The Role of the Federal Court in National Security Issues: Balancing the Charter Against Anti-terrorism Measures

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Introduction

I am very pleased to have been invited to the University of Alberta to participate in a collective reflection and debate on "National Security, the Law, and the Federal Courts." As you are all aware, issues of national security have taken on new life since the inception of the war on terror, but what you may not be aware of is the complexities inherent in adjudicating these issues within the context of a democratic and rights-oriented society. I will do my best to give you a sense of the kinds of issues that come before the Federal Court in this regard, and how national security considerations raised therein must be balanced against the rights of citizens.

The *Charter* Context

It was not until the early 1960s that Canada truly embraced a philosophy based on rights and freedoms. In 1960, the Diefenbaker government adopted the *Canadian Bill of Rights*.[1] It was not enshrined in the Constitution and its primary value was as an interpretive tool. During the 1960s and 70s, several provincial governments adopted general texts protecting rights and freedoms.[2] At the same time, commissions of inquiry were established to shed light on the abuses of intelligence services, particularly with respect to the Québec independence movement and various extreme-left splinter groups elsewhere in Canada. It was then that the importance of striking a balance between national security and rights and freedoms began to become apparent.[3] These crises also led to the creation of the Security Intelligence Review Committee (SIRC). This committee oversees the operations of the Canadian Security Intelligence Service (CSIS) to ensure that the intelligence service's extraordinary powers are exercised in accordance with its legislative authority.

In 1982, the British Parliament adopted the *Canada Act 1982*, and the *Canadian Charter of Rights and Freedoms* came into effect by royal proclamation on 17 April 1982.[4] The *Charter* had a significant impact on Canadian law, both directly and indirectly, especially as it related to national security. Directly, because it was sometimes interpreted so as to invalidate or limit the scope of provisions that unduly restricted rights and freedoms in the name of national security. This was the case, for example, with *in camera* hearings to deal with sensitive information, traditionally justified under the common law privilege to protect state secrets.[5] The *Charter* also had indirect effects by fostering a culture of rights and freedoms in Canada that made significant changes to the way Parliament legislated in the area of national security. For instance, in 1984 the security clearance process for government employees was made less discretionary and became a subject of complaint before the SIRC. National security would no longer be the exclusive realm of the executive acting secretly

and without limits; it was instead becoming increasingly open with the addition of various checks and balances.

Canada was one of the first countries to enshrine in its Constitution the fundamental rights that reflect its traditional values. Canadian governments became accustomed to having their legislative texts reviewed by the courts to ensure that they were not exceeding their respective legislative jurisdictions. Protecting individual and collective rights in the Canadian Constitution added a new dimension to the relationship between the legislature and the judiciary.

Canada was also one of the first countries to include in its fundamental law a provision setting certain limits on these rights. Section 1 clearly sets out a general guarantee of the rights and freedoms contained in the *Charter*, but it goes on to state that these rights and freedoms may be circumscribed in the public interest if it can be demonstrated that the limits are justified. This provision, from the outset, embodies the idea that recognized rights and freedoms cannot be considered absolute and may be restricted by law as long as the restriction can be justified in accordance with section 1.

Role of the Courts

The courts are regularly called upon to strike a balance between national interests and security on one hand, and individual and collective rights on the other. In the context of balancing national security with the right to a fair and transparent trial, the Supreme Court, in considering the legality of a judicial investigative hearing conducted in relation to the Air India trial, as authorized by section 83.28 of the *Criminal Code*, stated:

> The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law.
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> […]
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> Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law.[6]

Our duty at the Federal Court of Canada is to balance the requirements of national security with the rule of law and protection of individual rights in the context of the following activities amongst others:

- issuing warrants that enable the CSIS to investigate threats to Canada's security;
- considering the reasonableness of certificates declaring that noncitizens are inadmissible for national security reasons and quashing any such certificates that are not found to be reasonable; and
- determining whether information considered sensitive by the government should or should not be disclosed during a trial.

In reviewing these activities, the rights and freedoms most likely to be at stake are the following:

- privacy rights, and more particularly protection against searches, seizures, and investigations, in the context of the fight against terrorism;
- the fundamental freedoms inherent in a democratic society such as freedom of expression, freedom of the press, freedom of conscience and religion, and freedom of association; and
- procedural rights such as the right to be present at one's hearing, the right to know the facts relevant to the proceeding, the right to be heard, and the right to have an unbiased decision maker.

