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## As Good as it Gets? Security, Asylum, and the Rule of Law after the Certificate Trilogy

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## As Good as it Gets? Security, Asylum, and the Rule of Law after the Certificate Trilogy

### Abstract

This article uses constitutional discourses on the legality of security certificates to shed light on darker, neglected corners of the security and migration nexus in Canada. I explore how procedures and practices used in the certificate regime have evolved and migrated to analogous adjudicative and discretionary decision-making contexts. I argue, on the one hand, that the executive's ability to label persons security risks has been subjected to meaningful constraints in the certificate regime and other functionally equivalent adjudicative proceedings. On the other hand, the ability of discretionary decision makers to deport individuals who pose de jure security risks to face torture or similar abuses remains effectively unconstrained—so much so that it is doubtful that Canada has complied with Suresh. If the Supreme Court of Canada takes its own rationale in the certificate trilogy seriously, it must either revise its position in Suresh or encourage the extension of the procedures and practices used in the certificate regime to the entire security and migration nexus, including the removal process.

### Keywords

National security--Law and legislation; Official secrets; Human rights; Detention of persons; Deportation; Canada

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## As Good as it Gets? Security, Asylum, and the Rule of Law after the Certificate Trilogy

GRAHAM HUDSON\*

This article uses constitutional discourses on the legality of security certificates to shed light on darker, neglected corners of the security and migration nexus in Canada. I explore how procedures and practices used in the certificate regime have evolved and migrated to analogous adjudicative and discretionary decision-making contexts. I argue, on the one hand, that the executive's ability to label persons security risks has been subjected to meaningful constraints in the certificate regime and other functionally equivalent adjudicative proceedings. On the other hand, the ability of discretionary decision makers to deport individuals who pose de jure security risks to face torture or similar abuses remains effectively unconstrained—so much so that it is doubtful that Canada has complied with *Suresh*. If the Supreme Court of Canada takes its own rationale in the certificate trilogy seriously, it must either revise its position in *Suresh* or encourage the extension of the procedures and practices used in the certificate regime to the entire security and migration nexus, including the removal process.

Cet article fait appel au discours constitutionnel sur la légitimité des certificats de sécurité pour mettre en lumière des aspects plus sombres et souvent négligés des liens entre la sécurité et l'immigration au Canada. J'analyse la manière dont ont évolué les procédures et les pratiques employées dans le régime des certificats, qui ont migré vers des contextes décisionnels judiciaire et discrétionnaire analogues. Je prétends que, d'une part, la possibilité pour le pouvoir exécutif de cataloguer une personne comme danger pour la sécurité a été assujettie à des contraintes significatives dans le régime des certificats et autres mesures judiciaires ayant la même fonction. Par contre, la possibilité de déporter de manière discrétionnaire des personnes qui représentent en droit un danger pour la sécurité au risque de les exposer à la torture ou à d'autres abus semblables demeure effectivement

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libre de contraintes – à tel point qu’il est douteux que le Canada ait respecté les droits de l’accusé dans l’affaire Suresh. Si la Cour suprême du Canada prend au sérieux son propre raisonnement relativement à la trilogie des certificats, elle doit soit réviser sa position face à l’affaire Suresh, soit prôner la poursuite des procédures et des pratiques employées dans le régime des certificats jusqu’au bout du lien entre la sécurité et l’immigration, y compris le processus de déportation.

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**FEW ELEMENTS OF CANADA’S NATIONAL SECURITY APPARATUS** have received as much legal, popular, or scholarly attention as security certificates.<sup>1</sup> Although

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1. For a small sampling of literature, see Colleen Bell, “Subject to Exception: Security Certificates, National Security and Canada’s Role in the ‘War on Terror’” (2006) 21:1 CJLS 63 [Bell, “Subject to Exception”]; Canadian Bar Association, “Submission on Bill C-3 *Immigration and Refugee Protection Act* amendments (Certificate and Special Advocates)” (November 2007), online: <[www.cba.org/CBA/submissions/pdf/07-59-eng.pdf](http://www.cba.org/CBA/submissions/pdf/07-59-eng.pdf)>; Canadian Council for Refugees, “Security certificates: Next Steps” (6 June 2007), online: <[ccrweb.ca/sites/ccrweb.ca/files/certificates07.pdf](http://ccrweb.ca/sites/ccrweb.ca/files/certificates07.pdf)>; Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of ‘Special Advocates’ in National Security Proceedings* (Ottawa: University of Ottawa Faculty of Law, 2007); Joanne Mariner, “Canada: Parliament Should Amend Bill on Special Advocates” (19 November 2007), online: Human Rights Watch <[www.hrw.org/news/2007/11/18/canada-parliament-should-amend-bill-special-advocates](http://www.hrw.org/news/2007/11/18/canada-parliament-should-amend-bill-special-advocates)>; John Ip, “The Rise and Spread of the Special Advocate” (2008) PL 717; International Civil Liberties Monitoring Group, “Submission of Information by the ICLMG to the Committee Against Torture (CAT) for the Examination of Canada’s 6th Report in May 2012” (16 April 2012), online: <[iclmg.ca/wp-content/uploads/sites/37/2014/03/BR-CAT-Canadas-6th-report.pdf](http://iclmg.ca/wp-content/uploads/sites/37/2014/03/BR-CAT-Canadas-6th-report.pdf)>; David Jenkins, “There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology” (2011) 42:2 Colum HRL Rev 279; Kent Roach, “When Secret

in existence since 1978, security certificates have become a symbol of the heavy human rights costs associated with contemporary counter-terrorism law, policy, and practices. The reasons are easy to understand. Certificates are based largely on secret evidence, allow the indefinite detention of non-citizens alleged to threaten Canada's security, facilitate the removal of persons to face the substantial risk of persecution, torture, or similar abuses, and arguably discriminate on the basis of citizenship.<sup>2</sup> The certificate regime also rests on a broader assemblage of security-based policies and practices associated with several high-profile human rights abuses, including those perpetrated against Maher Arar, Abdullah Almalki, and Ahmad El Maati.<sup>3</sup>

Certificates have for these reasons been described as "exceptional."<sup>4</sup> A contested term, exceptionality may be defined simply as that which is rarely or infrequently used. This is a misleading definition: While certificates per se are infrequently used, security-based detentions and deportations have occurred rather regularly since the early 1990s through more ordinary measures, while the use of secret

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Intelligence Becomes Evidence: Some Implications of *Khadr* and *Charkaoui II*" (2009) 47 Sup Ct L Rev 147

