconstitutional on a number of grounds: (i) that the procedure for determining reasonableness of certification and for review of detention infringed section 7 of the Canadian Charter of Rights and Freedoms (the right to a fair hearing); (ii) that the detention of foreign nationals for 120 days without judicial review infringed the guarantee against arbitrary detention in section 9 of the Charter; (iii) that extended periods of detention pending deportation violated the guarantee contained within section 12 of the Charter against cruel and unusual treatment; (iv) that differential treatment of citizens and non-citizens infringed section 15 of the Charter; and (v) that rule of law principles were infringed by (a) the unavailability of an appeal of the judge's review of the reasonableness of a certificate, or (b) the provision for the issuance of an arrest warrant by the executive in the case of a permanent resident or for mandatory arrest without a warrant following an executive decision in the case of a foreign national.

The applicants were successful in respect of their first and second arguments, and it is on these arguments that the judgment concentrated. In holding that the IRPA failed to conform with fair process protections associated with the right to life, liberty and security of the person guaranteed by section 7 of the Canadian Charter, the Court said that the 'bottom line' in reviewing national security provisions under section 7 was that 'while administrative constraints associated with the context of national security may inform the analysis on whether a particular process is fundamentally unfair, security concerns cannot be used to excuse procedures that do not conform to fundamental justice.' Applying this standard the Court held that, while judges charged with applying the IRPA scheme were sufficiently independent and impartial, the scheme failed to satisfy the legal requirement that the judge make a decision based on the facts and the law. Since a judge under the scheme does not have full inquisitorial powers and a certified person is not given full disclosure nor a right to participate in the proceedings, 'the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged—perhaps unknowingly—to make the required decision based on only part of the relevant evidence.' This makes the judge feel 'a little bit like a fig leaf' in a process that remains uncomfortably 'pseudo-inquisitorial.'

'The secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law.

30 Ibid. at para. 23. See also para. 27: 'The protection may not be as complete as in a case where national security constraints do not operate. But . . . meaningful and substantial protection there must be.'
31 Ibid. at para. 50.
32 Ibid. at para. 51. Indeed, the Court said that Federal judges asked to operate the scheme had 'expressed unease' with the IRPA (para. 36).
Despite the best efforts of judges of the Federal Court to breathe judicial life into the IRPA procedure, it fails to assure the fair hearing that s. 7 of the Charter requires before the state deprives a person of life, liberty or security of the person.\textsuperscript{33}

The IRPA scheme also failed to meet the section 7 requirement that the named person be afforded an opportunity to meet the case put against him or her by being informed of that case and being allowed to question or counter it.\textsuperscript{34} The scheme’s ‘constant preoccupation’ with secrecy and confidentiality meant that ‘the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea of what needs to be said’.\textsuperscript{35}

The Court rejected the government’s contention that these violations of section 7 were saved by section 1 of the Charter, which permits the state to limit rights (including the section 7 guarantee of life, liberty and security) if it can establish that the limits are demonstrably justifiable in a free and democratic society.\textsuperscript{36} But violations of section 7 are not easily saved in this way.\textsuperscript{37} Turning to the context at hand, the Court recognised that since Canada is a ‘net importer of security information’, the protection of Canada’s national security and intelligence sources constitutes a pressing and substantial objective.\textsuperscript{38} It noted, however, that the basic issues raised as a consequence of the reaction of governments to the challenge posed by terrorism were ‘not new’.\textsuperscript{39} Previous attempts at reconciling national security demands with Charter guarantees had produced less intrusive regimes. In particular, the Security Intelligence Review Committee (SIRC) established under the Canadian Security Intelligence Act 1984\textsuperscript{40} developed a formal adversarial process, with a ‘court-like hearing room’ and ‘procedures that mirrored judicial proceedings as much as possible’.\textsuperscript{41}