I will now attempt to describe the backdrop set by the constitutional changes adopted in 1982, and the rigour with which the court embraced its responsibilities.

Privacy Rights and the Fight Against Terrorism

In Canada, protection against unreasonable search and seizure is expressly guaranteed in section 8 of the *Charter*. The right to privacy is protected by section 7, but not in the same explicit terms. Although the concept of privacy is hard to define and the existence of a tort of invasion of privacy is debatable,[7] the right continues to be a cornerstone of our democratic system. In Canada, it is protected by several federal and provincial statutes, in areas such as consumer protection, employment, health, and telecommunications, in both the public and private sectors. It is enshrined as a basic right in Québec's *Charter of Human Rights and Freedoms*.[8]

When the right to privacy is at issue in a national security context, we primarily think of the investigation and information gathering methods employed by intelligence services and the police. Their actions are circumscribed by section 8 of the *Charter*, which protects against unreasonable search and seizure. Criminal warrants must normally be authorized by a judge on the basis of reasonable and probable grounds.

While privacy concerns remain very important in the security context, Canadian courts have generally accepted lower thresholds for issuing warrants in national security investigations. For example, an intelligence officer is not required to specify an offence to justify his application for a warrant; instead he must satisfy the judge of the need to commence an investigation. Section 21 of the *Canadian Security Intelligence Service Act*[9] states that a judge may issue a warrant if there are "reasonable grounds" to believe "that a warrant under this section is required to enable the Service [CSIS] to investigate a threat to the security of Canada or to perform its duties and functions under [this Act]." Canadian courts have found the standard of "reasonable grounds to believe" to be consistent with the *Charter*[10] in this context.

Not lost on a court issuing warrants under this provision are the following characteristics, which are particular to the fight against terrorism, namely:

- the preventive function of intelligence service investigations;
- the length and ongoing nature of these investigations;
- the seriousness of terrorism offences; and
- the nature of the methods used by terrorists.

I hasten to add that a warrant to conduct an intelligence investigation does not give intelligence officers carte blanche. The role of the judge remains important, since the onus is on the officers to justify their demands, and judges have the power to, and do, limit the intrusiveness of investigative powers by imposing conditions on the warrants they issue. In certain circumstances, the court will require CSIS to report back to it and keep the court informed of specific developments in the investigation. The SIRC also annually selects a sample of warrants and studies whether the information presented in the application to the court is consistent with the complete information available to CSIS. The SIRC also reviews whether CSIS has acted in accordance with the powers granted to it by the court and reports its findings to Parliament.

I will now briefly address other intelligence service and police practices that judges are beginning to see more frequently, and which also engage the right to privacy. Some have been the subject of public criticism for drifting too far from the standard that violations of privacy must be reasonable, circumscribed, and authorized by a judge. Here are some examples:

- Use of biometric data such as fingerprints and DNA samples by the state. In Canada, the first database was established in 1998. The development of such databases raises the issue of what types of uses are legal and, in particular, to what extent biometric data may be stored and disseminated by the public administration. The Supreme Court of Canada has already indicated that DNA samples may be collected legally

for specific purposes such as the identification of criminals.[11] The right to privacy is invoked in this context to limit the dissemination of biometric data.

- Another tool used increasingly frequently in the fight against terrorism is financial transaction monitoring.[12] Those who finance terrorist activity are now subject to the same types of criminal sanctions as those who commit terrorist acts.[13] From an administrative law perspective, efforts are being made to prevent charitable organizations from financing terrorists or from being used as fundraising conduits for their activities. In Canada, financial institutions are required to report to the administrative authority Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)[14] any financial transactions they have reasonable grounds to suspect are related to a terrorist financing offence. FINTRAC then communicates this information to the authorities. The legal issue is whether an administrative agency may validly obtain private information in the absence of a warrant and upon mere disclosure by financial institutions, which will then be used to prosecute individuals. The jurisdiction of the Federal Court is engaged pursuant to section 30 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.[15]

- In Canada, the Minister of National Defence can authorize the Communications Security Establishment Canada (CSEC) to intercept private communications for the purpose of obtaining foreign intelligence. Although it is subject to authorization, the warrant is not issued by a judge but by the minister responsible, making the decision more political in nature.[16] Conceivably, this decision would be subject to judicial review in the Federal Court. Canadian courts, however, have yet to consider the constitutionality of this mechanism.