2. Similar provisions in UK legislation were found to be inconsistent with the European Convention of Human Rights. See *A and Others v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68 [*A and Others*, 2004].
3. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) [Arar Inquiry]; The Honourable Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin: Supplement to Public Report* (Ottawa: Public Works and Government Services Canada, 2010).
4. Bell, "Subject to Exception," *supra* note 1; Colleen Bell, *The Freedom of Security: Governing Canada in the Age of Counter-Terrorism* (Vancouver: UBC Press, 2011), ch 2; Irina Ceric, "The Sovereign Charter: Security, Territory and the Boundaries of Constitutional Rights" (2012) 44:1 Ottawa L Rev 353; Mike Larsen & Justin Piché, "Incarcerating the 'Inadmissible': KIHC as an Exceptional Moment in Canadian Federal Imprisonment" (May 2007) [unpublished, archived at York University, York Centre for International and Security Studies]; Kent Roach, "The Law Working Itself Pure? The Canadian Experience with Exceptional Courts and Guantánamo" in Fionnuala Ní Aoláin & Oren Gross, eds, *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (New York: Cambridge University Press, 2013) 201.

evidence in the context of these and related practices is commonplace.<sup>5</sup> Indeed, successive governments have steadily “securitized” the entire immigration and refugee law system, employing such practices as enhanced surveillance and screening of migrants,<sup>6</sup> arbitrary detentions, expedited removals, limitations on the procedural and substantive rights of asylum seekers, and greater information sharing or institutional cooperation at the domestic and international levels.<sup>7</sup> In combination with recent legislative reforms,<sup>8</sup> these practices support a range of adjudicative and discretionary decision-making processes that operate outside of the context of certificates.<sup>9</sup>

We may instead adopt a constitutional definition of exceptionality, one that refers to measures and practices that do not (self-evidently) cohere with

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5. These measures include admissibility hearings, refugee claim hearings, detention reviews, as well as a host of supplemental preventive and deterrent measures that include revocation of passports and the removal of the citizenship of so-called “foreign fighters” (when such fighters have dual citizenship). I will outline the similarities between these proceedings and certificates in Part III of this article, below. In the meantime, see Jo Anne Colson, *Canadian Refugee Policy: the Politics of the Frame* (PhD Thesis, Trent University, 2013) [unpublished] at 132-40; Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order* (New York: Routledge, 2011) at 20; Sharryn J Aiken, “National Security and Canadian Immigration: Deconstructing the Discourse of Trade-Offs” in Francois Crépeau, ed, *Les migrations internationales contemporaines: Une dynamique complexe au cœur de la globalisation* (Montreal: Presses de L’Université de Montréal, 2009) 172; Sharryn J Aiken, “Of Gods and Monsters: National Security and Canadian Refugee Policy” (2001) 14:1 RQDI 7 at 19 [Aiken, “Of Gods and Monsters”].
  6. Deborah Waller Meyers, “Does ‘Smarter’ Lead to Safer? An Assessment of the US Border Accords with Canada and Mexico” (2003) 41:4 Int’l Migr 5; H Richard Friman, “Migration and Security: Crime, Terror, and the Politics of Order” in Ariane Chebel d’Appollonia & Simon Reich, eds, *Immigration, Integration, and Security: America and Europe in Comparative Perspective* (Pittsburgh: University of Pittsburgh Press, 2008) 130.
  7. Graham Hudson, “Transnational Human Rights Advocacy and the Judicial Review of Global Intelligence Agency Cooperation in Canada” in Craig Forcese & François Crépeau, eds, *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2011) 175; Alexander Moens, “The Challenging Parameters of the Border Action Plan” in *Seminar Proceedings: Perimeter Security and the Beyond the Border Dialogue: Perspectives from the PNW-Western Canada Region* (Bellingham, Wash: Border Policy Research Institute, 2011) 15.
  8. Protecting Canada’s Immigration System Act, SC 2012, c 17; Balanced Refugee Reform Act, SC 2010, c 8.
  9. Examples include admissibility hearings, detention reviews, and decisions to deport in the context of persecution, torture, extra-judicial killings, and similar human rights abuses. I will provide a more detailed description of these various decision-making processes in Part III of the article, below.

constitutional principles or autonomous legal values such as the rule of law.<sup>10</sup> The difficulty with this understanding of exceptionality is that reasonable people can disagree about what the law allows. In three recent cases—*Charkaoui v Canada (Citizenship and Immigration)*<sup>11</sup> in 2007, *Charkaoui v Canada (Citizenship and Immigration)*<sup>12</sup> in 2008, and *Canada (Citizenship and Immigration) v Harkat*<sup>13</sup> in 2014 (the “certificate trilogy”)—the Supreme Court of Canada (“SCC”) decided that the pernicious qualities of certificates are more or less manageable so long as courts, Parliament, and other legal actors are vigilant in operationalizing core constitutional principles. In *Charkaoui I* and *Charkaoui II*, the Court decided that elements of the certificate regime were unconstitutional but could be saved if Parliament addressed deficiencies in disclosure and adversarial challenge. In *Harkat*, the Court reviewed Parliament’s response to the *Charkaoui* judgments, finding that the current regime passes constitutional muster. It also upheld the reasonableness of the certificate issued against Mr. Harkat, paving the way for his removal from Canada.<sup>14</sup> Mr. Harkat was the first of five alleged terrorists named in certificates since September 11 (“9/11”) to be subject to removal.

The possible removal of Mr. Harkat highlights a third, doctrinal definition of exceptionality. In the 2002 case of *Suresh v Canada (Minister of Citizenship and Immigration)*,<sup>15</sup> the SCC ruled that Canada is generally prohibited from deporting persons to a place where they face a substantial risk of torture. Derogating from Canada’s international obligations,<sup>16</sup> the Court went on to say that deportation to torture may be justified under “exceptional circumstances.”<sup>17</sup>

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10. Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005); David Dyzenhaus, “The State of Emergency in Legal Theory” in Victor V Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge, UK: Cambridge University Press, 2005) 65; Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?” (2003) 112:5 Yale LJ 1011; John Ferejohn & Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers” (2004) 2:2 Int’l J Const L 210; Colin McQuillan, “The Real State of Emergency: Agamben on Benjamin and Schmitt” (2010) 18 Stud Soc & Pol Thought 96; Walter Benjamin, “On the Concept of History,” translated by Edmund Jephcott et al in Howard Eiland & Michael W Jennings, eds, *Walter Benjamin: Selected Writings, Volume 4: 1938-1940* (Cambridge: Harvard University Press, 2003) 389.
  11. 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui I*].
  12. 2008 SCC 38, [2008] 2 SCR 326 [*Charkaoui II*].
  13. 2014 SCC 37, [2014] 2 SCR 33 [*Harkat*].
  14. *Re Harkat*, 2010 FC 1241, [2012] 3 FCR 251 [*Harkat*, (9 December 2010)].
  15. 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].
  16. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36.
  17. *Suresh*, *supra* note 15 at para 78.