\textsuperscript{33} Ibid. at para. 65.
\textsuperscript{34} Ibid. at para. 31.
\textsuperscript{35} Ibid. at para. 55.
\textsuperscript{36} Section 1, Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’
\textsuperscript{37} The Oakes test (\textit{R v Oakes} [1986] 1 SCR 103) requires a pressing and substantial objective and proportional means. A finding of proportionality requires: (i) means rationally connected to the objective; (ii) minimal impairment of rights; and (iii) proportionality between the effects of the infringement and the importance of the objective.
\textsuperscript{38} \textit{Charkaoui}, supra n. 22 at para. 68.
\textsuperscript{39} Ibid. at para. 69.
\textsuperscript{40} Canadian Security Intelligence Service Act, S.C. 1984, c. 21.
also included an independent panel of lawyers with security clearance to act as counsel to SIRC.\footnote{SIRC counsel were instructed to cross-examine intelligence service witnesses ‘with as much vigour as one would expect from the complainant’s counsel’. After the \textit{ex parte} portion of the hearing, the excluded person would be provided with a summary, which would include ‘the gist of the evidence, without disclosing the national security information’. The affected person and his/her counsel would then be allowed to ask their own questions, and to cross-examine on the basis of the summary. See SIRC Annual Report 1988–1989, 30 September 1989, available at: www.sirc-csars.gc.ca, at 64.} The Court noted that this earlier arrangement was the inspiration behind the ruling of the European Court of Human Rights in \textit{Chahal}\footnote{Chahal v United Kingdom 1996–V 1831; (1997) 23 EHR R 413.} and became the model for the ‘special advocate’ scheme currently operating in the United Kingdom.\footnote{Section 6, Special Immigration Appeals Commission Act 1997, 1997 c. 68; Rule 35, Special Immigration Appeals Commission (Procedure) Rules 2003, S.I. 2003/1034; Schedule, Prevention of Terrorism Act 2005, 2005 c. 2. See also House of Commons Constitutional Affairs Committee, Report on The Operation of the Special Immigration Appeals Commission (SLAC) and the Use of Special Advocates, 3 April 2005, HC 323, which noted at para. 52 three important disadvantages faced by special advocates: (i) once they have seen the confidential matter, they cannot, subject to narrow exceptions, take instructions from the appellant or the appellant’s counsel; (ii) they lack the resources of an ordinary legal team, for the purposes of conducting in secret a full defence; and (iii) they have no power to call witnesses.} The IRPA scheme, as we have seen, made no such provision. ‘Mechanisms developed in Canada and abroad’, the Supreme Court concluded, ‘illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the IRPA.\footnote{Charkaoui, supra n. 22 at para. 87.}’

The applicants’ second (successful) argument was that the prohibition on the review of the certification of foreign nationals until 120 days after the certificate was confirmed violated the guarantee of freedom from arbitrary detention contained within section 9 of the Charter. The government argued that the 120-day period was sufficiently prompt, particularly as foreign nationals could apply for release and depart from Canada at any time. (There are echoes here of the UK government’s ‘prison with three walls’ argument in defence of its indefinite detention of foreign nationals strategy under the Anti-Terrorism, Crime and Security Act 2001.\footnote{See Shah, ‘The UK’s Anti-Terror Legislation and the House of Lords: The First Skirmish’, (2005) 5 Human Rights Law Review 403 at 405.}) While accepting that some flexibility may be necessary regarding the period for which a suspected terrorist may be detained, the Court ruled that this could not justify the complete denial of a timely detention review. As the Supreme Court pointed out, if terrorist-related objectives are satisfied when providing permanent residents with a mandatory detention review within 48 hours, then ‘how can a denial of review for foreign nationals for 120 days after the certificate is confirmed be considered minimal impairment?’\footnote{Charkaoui, supra n. 22 at para. 93.}

The remedial dimension of \textit{Charkaoui} is also noteworthy. The Supreme Court issued a declaration that the IRPA’s procedure for judicial approval of certificates was inconsistent with the Charter and hence unlawful, suspended for one year...
from the date of the judgment ‘in order to give Parliament time to amend the law’. Some might argue that this (unorthodox) outcome displays a degree of political awareness on the part of the Supreme Court judges. This may be so, but it leaves the applicants in an invidious position. Rather like the detainees in Belmarsh prison (and elsewhere) in the aftermath of the Law Lords’ decision in A v Home Secretary, the result means that individuals who have won their case before the highest national tribunal are forced to fiddle while government rethinks. Not only is this unsatisfactory in terms of rights protection, it also allows government to evade what ought to be one of the immediate consequences of getting it wrong: namely, the automatic release of those it has wrong-fully detained.

3. Conclusion

The Arar Inquiry and the Canadian Supreme Court’s decision in Charkaoui reveal much about the nature of the ‘third phase’ of reaction to government anti-terror laws and policies. They both display a sophisticated awareness of the importance in this context of issues of secrecy. Commissioner O’Connor observed in his Factual Inquiry that ‘the single most important factor’ in supervising the use of anti-terror powers is to ensure that governments do not abuse their ability to withhold information from public scrutiny. The Supreme Court’s decision in Charkaoui may be seen as an elaboration of this general insight. Taking its cue from the ‘harsh spotlight’ (as the Court itself put it) shone by the Arar Inquiry into the behaviour of Canadian officials, the Court used its authority to restate the importance of ‘normal’ public law principles and to stake out a ‘bottom line’ below which standards were not to slip. These examples indicate, then, a robust (but not openly hostile) approach to the review of anti-terror laws and policies based on a willingness, first, to open up to scrutiny as much evidence as possible and, second, to conduct a searching inquiry into the plausibility of the arguments advanced by government in order to justify its decisions and actions on this front. More generally, they confirm that the best hope for those who favour a more forthright approach to the review of anti-terror policies is for different reviewing bodies to act in concert. This reinforces the impression gained elsewhere. Courts in particular, as the Law Lords’ decision in A v Home Secretary showed, can sometimes make good their evidence-gathering deficiencies by drawing on material unearthed by other bodies working towards similar ends.

48 Ibid. at paras 139 and 140.
49 Supra n. 1. See Shah, supra n. 46.
50 Charkaoui, supra n. 22 at para. 26.