- As a general rule, telecommunications monitoring is subject to a warrant with respect to private communications. It is therefore important that the legal characterization of emails and text messages be clarified.[17]

- Other practices related to CSIS activities abroad are raising new legal issues. Recently, the Federal Court had to decide whether it had jurisdiction to issue warrants in foreign states.[18] Out of respect for the principles of state sovereignty and comity of nations, the court decided that it lacked such jurisdiction. The court also recognized that Parliament had the power to authorize this type of activity as long as the *Canadian Intelligence Security Service Act* contained an express provision to that effect.

- There is also the issue of the collection and storage by customs officials of certain personal information of passengers arriving in Canada by air. One of the objectives in gathering this information is the identification of criminals, terrorists, and smugglers. In 2002, retired Supreme Court Justice Gérard La Forest prepared a legal opinion for the Privacy Commissioner on this very issue of the constitutionality of the personal data management practices employed by customs officials.[19] He emphasized the intrusive nature of these practices and their potential for violating section 8 of the *Charter*. Following the publication of this opinion, the minister responsible made changes to the database, limiting the types of information collected and the circulation of the data within the government.[20]

- Finally, as the fight against terrorism intensifies, there is an increasing and justified need for information sharing within the public administration and with foreign governments. This must be done with a full appreciation of privacy rights. We must set clear limits on the dissemination of personal information within our own public administration and beyond our borders. Our objective

of sharing information must not become a pretext to circumvent the normal requirements for issuing warrants or to use personal information for purposes other than those for which they were originally collected.

The Fundamental Freedoms Guaranteed by the *Charter* and the Fight Against Terrorism

In addition to the right to privacy, other fundamental *Charter* freedoms may be affected by some of the tools employed to fight terrorism. These include freedom of the press, freedom of association, and freedom of religion and conscience.

- With respect to freedom of the press, we must ask ourselves to what extent national security considerations can justify the restriction, in certain cases, of public and media access to legal debate, documents, and evidence. In Canadian law, there are many legislative exceptions to the rule of judicial transparency, but they are usually very specific and limited in their application. Our courts have generally upheld these exceptions, while limiting their scope as much as possible to ensure that the public is never excluded unless there are genuine national security considerations involved. Despite these concerns, the courts must bear in mind the need for intelligence services to protect their sources, to respect their information exchange agreements with foreign countries, and not to compromise any security investigations that are being legally conducted.

- The courts may be called upon to consider various anti-terrorist strategies as they relate to freedom of association or freedom of religion and conscience. One example is the list of dangerous entities prepared by the Governor in Council, which arguably may violate freedoms of expression and association.[21] However, the courts have often reiterated that the *Charter* freedoms of association and religion and conscience do not protect the right to associate with organizations that engage in violence.[22] To prevent abuse, the list is reviewed every two years, targeted individuals or groups may ask the Minister of Public Safety to review a decision, and judicial review is also available.[23] The consequences for individuals and groups who find themselves on the list can be very serious, as the case of Liban Hussein has made painfully clear. Hussein was suspected by the United States, Canada, and the United Nations of financing terrorism. As soon as his name was placed on the list, it became illegal for anyone to do business with him. He was subsequently delisted by Canada and the United Nations. This illustrates the importance of implementing reliable national security procedures, especially when people's lives and reputations are at stake.

Procedural Guarantees in Criminal and Administrative Hearings and the Fight Against Terrorism

The *Charter* grants individuals extensive procedural guarantees both in administrative justice contexts such as immigration law, and in the criminal justice context. These guarantees can be traced back to Anglo-American common law and are particularly well developed in criminal law. They include, for example, the right to be present at one's hearing, the right to know the evidence against oneself, the right to be heard by the decision maker, and the right to full answer and defence. The ability to exercise these rights generally requires transparency in judicial and administrative processes. Because national security concerns preclude full transparency, procedural guarantees must inevitably take a different form in some cases.

Terrorism trials are especially likely to involve both the superior courts of the provinces and the Federal Court. The Federal Court plays an ancillary but important role. The procedures for managing the disclosure of sensitive infor-

mation set out in the *Canada Evidence Act*[24] are carried out in the Federal Court, in separate proceedings, *in camera*, and in the absence of a party who may have an interest in being present (*ex parte* proceedings). This may result in a violation of the participation rights of the accused or other persons with an interest in the related proceedings, in which civil or criminal disclosure rules may require that sensitive information be disclosed. Nevertheless, the courts have held that procedural substitutes may be used to protect the rights of the accused in these situations. These substitutes include increased judicial intervention, the designation of an *amicus* (a friend of the court) to protect the interests of the absent party, rights of appeal, and the right of the accused or interested party to make *ex parte* submissions. The constitutionality of these *Canada Evidence Act* provisions was recently upheld in *Canada (Attorney General) v. Khawaja*.[25]