The Court did not clarify what counts as an exceptional circumstance. Given that Mr. Harkat claims that he would be subject to torture or similar abuse if returned to Algeria,<sup>18</sup> the precise ambit (and legality) of this zone of exceptionality are critical. Amidst revelations concerning Canada's complicity in torture as well as extensive normative developments,<sup>19</sup> the Court may soon have occasion to revisit *Suresh*, much as it did with respect to extradition to face the death penalty.<sup>20</sup>

The purpose of this article is to use constitutional discourses on the legality of security certificates to shed light on darker, neglected corners of the security-migration nexus, with special regard to deportation to torture. I argue that the certificate trilogy and *Suresh* rest on the same cardinal principle: Decisions that expose asylum seekers to serious human rights abuses or a substantial risk thereof must be constrained by enhanced procedural protections such as disclosure, adversarial challenge, and judicial review. On the one hand, courts have internalized this principle in the context of certificates and functionally equivalent proceedings, which is to say that they have imposed meaningful (albeit imperfect) constraints on the ability of the executive to label persons security risks. On the other hand, the ability of decision makers to subsequently deport such people to face torture or similar abuses remains effectively unconstrained—so much so that it is doubtful that Canada has complied with *Suresh*. If the SCC takes its own rationale in the certificate trilogy seriously, it must either revise its position in *Suresh* or encourage the extension of the procedures and practices used in the certificate regime to the entire security-migration nexus, including the removal process.

The article is divided into four parts. First, I review the shifting legislative and constitutional landscape within which security certificates operate, highlighting core principles elucidated in *Charkaoui I* and *Charkaoui II*. This includes reference to recent legislative changes ushered in by the *Anti-terrorism Act, 2015*.<sup>21</sup> Second, I use *Harkat* as a base for appraising how Parliament and the Federal Court have attempted to operationalize the constitutional principles outlined in *Charkaoui I* and *Charkaoui II*. I focus in particular on how the SCC has placed the bulk of responsibility for guarding the rule of law on the shoulders of Federal Court judges. I argue that its trust in the Federal Court's ability (and willingness) to

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18. Sean Kilpatrick, "Mohamed Harkat says he'll need a casket if deported to Algeria," *CTV News* (15 May 2014), online: <[www.ctvnews.ca/canada/mohamed-harkat-says-he-ll-need-a-casket-if-deported-to-algeria-1.1823216](http://www.ctvnews.ca/canada/mohamed-harkat-says-he-ll-need-a-casket-if-deported-to-algeria-1.1823216)>.

19. I will detail these factual and normative developments below.

20. *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283.

21. SC 2015, c 20 [*Bill C-51*].



discharge this role is the primary condition under which it tolerates legislative language and executive practices that continue to provide for the possibility of grave injustice and human rights abuses. Third, I reflect on how the position of the Court in the certificate trilogy obligates it to take notice of non-compliance with *Suresh*. I argue that certain procedural protections used in the certificate regime should be used to improve the quality and fairness of decision making about the deportation of individuals who pose security risks in contexts where there is a substantial risk of torture or similar abuse.

## I. THE CONSTITUTION OF SECURITY CERTIFICATES

### A. LEGISLATIVE FRAMEWORK

In existence since 1978, security certificates are a long-standing component of immigration and refugee law. Governed under Division 9 of the *Immigration and Refugee Protection Act*,<sup>22</sup> certificate proceedings begin when the Ministers of Public Safety Canada and Citizenship and Immigration Canada issue a certificate against a non-citizen who they allege is inadmissible to Canada on the grounds of security, violation of human or international rights, serious criminality, or organized criminality.<sup>23</sup> The bulk of evidence used to support this allegation is provided by the Canadian Security Intelligence Service (“CSIS”), although the Ministers may also rely on information provided by the Canadian Border Services Agency (“CBSA”), Royal Canadian Mounted Police (“RCMP”), or Communications Security Establishment. This evidence is collected through domestic operations as well as through formal and informal partnerships with foreign intelligence and law-enforcement agencies.<sup>24</sup>

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22. SC 2001, c 27 [*IRPA*].

23. *Ibid*, s 77(1).

24. For an overview of how security intelligence is gathered and shared, see Hudson, *supra* note 7; Adam DM Svendsen, “Connecting Intelligence and Theory: Intelligence Liaison and International Relations” (2009) 24:5 *Intelligence & Nat’l Sec* 700; Martin Rudner, “Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism” (2004) 17:2 *Int’l J Intelligence & Counterintelligence* 193; Glen M Segell, “Intelligence Agency Relations Between the European Union and the U.S.” (2004) 17:1 *Int’l J Intelligence & Counterintelligence* 81; Stéphane Lefebvre, “The Difficulties and Dilemmas of International Intelligence Cooperation” (2003) 16:4 *Int’l J Intelligence & Counterintelligence* 527; Derek S Reveron, “Old Allies, New Friends: Intelligence-Sharing in the War on Terror” (2006) 50:3 *Orbis* 453; Richard J Aldrich, “Beyond the Vigilant State: Globalisation and Intelligence” (2009) 35:4 *Rev Int’l Stud* 889.

Once the Ministers believe they have reasonable grounds to suspect that a non-citizen poses a security risk, they will issue a certificate and a warrant for the arrest of the named person. A Federal Court judge (the “designated judge”) will review the reasons for the detention and the reasonableness of the certificate itself. The judge must order the continuation of the detention if the release of the named person would be injurious to national security, endanger the safety of any person, or enhance the risk of flight. Detention reviews occur within the first forty-eight hours after a detention begins and at six-month intervals thereafter, at least until the reasonableness of the certificate has been determined.<sup>25</sup>

Until recently, the *IRPA* required the Ministers to provide the designated judge with all relevant information and other evidence upon which the certificate is based.<sup>26</sup> As part of the suite of amendments introduced through the recently enacted *Bill C-51*, the scope of this disclosure will be reduced to evidence that is “relevant to the ground of inadmissibility stated in the certificate.”<sup>27</sup> The Ministers must then prove, on a balance of probabilities, that they had reasonable grounds to issue the certificate.<sup>28</sup> If the designated judge finds that a certificate is reasonable, the person is inadmissible and subject to removal from Canada. The designated judge is authorized to make decisions on the basis of evidence not disclosed to the named person.<sup>29</sup>

Provisions in Division 9 of the *IRPA* govern the general framework for proceedings. Section 83 specifies the procedures by which information is to be protected, directing designated judges to: proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit; receive into evidence, and base a decision on, anything that they consider to be reliable and appropriate, even if it is inadmissible in a court of law; and ensure the confidentiality of information and other evidence provided by the Minister if, in the judge’s opinion, its disclosure would be injurious to national security or endanger the safety of any person.<sup>30</sup> At the initiative of the Ministers, the latter determination is made during the course of a closed hearing.

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25. *IRPA*, *supra* note 22, s 82.

26. *Ibid*, s 77(2).

27. *Supra* note 21, s 72(2), amending *IRPA*, *supra* note 22, ss 77(2)-(3).

28. *IRPA*, *supra* note 22, s 78; *Abani v Canada (Minister of Citizenship and Immigration)* (2000), 184 FTR 320 at para 16, 77 CRR (2d) 144 (FCA); *Almrei v Canada (Minister of Citizenship)*, 2004 FC 420 at paras 34-35, [2004] 4 FCR 327.

29. *IRPA*, *supra* note 22, s 83(1)(i).

30. *Ibid*, s 83(1).

According to the *IRPA*, named persons are entitled to the disclosure of such evidence as is necessary to be “reasonably informed” of the case against them.<sup>31</sup> Disclosed evidence comes in the form of a public Security Intelligence Report (“SIR”), “source matrices,” and summaries of closed evidence prepared by the Minister.<sup>32</sup> The named person and his or her counsel are allowed to call witnesses and to cross-examine those government witnesses who testify during open hearings. The *IRPA* directs designated judges to maintain the confidentiality of information, the disclosure of which would adversely affect national security (including the integrity of national security operations, strategies, and relationships) or the safety of individual persons including intelligence officers, operatives, and human sources. Closed hearings are attended by the designated judge, Ministers, “special advocates” (“SAs”), and a court worker. Each of these parties has access to secret SIRs, which include the history, results, and progress of ongoing or stalled intelligence operations.

Due to *Bill C-51*, not all of this information will be filed with the Federal Court; only information that is relevant to the ground of admissibility outlined in the certificate will be filed. SAs may request the disclosure of information in the possession of the government that has not been filed.<sup>33</sup> This procedure enables SAs to access exculpatory evidence, challenge the reliability of submitted evidence or the reasonableness of the government’s position, or identify whether evidence may have been derived from torture. *Bill C-51* allows the Ministers to challenge further disclosure, on the grounds that requested information does not enable the named person to be reasonably informed of the case against him or her.<sup>34</sup> This supposes, wrongly, that the right to be reasonably informed suffices to enable named persons to adequately defend themselves. As we will see when I review *Harkat*, the adequacy of the SA regime is a separate matter from the right of named persons to be reasonably informed; both are necessary for a trial to be fair.

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31. *Ibid.*, s 83.

32. Since 2005, the Federal Court has required that source matrices include information that places intelligence in context, including the origin and the length of the relationship between CSIS and a human source or foreign intelligence service; whether there are reasons to believe the information or intelligence was provided for self-gain; whether a human source has a prior criminal record or is under investigation by a law-enforcement or security intelligence agency; the extent to which information or intelligence has been, or is, corroborated by other evidence or information; whether the information or intelligence was acquired through torture or grave human rights abuse; and the accuracy of any document that records or summarizes intercepted information. See *Re Harkat*, 2005 FC 393 at paras 94-96, [2006] 1 FCR D-5 [*Harkat*, (22 March 2005)].

33. *Bill C-51*, *supra* note 21, ss 54, 57(1) amending *IRPA*, *supra* note 22, ss 77(2)-(3), 83(1)(c.2).

34. *Ibid.*

## B. CHARKAOU I

Prior to *Harkat*, the SCC twice reviewed elements of the certificate regime for consistency with the *Canadian Charter of Rights and Freedoms, 1982* (“*Charter*”).<sup>35</sup> In *Charkaoui I*, it invalidated certain provisions in the *IRPA* governing the protection of information. A primary issue was the constitutionality of the use of closed evidence. At the time, the impugned provisions required that such evidence be tendered during closed hearings attended by only the designated judge and the Ministers—there were no SAs. The court found that the absence of counsel representing the interests of named persons during closed proceedings contravened the section 7 *Charter* right to a fair trial. Importantly, this decision rested on the observation that certificates lead to three actual or potential substantive harms: protracted detention, deportation to torture, and harm to dignity.<sup>36</sup>

The cardinal principle in *Charkaoui I*—and the certificate trilogy as a whole—is that proceedings that lead to (the risk of) serious deprivations of life, liberty, or security of the person require enhanced procedural protections. It does not matter whether the proceedings are criminal or administrative in nature; what matters is the impact the decision has on the well-being of the affected person. While certificate proceedings are administrative in nature, the Court accordingly relied on criminal law principles to resolve the question of whether named persons were receiving a fair trial, which consists of three conditions. First, the named person must know and be able to respond to the Minister’s allegations. This requires that the named person receive a certain but unspecified amount of direct disclosure. Second, the designated judge must base his or her decision on both the facts and the law. This condition could be satisfied by the presence of opposing counsel during secret trials (*i.e.*, adversarial challenge), who may challenge the reliability and sufficiency of secret evidence as well as the strength of the Minister’s arguments. Third, the designated judge must be independent and impartial.<sup>37</sup>

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35. It upheld the constitutionality of pre-9/11 certificate legislation. See *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 90 DLR (4th) 289.

36. *Charkaoui I*, *supra* note 11 at paras 12-18. The Court did not use the term “dignity” directly. It stated that a “certificate may bring with it the accusation that one is a terrorist, which could cause irreparable harm to the individual,” adding later that this includes—and thus is not limited to—deportation to torture (*ibid* at para 14). The Court was aware of the 2004 judgment of the UK House of Lords that similar provisions in the United Kingdom were discriminatory within the meaning of Article 14 of the European Conventions on Fundamental Freedoms and Human Rights. See *A and Others, 2004*, *supra* note 2.

37. *Charkaoui I*, *supra* note 11 at paras 28-31.

The Court ruled that the first two conditions were sorely lacking. The Court pointed to several alternative approaches to the use of secret evidence in legal proceedings, thereby giving the government an opportunity to save the certificate regime. Prior to the introduction of the *IRPA*, for example, the reasonableness of certificates was reviewed by the Security Intelligence Review Committee (“SIRC”)—an independent body tasked with the review of CSIS activities.<sup>38</sup> SIRC was assisted by security-cleared counsel who, among other things, advanced the interests of a complainant. While not an advocate per se, SIRC counsel had access to closed evidence and could cross-examine government witnesses during closed hearings. Similar approaches were used during the Arar Inquiry.<sup>39</sup> The Court also took notice of the fact that the United Kingdom has employed a SIRC-style SA model since 1997.<sup>40</sup> Notwithstanding some notable weaknesses, including under-resourcing of SAs and statutory bars to communication between SAs and affected persons, this system was certainly superior to the *IRPA* system then under review. The Court left it for Parliament to decide how to bring the certificate regime into conformity with the *Charter*.