In cases involving national security considerations, the courts have demanded some fairly elaborate procedural substitutes to protect the rights of the accused. For example, the security certificate regime allows the Minister of Public Safety and the Minister of Citizenship, Immigration and Multiculturalism to declare a person inadmissible to Canada. This decision is subject to review by the Federal Court, in the absence of the interested person. The person named in the security certificate is entitled to receive a summary of the evidence. Until 2007, the judge hearing the case, with the view of ensuring that the rights of the interested person were respected, played a more active role than usual in proceedings. The decision was final: no appeal was available to the interested person. In 2007, the Supreme Court decided that these guarantees were insufficient. Accordingly, in 2008 Parliament amended the *Immigration and Refugee Protection Act* (*IRPA*),[26] adding a right of appeal and a right to the assistance of special advocates.

Inspired by the British model, the role of the special advocate in Canada is to defend the interests of the person named in the security certificate. Some are of the opinion that the recent amendments to the *IRPA* do not go far enough, that they still do not constitute a minimal impairment of rights, that special advocates should be granted more extensive powers and means, should be able to receive instructions freely from the interested party and his or her counsel, and should be able to call witnesses. We can therefore expect further litigation and judgments in the coming months and years with respect to the role and mandate of the special advocate, and the nature and scope of the discretion granted to the judge by the legislature. The amendments sought to strike a balance protecting the rights of individuals subject to security certificates while still addressing national security concerns. It remains to be seen whether this balance will be considered appropriate by the judiciary, and if not, how it may be improved.

Finally, I will touch briefly on the right to full answer and defence, as provided for under section 7 of the *Charter*. This issue has received recent attention by the Supreme Court of Canada in *Canada (Justice) v. Khadr*[27] in the context of disclosure. In this case, the Supreme Court held that the *Charter* applied to the Canadian officials during their interviews with Mr. Khadr in Guantanamo Bay. In the context of this case, the *Charter* applied extraterritoriality essentially by reason of the illegality of the process in place in Guantanamo at that time. As a consequence, the Supreme Court found that section 7 of the *Charter* applied so as to require disclosure of information arising from these interviews at issue.

Conclusion

In conclusion, I would like to emphasize the context in which the Federal Court deals with national security issues. The court engages in a complicated and very important balancing between *Charter* rights and freedoms on one hand and the exigencies of national security on the other.

Democracies such as ours do not have the right to forsake their traditional social values and abandon fundamental moral and legal principles for the sake of employing new weapons in the fight against international terrorism.

The basic purpose of any national security policy is to protect us from attacks on our rights and freedoms. To turn our backs on this objective in the name of national security concerns is to abandon the values we hold most dear and to do that which we are trying to prevent. I adopt the following view expressed by the Supreme Court in the *Application under s. 83.28 of the Criminal Code Reference*:

> In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.[28]

The international commitments of our Western democracies also prohibit us from sacrificing rights and freedoms on the altar of national security. In Canada, the *Charter* constitutes an additional protection enabling us to keep our moral and legal values at the forefront of any debate regarding our efforts to fight terrorism. I would also add that it is possible for Western democracies to be fully engaged in the fight against terrorism without giving up our most precious moral and legal values.

Clearly, our adherence to the rule of law and respect for *Charter* rights increases the complexity of terrorism and other national security cases. That said, the *Charter* should not be considered a hindrance in the fight against terrorism. Instead it has served as a guide to the courts and to Parliament in their quest to strike an important and necessary balance between national security and rights and freedoms.

Notes

* Judge of the Federal Court of Canada and Chief Justice of the Court Martial Appeal Court of Canada. This article is based on a lecture delivered at the Faculty of Law, University of Alberta, on 20 January 2009.

1 S.C. 1960, c. 44 (enacted 10 August 1960).

2 For the recent history of Canadian rights and freedoms legislation, see Canada, Department of Justice, *A Canadian Charter of Human Rights* (Ottawa: Information Canada, 1968) at 179-83.

3 See Canada, Security Intelligence Review Committee, "The Case for Security Intelligence Review in Canada" in *Reflections: A History of SIRC* (Ottawa: Security Intelligence Review Committee, 2005), online: <http://www.sirc-sars.gc.ca/opbapb/rfcrfx/sc02a-eng.html>.