Parliament shortly thereafter amended the *IRPA*, empowering SAs to attend closed hearings in order to challenge the Ministers’ claims that certain information cannot be disclosed for reasons of national security or personal safety and to challenge the relevance, reliability, and sufficiency of secret evidence.<sup>41</sup> Section 85.2 of the *IRPA* specifies that SAs may make oral and written communication with respect to classified information.<sup>42</sup> SAs may also participate in, and cross-examine witnesses who testify during closed hearings.<sup>43</sup>

Designated judges have been required to interpret and apply these provisions in light of *Charkaoui I*. Over time, a series of questions has recurred, including: (a) May SAs have access to all information on file with the government that is relevant to a named person, or only evidence submitted by the Ministers; (b) Under what circumstances might procedural fairness justify the disclosure of privileged material, such as the employment records of CSIS agents or the identities of confidential informants;<sup>44</sup> (c) May SAs cross-examine CSIS human sources (whose identities would normally be kept confidential) in order to

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38. Murray Rankin, “The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness” (1990) 3 Can J Admin L & Prac 173.

39. Hudson, *supra* note 7 at 33.

40. *Charkaoui I*, *supra* note 11 at paras 80-84.

41. *IRPA*, *supra* note 22, s 85.1(2).

42. *Ibid*, s 85.2(a).

43. *Ibid*, s 85.2(b).

44. *Re Harkat*, 2009 FC 203, [2009] 3 FCR D-10.

challenge the reliability of evidence; (d) To what extent may SAs communicate with named persons, or other SAs, about a case after having seen classified material; (e) To what extent are communications between SAs and named persons covered by solicitor–client privilege; and (f) Do named persons have a right to direct disclosure, regardless of what is disclosed to SAs?

Foreseeing some of these issues, Parliament provided designated judges with broad discretion over procedural matters relating to SAs. For instance, section 85.6 of the *IRPA* authorizes the chief justices of the Federal Court of Appeal and the Federal Court, along with a committee of their choosing, to make rules governing the practices and procedures relating to SAs.<sup>45</sup> Designated judges, of which there are typically between eight and ten, receive training in handling secret evidence and presiding over secret trials and regularly confer with one another about lessons learned and best practices. Section 85.2(c) directs designated judges to authorize “any other powers that are necessary to protect the interests of the permanent resident or foreign national.”<sup>46</sup> Section 85.5 allows judges to waive prohibitions on communication between SAs and named persons.<sup>47</sup> Finally, Parliament provided named persons with a right of appeal to the Federal Court of Appeal for serious questions of general importance, excluding interlocutory decisions.<sup>48</sup> These legislative provisions and the institutional culture of the Federal Court have helped ensure consistent practices among designated judges.

### C. *CHARKAOUI II*

Shortly following the 2008 amendment of the *IRPA*, the Court turned its attention to the outer limits of the certificate regime: the assemblage of security intelligence practices that produce evidence used against named persons. In *Charkaoui II*, the Court again analogized the certificate regime to criminal proceedings, this time noting that functional distinctions between security intelligence and law enforcement have been blurred post-9/11 and that certificate-based deportations can lead to arrest and prosecution abroad.<sup>49</sup> The Court decided that CSIS, and any other domestic institution providing the Ministers with security intelligence and other information, is subject to criminal law principles relating to the retention and disclosure of evidence. Operationally, this means that CSIS must retain and disclose to the Ministers all information on file regarding a named

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45. *Supra* note 22, s 85.6.

46. *Ibid*, s 85.2(c).

47. *Ibid*, s 85.5.

48. *Ibid*, s 82(3).

49. *Supra* note 12 at paras 26-28, 50-55.

person, whether it is inculpatory or exculpatory.<sup>50</sup> The Ministers, in turn, are responsible for ensuring that all of this information is disclosed to the designated judge and SAs. In consideration of the position of the Minister and SAs, the judge then determines what material may be disclosed to the named person and what material must remain classified.

*Charkaoui II* provided considerable guidance to designated judges with respect to questions of disclosure, but some old questions remained and new questions quickly emerged, including: (a) What is the exact scope of CSIS's obligation to disclose; (b) Must it disclose all information that is minimally relevant or only information that is reasonably necessary in order for the SAs to test the accuracy of submitted evidence;<sup>51</sup> (c) Does *Charkaoui II* disclosure include information that may be privileged, such as the identities of human sources; (d) If CSIS's confidential informants do enjoy privilege, under what conditions (if any) may it be lifted; (e) If there is no privilege, or if it is lifted, should SAs also be able to cross-examine human sources; (f) How might *Charkaoui II* affect the fairness of proceedings that were already underway, given that large volumes of information that should have been disclosed in principle were already destroyed in accordance with long-standing internal policy; and (g) Are named persons entitled to receive a certain amount of direct disclosure? As adequate as the SA system may be, it does not completely satisfy the free-standing section 7 right of a named person to know and respond to the case against him or her.

#### D. SUMMARY

In sum, Parliament's intent that certificate proceedings be carried out "as informally and expeditiously as possible"<sup>52</sup> has not been realized. To the contrary, they have proven to be exceedingly complex, time consuming, and administratively burdensome. The internal operations of public and closed proceedings and the issue of the stream within which certain information belongs have been subject to frequent interlocutory hearings, appeals, and *Charter* challenges. *Charter* challenges have in two instances yielded landmark SCC rulings,<sup>53</sup> but there remained a plethora of questions about how the Federal Court was to operationalize abstract principles. Parliament's decision to allow the Federal Court and Federal Court of Appeal to produce rules and resolve questions of procedure has facilitated a measure of consistency. Designated judges frequently

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50. *Ibid* at para 2.

51. *Harkat*, (22 March 2005), *supra* note 32 at para 12.

52. *IRPA*, *supra* note 22, s 83(1)(a).

53. *Charkaoui I*, *supra* note 11; *Charkaoui II*, *supra* note 12.

confer with each other, receive direction from the chief justices of the Federal Court and Federal Court of Appeal, and regularly cite each other's decisions. Consistency is also supported by the availability of appeals on questions of law, both to the Federal Court of Appeal and ultimately to the SCC. Still, the normal operations and institutional capacities of the Federal Court have been strained by the need for judges to manage large volumes of factual information across public and closed hearings while building and maintaining a body of jurisprudence in the context of a shifting constitutional and legislative landscape.

## II. *HARKAT V CANADA*

*Harkat* is the most recent SCC case dealing with the constitutionality of the certificate regime. The case was triggered by a 2010 finding by a designated judge that the certificate issued against Mr. Harkat was reasonable.<sup>54</sup> Facing removal from Canada, Mr. Harkat's only chance of having the certificate against him quashed was to persuade the SCC that the post-*Charkaoui I* legislative framework for certificates remained unconstitutional or that the proceedings against him were conducted in an unfair manner.

### A. A SECOND LOOK AT CERTIFICATE LEGISLATION

The first set of issues concerned whether Parliament fully incorporated the elements of a fair trial into Division 9 of the *IRPA*. There was a host of sub-issues at play here, including: (a) whether named persons receive enough information to be reasonably informed of the case against them; (b) whether SAs possess the powers and resources necessary to discharge their roles; and (c) whether the *Charter* allows for hearsay to be used as evidence.