4 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

5 In *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128 (CanLII), the Chief Justice of the Federal Court decided that certain provisions of the *Evidence Act* violated the freedom of the press and read them down to make them consistent with the *Charter*.

6 *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248 at paras. 5 and 7 (CanLII) [*Application under s. 83.28*].

7 Colin H.H. McNairn & Alexander K. Scott, *Privacy Law in Canada* (Toronto: Butterworths, 2001) at chapter 3.

8 R.S.Q. c. C-12.

9 R.S. C. 1985, c. C-23 [*Canadian Intelligence Service Act*].

10 In 1987, this standard of proof applicable to warrants for national security investigations was held to be valid under section 8 of the *Charter* by what was then the Federal Court of Canada – Appeal Division. See *Atwal v. R.*, [1988] 1 F.C. 107 at 131-34 [*Atwal*]. In 1984, the Supreme Court recognized that the standard for issuing a mandate might "will be a different one [from the standard applicable in a criminal context]" where "state security is involved." See *Hunter et al. v. Southam Inc.,* 1984 SCC 33, [1984] 2 S.C.R. 145 at para. 43 (CanLII). However, in *Atwal*, Justice Hugessen dissented on this issue. He considered the standard to be unconstitutional on the grounds that the *Canadian Intelligence Service Act* did not "provide any reasonable standard by which the judge may test the need for the warrant" and that, in his opinion, such a standard would allow CSIS to engage in bargaining (at 151-53).

11 For a list of cases on this point, see Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham: LexisNexis Butterworths, 2005) at 238, footnote 129 [Cohen].

12 Prior to 2001, there was the *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, GA Res. 54/109, online: <http://untreaty.un.org/English/Terrorism/Conv12.pdf>. The most important resolution since then is probably *United Nations Security Council Resolution 1373 (2001)*, 28 September 2001, online: <http://daccessdds.un.org/doc/

UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

13 See Paul Eden & Thérèse O'Donnell, eds., *September 11, 2001: A Turning Point in International and Domestic Law?* (Ardsley NY: Transnational Publishers, 2005) at 663.

14 Financial Transactions and Reports Analysis Centre of Canada, online: < http://www.fintrac.gc.ca/>.

15 S.C. 2000, c. 17.

16 Section 273.65 of the *National Defence Act*, R.S.C. 1985, c. N-5 empowers the Minister of National Defence to authorize the Communications Security Establishment in writing to intercept private communications for the purpose of obtaining foreign intelligence. For the constitutional issues related to this procedure, see Cohen, *supra* note 11 at 228-32.

17 On these issues, see Cohen, *supra* note 11 at chapter 10.

18 *Canada Security Intelligence Service Act (Re)*, 2008 FC 300 (CanLII) and *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301 (CanLII).

19 Justice Gérard La Forest, "Opinion – CCRA Passenger Name Record" (19 November 2002), online: Office of the Privacy Commissioner of Canada <http://www.privcom.gc.ca/media/nr-c/opinion_021122_lf_e.asp>.

20 For a thorough analysis of this issue, see *supra* note 11 at 458-71.

21 For the cabinet's schedule of listed entities – authorized by section 83.05 of the *Criminal Code*, R.S.C. 1985, c. C.46 – see "Currently Listed Entities," online: Public Safety Canada <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>.

22 See *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (CanLII) and *Al Yamani v. Canada (Solicitor General)*, 1995 FC 3553, [1996] 1 F.C. 174 (CanLII).

23 Cohen, *supra* note 11 at 282.

24 Section 38.11 of the *Canada Evidence Act*, R.S. 1985, c. C-5.

25 See *Canada (Attorney General) v. Khawaja*, 2007 FC 463 at paras. 39, 40, 43 and 57 (CanLII), affirmed 2007 FCA 388 at paras. 39, 139 and 140 (CanLII), leave to appeal to S.C.C. refused, 2008 SCC 18970 (CanLII).

26 S.C. 2001, c. 27 (*IRPA*). Sections 85.1 and 85.2 of the *IRPA* define in part the special advocate's role in *in camera* proceedings. Paragraph 85.2(1)(c) of the *IRPA* grants discretion to the judge to authorize the special advocate to exercise "any other powers that are necessary to protect the interests of the permanent resident or foreign national." Sections 85.4 and 85.5 of the *IRPA* also grant powers to the judge to authorize certain communications subject to any conditions the judge considers appropriate.

27 2008 SCC 28 (CanLII).

28 *Application under s. 83.28*, *supra* note 6 at para. 7.