As noted, the Court in *Charkaoui I* stated that a fair trial consists of three distinct but interrelated elements: the right to know and to respond to the Minister's allegations; the right to have decisions made on the basis of the facts and law; and the right to have decisions made by an independent and impartial adjudicator. The Court found that a certificate proceeding will always be unfair if (a) the named person is provided access only to general assertions (in violation of the right to know and respond to the case) and; (b) there is an absence of adversarial challenge (in violation of the right to a decision based on the facts and law). As we saw, the Court dealt with these issues by recommending the introduction of an SA system. But the Court did not squarely address the

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54. *Harkat*, *supra* note 13 at paras 107-09.



question of whether the section 7 right of named persons to know and meet the case against them requires a certain degree of direct disclosure, regardless of what may be disclosed to an SA.

There are some analogues for determining the scope of direct disclosure. In a criminal trial, for example, an accused is entitled to receive any and all information in the possession of the Crown that is relevant to his or her defence and that is not subject to a limited class of privilege. The accused is always entitled to information that is submitted as evidence. Even here, there may be conflicts between disclosure and national security. These conflicts are governed by section 38 of the *Canada Evidence Act*,<sup>55</sup> which authorizes judges to order the disclosure of sensitive information if the public interest in doing so outweighs the public interest in non-disclosure.<sup>56</sup> When this happens in the context of a criminal trial, the Crown may respond by withdrawing the contested information as evidence. This means that information that is not disclosed to an accused may not, under any circumstances, be submitted as evidence in a criminal trial. In the event that the non-disclosure of evidence unduly limits the capacity of the accused to make full answer and defence, a judge may provide certain remedies, including a stay of proceedings.

The Court has consistently found that this model is inappropriate for certificates because requiring that evidence either be disclosed to a named person or withdrawn undermines the entire purpose of the certificate regime.<sup>57</sup> While the Court has applied criminal law principles to certificate proceedings, it was reluctant to find that the use of secret evidence during administrative proceedings is unconstitutional *per se*. The real question was the extent of direct disclosure required or, put negatively, the extent of submitted evidence that may be withheld constitutionally from the named person. The Court decided that named persons are entitled to receive what it called an “incompressible minimum amount of disclosure,” in the absence of which proceedings will be deemed

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55. RSC 1985, c C-5.

56. *Harkat*, *supra* note 13 at para 69.

57. *Ibid* at para 50; *Charkaoui I*, *supra* note 11 at para 77.

unfair.<sup>58</sup> Designated judges must determine whether there has been a sufficient degree of direct disclosure on a case-by-case basis. In the event that a judge directs disclosure of material that the Minister resolutely wishes to keep classified, “the Minister must withdraw the information or evidence whose non-disclosure prevents the named person from being reasonably informed.”<sup>59</sup> Incidentally, *Bill C-51* provides the Minister with the exclusive right to appeal decisions on disclosure—the exercise of which suspends the disclosure order until the matter has been settled by the Federal Court of Appeal.<sup>60</sup>

The Court then addressed the tendency of the government to over-claim national security confidentiality. This issue has been a subject of judicial concern, both within the context of security certificates<sup>61</sup> and beyond.<sup>62</sup> It should be noted that over-claiming of confidentiality is often not driven by disregard for the *Charter*; it is more frequently a function of novel and complex relationships between government lawyers and members of the intelligence community and an understandable concern on the part of the former to err on the side of over-claiming rather than divulging highly sensitive information. Nonetheless, the Court took occasion to direct designated judges to “be vigilant and skeptical with respect to the Minister’s claims of confidentiality.”<sup>63</sup> Recognizing the exceptional nature of security certificates and its place at the outer limits of constitutionality, the Court concluded that over-claiming threatens the integrity of the certificate regime’s “fragile equilibrium” and that “systematic over-claiming would infringe the

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58. *Harkat*, *supra* note 13 at para 55. This aspect of the judgment was informed by the 2009 case of *A and Others v the United Kingdom* decided by the European Court of Human Rights (“ECHR”). The ECHR decided that a trial would be unfair where disclosed material consists “purely” of general assertions and a decision is “based solely or to a decisive degree on closed material.” See *A and Others v the United Kingdom* [GC], No 3455/05, [2009] ECHR 301 at para 220, 49 EHRR 29. See also *Secretary of State for the Home Department v AF*, [2009] UKHL 28 at para 51, [2010] 2 AC 269; *Secretary of State for the Home Department v MB*, [2007] UKHL 46, [2008] 1 AC 440.

59. *Harkat*, *supra* note 13 at para 59. Just such a scenario occurred in the 2009 Federal Court case of *Re Charkaoui*. Justice Trembley-Lamer ordered the disclosure of evidence notwithstanding the Minister’s ardent position that this would result in injury to national security. The Minister chose to withdraw the evidence, which resulted in the quashing of the certificate against Mr. Charkaoui. See *Re Charkaoui*, 2009 FC 1030, [2010] 4 FCR 448 [*Re Charkaoui*].

60. *Supra* note 21.

61. *Re Almrei*, 2009 FC 1263, [2011] 1 FCR 163 [*Almrei*, (14 December 2009)].

62. *Canada (Attorney General) v Almqi*, 2010 FC 1106 at para 108, [2012] 2 FCR 508; *Khadr v Canada (Attorney General)*, 2008 FC 549 at paras 73-77, 98, 329 FTR 80; Arar Inquiry, *supra* note 3 at 302.

63. *Harkat*, *supra* note 13 at para 63.

named person's right to a fair process or undermine the integrity of the judicial system, requiring a remedy under s[ection] 24(1) of the *Charter*.”<sup>64</sup>

With these issues out of the way, the Court turned its attention to the adequacy of the SA system. As noted, SAs are prohibited from communicating with named persons after accessing classified material. This provision impedes effective advocacy, as communication helps SAs receive meaningful instruction and information from affected persons, use knowledge about personal history and relationships to challenge the reliability or sufficiency of circumstantial evidence, prepare the named person to testify, and more effectively cross-examine the Ministers' witnesses.<sup>65</sup> In addition to improving legal representation, the freer, two-way flow of information between SAs and named persons (and their counsel) would concomitantly improve the ability of designated judges to make decisions on the basis of law and the facts.

The constitutionality of the *IRPA* on this point was saved by section 85.4(2), which authorizes designated judges to allow communication on a case-by-case basis. It turns out that designated judges have adopted the practice of authorizing communication “in most cases.”<sup>66</sup> The Court explicitly directed designated judges to continue this practice and to “take a liberal approach” to communication requests, refusing authorization only “where the Minister has demonstrated, on a balance of probabilities, a real—as opposed to a speculative—risk of injurious disclosure.”<sup>67</sup> It also noted that SAs may receive an “unlimited amount of one-way communication” from named persons, the utility of which is enhanced by the provision of fulsome summaries, public SIRs, and now the guarantee of a minimum core of disclosure.<sup>68</sup>

A practical difficulty arises, though, as SAs may receive such permission only after submitting a formal request during interlocutory hearings attended by the Ministers. To support the request, an SA may need to divulge to the Ministers prior communications and litigation strategies, which can obviously prejudice the named person and breach the solicitor-client privilege that attaches to communications between the SA and the named person. In addition to being

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64. *Ibid* at para 64.

65. Forcese & Waldman, *supra* note 1 at 35-38.

66. *Re Harkat*, 2010 FC 1242 at para 139, [2012] 3 FCR 432.

67. *Harkat*, *supra* note 13 at para 70.

68. *Ibid* at para 71.

powerfully protected at common law and constitutional law,<sup>69</sup> solicitor-client privilege is expressly protected under section 85.1(4) of the *IRPA*. The Court decided that this potential unfairness may be averted if designated judges employ safeguards, such as hearing an SA's submissions in the absence of the Ministers.<sup>70</sup>

A final issue relates to hearsay. This is an issue of general importance because evidence derived from security intelligence work often contains appreciable levels of hearsay. Hearsay is ordinarily inadmissible as evidence in large part due to questions of reliability.<sup>71</sup> Recall that the *IRPA* allows designated judges to receive into evidence anything they consider to be reliable and appropriate, even if inadmissible in a court of law.<sup>72</sup> The Court upheld the constitutionality of this provision on the grounds that the *IRPA* empowers designated judges to exclude evidence that they find to be unreliable or that excessively prejudices a named person.<sup>73</sup> This exclusionary power allows judges to protect against unfairness while accommodating the realities of security intelligence work.

#### B. WERE THE PROCEEDINGS AGAINST MR. HARKAT FAIR?

The next cluster of issues concerned whether proceedings against Mr. Harkat cohered with the principles outlined in *Charkaoui II*. This segment of the judgment dealt with the extent to which criminal law principles should govern certificate proceedings. For example, Mr. Harkat argued that his SAs should have the authority to cross-examine or at least learn the identities of CSIS human sources. The government responded that these sources are protected by "informer privilege," which is ordinarily used to withhold the identities of police informants. It is a cardinal rule in criminal law that the identities of police informants are privileged, meaning that they cannot be divulged to the defence or to the public.<sup>74</sup> This obviously means that informers cannot be cross-examined. The rationale for informer privilege is twofold: to protect the informer and, in

69. *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385; *R v Hebert*, [1990] 2 SCR 151, [1990] 5 WWR 1; *R v Jones*, [1994] 2 SCR 229 at 246-55, 114 DLR (4th) 645; *Re Shell Canada Ltd*, [1975] FC 184, 55 DLR (3d) 713; *Solosky v The Queen*, [1980] 1 SCR 821, 105 DLR (3d) 745.

70. *Harkat*, *supra* note 13 at para 72; *Re Almrei*, 2008 FC 1216 at paras 60-61, [2009] 3 FCR 497.

71. David M Tanovich, "Starr Gazing: Looking into the Future of Hearsay in Canada" (2003) 28:2 Queen's LJ 371.

72. This allows for the admission of evidence if a judge is "satisfied that the information is reliable and appropriate," even though "under traditional rules of evidence it would be inadmissible as hearsay." See *Re Jaballah*, 2010 FC 224 at para 62, [2011] 3 FCR 155.

73. *Harkat*, *supra* note 13 at para 76.

74. *R v Leipert*, [1997] 1 SCR 281, 143 DLR (4th) 38.

so doing, to encourage others to come forward with important information.<sup>75</sup> The non-disclosure of information pertaining to informers runs counter to the principle of full disclosure. However, informer privilege has acquired constitutional status, such that the identity of the informer will be divulged if and only if it is necessary to demonstrate the innocence of the accused.<sup>76</sup>

When the *Harkat* case was before the Federal Court, Justice Noël, the designated judge, held that CSIS human sources are protected by privilege. Consistent with the logic of *Charkaoui II*, Justice Noël reasoned that such sources are functionally equivalent to police informers and that utmost secrecy is essential to effective intelligence work.<sup>77</sup> It is standard practice, for example, to “compartmentalize” information pertaining to the identities of human sources, such that only those who “need to know” such information in order to fulfill an operational requirement are provided with access.<sup>78</sup> Failure to maintain the confidentiality of informer identities would result in the breakdown of short- and long-term relationships that are among the primary means through which CSIS acquires intelligence and other information.<sup>79</sup> Justice Noël held that the only circumstance under which SAs would be granted access to such information would be to “prevent a flagrant breach of procedural justice which would bring the administration of justice into disrepute.”<sup>80</sup>

The question of privilege was practically important in the context of *Harkat* because of a series of revelations concerning ministerial malfeasance. Since 2005, the Federal Court has required the Ministers to disclose to the court all relevant information regarding the credibility and reliability of human sources, including the source’s motivation, evaluation, payment, and background.<sup>81</sup> Following *Charkaoui II*, this information must also be disclosed to SAs. In

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75. *Re Harkat*, 2009 FC 204 at para 13, [2009] 4 FCR 370 [*Harkat*, (22 December 2008)].

76. *R v Scott*, [1990] 3 SCR 979 at 995-96, 116 NR 361; *Named Person v Vancouver Sun*, 2007 SCC 43 at para 29, [2007] 3 SCR 253; *Marks v Beyfus* (1890), 25 QBD 494 at 498 (available on WL Can) (CCA).

77. *Harkat*, (22 December 2008), *supra* note 75 at para 12. See also Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report: Security and Information* (Hull, Que: Minister of Supply and Services Canada, 1980) at 41-47.

78. *Harkat*, (22 December 2008), *supra* note 75 at paras 25-48; *R v Treu* (1979), 104 DLR (3d) 524, 49 CCC (2d) 222, (Qc CA); *Canada (Attorney General) v Ribic*, 2003 FCA 246 at para 6, [2005] 1 FCR 33; *R v Ribic*, 2008 ONCA 790, 238 CCC (3d) 225; *Regulation of Investigatory Powers Act 2000* (UK), c 23, s 29(5)(e); *National Security Information*, 3 CFR § 166 (1982), s 4.1.

79. *Harkat*, (22 December 2008), *supra* note 75 at paras 25-31.

80. *Ibid* at para 46.

81. *Re Harkat*, 2005 FC 393 at paras 93-94, 98, 261 FTR 52.

2009, the Ministers informed Justice Noël that they did not disclose to the court that a CSIS informant had failed a polygraph test in 2001.<sup>82</sup> What is more, a CSIS employee had reworded the original report in 2008 to conceal this fact: Whereas the original 2002 report indicated that the source in question was untruthful “on all relevant questions,” a 2008 “quality control” assessment of the test indicated that the source was truthful on half of the relevant questions and that the answers to the other half should have been found inconclusive.<sup>83</sup> The official report disclosed to the Federal Court did not contain any account of this revision or of the original results; the court only received the amended report. The employee in question did not mention this *ex post facto* change when the designated judge asked whether there was “anything unusual in the file relating to the human sources.”<sup>84</sup>

Justice Noël considered this incident a “troubling” and “flagrant” violation of procedural justice that impugned the integrity of the court.<sup>85</sup> He lifted informer privilege and ordered the disclosure of information about the human source to the court and SAs, including information that might have revealed the informer’s identity.<sup>86</sup> He later ordered the disclosure of similar information on another human source.<sup>87</sup> Finally, he chose to rely on information provided by the human source in question only when corroborated by extrinsic evidence.<sup>88</sup> It was in context of this breach of justice that SAs representing Mr. Harkat requested that all information relating to the human source be excluded or, in the alternative, that they be authorized to cross-examine the source.

The SCC reviewed Justice Noël’s decision on these matters in *Harkat*. On the question of privilege, it decided that the functions of CSIS and police forces are sufficiently distinct so as to preclude “automatically applying traditional police informer privilege to CSIS human sources.”<sup>89</sup> As noted by the Federal Court of Appeal both in *Re Harkat*<sup>90</sup> and in *Canada (Attorney General) v Almalki*,<sup>91</sup> class privilege is a fairly rare and inflexible protection that does not easily fit the

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82. *Re Harkat*, 2009 FC 553 at paras 1-3, 345 FTR 143 [*Harkat*, (27 May 2009)].

83. *Re Harkat*, [2010] 4 FCR 149 at paras 16-23.

84. *Re Harkat*, 2009 FC 1050 at para 27, [2010] 4 FCR 149 [*Harkat*, (15 October 2009)].

85. *Harkat*, (27 May 2009), *supra* note 82 at para 16; *Harkat*, (15 October 2009), *supra* note 84 at paras 62-68.

86. *Harkat*, (27 May 2009), *supra* note 82.

87. *Harkat*, (15 October 2009), *supra* note 84 at para 69.

88. *Harkat*, (9 December 2010), *supra* note 14, n 1.

89. *Ibid* at para 85.

90. 2012 FCA 122, [2012] 3 FCR 635 [*Harkat*, (25 April 2012)].

91. 2011 FCA 199 at paras 29-30, [2012] 2 FCR 594 [*Almalki*, (13 June 2011)].

realities of security intelligence work. In contrast to the relationship inhering between police and informers, those between CSIS employees and human sources tend to be comparatively fluid, complex, and informal. Due to the categorical, all-or-nothing nature of class privilege and the unique institutional and social contexts of security intelligence work, the question of informer privilege would best be left to Parliament rather than to courts.<sup>92</sup> Parliament has since amended the *Canadian Security Intelligence Service Act* to prohibit the disclosure of the identities of CSIS human sources or information from which their identities may be inferred in any legal proceeding, including certificate proceedings. However, a named person or SA may contest that the person concerned is a human source or that certain information may not safely be disclosed.<sup>93</sup>

It remains to be seen whether this amendment will withstand *Charter* scrutiny. It is worth noting here that the Court in *Harkat* stated that disclosure of information pertaining to human sources would be only to persons with security clearance who are obligated to maintain the confidentiality of the information.<sup>94</sup> On the one hand, this caveat is not likely to inhibit the ability of CSIS to recruit new sources or otherwise to use traditional techniques for acquiring and processing information. On the other, it helps SAs and judges assess the reliability of evidence, most especially in light of above-noted instances of misdirection. The rights of named persons may be dependent on the disclosure of human source files and related information to SAs. It should also be noted that designated judges take into account the fact that information from human sources is hearsay when weighing the evidence.<sup>95</sup>

There remained two outstanding issues: (a) whether the destruction of important source materials—including recordings of intercepted communications used to link Mr. Harkat with known terrorists—rendered the proceedings against Mr. Harkat unfair; and (b) whether the Ministers failed to discharge their duties of candour and utmost good faith in failing to secure recent foreign intelligence relevant to Mr. Harkat's defence.

Pursuant to precedent established in the context of criminal law, the Ministers have a duty to retain evidence relevant to the defence of the named person and to explain the loss or destruction of such evidence; the failure to do so results in

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92. *Harkat*, (25 April 2012), *supra* note 90 at paras 92-100; *Almalki*, (13 June 2011), *supra* note 90 at paras 20-26, 30.

93. Canadian Security Intelligence Service Act, RSC 1985, c C-23, s 18.1(4) [CSIS Act].

94. *Supra* note 13 at para 83.

95. *Ibid* at para 90.

a *Charter* breach.<sup>96</sup> Given the law established in *Charkaoui II*, the destruction of source files by CSIS constituted “unacceptable negligence,” amounting to a breach of the Ministers’ disclosure obligations. Since this breach prejudiced Mr. Harkat’s ability to make full answer and defence, it amounted to a violation of his section 7 right to procedural fairness.<sup>97</sup> A breach of this sort does not, however, entail the right to a remedy—not even in the criminal law context. The provision of a remedy is a question to be determined on a case-by-case basis. Courts will consider the nature and extent of the prejudice suffered,<sup>98</sup> “the context of the rest of the evidence and the position taken by the defence.”<sup>99</sup>

Mr. Harkat sought one of two remedies: a stay of proceedings or an order excluding the summaries of the information contained in the destroyed files. The former remedy was refused. The request for the latter remedy received differing responses from the Federal Court, the Federal Court of Appeal, and the SCC. In principle, the exclusion of evidence addresses any prejudice to the claimant to the extent necessary to preserve the integrity of the justice system. Since evidence may help courts perform their truth-seeking function despite producing prejudicial effects, alternatives to exclusion are to be preferred.<sup>100</sup> The Federal Court refused to exclude the evidence on the grounds that summaries of the original operational notes and recordings were reliable, and hence the prejudice was minimal while the probative value was high. The Federal Court of Appeal excluded the summaries, noting that the reliability of the summaries could not be adequately tested and that the extent of the prejudice against Mr. Harkat was therefore unknown.<sup>101</sup>

The SCC sided with the Federal Court on this issue. Without fully addressing the concerns of the Federal Court of Appeal, it declared the summaries to be reliable. It also noted that admission of the summaries would not adversely affect the integrity of the justice system, as the destruction of the originals occurred prior to *Charkaoui II*, pursuant to policies that had not yet been declared unconstitutional. The destruction of the originals was, in other words, inadvertent and understandable given the uncertainty of the law at the time.<sup>102</sup>

One wonders how the Court knew that the summaries were reliable without comparing them with the originals. Presumably, the designated judge was able

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96. *R v La*, [1997] 2 SCR 680 at paras 18-20, 148 DLR (4th) 608.

97. *Harkat*, *supra* note 13 at para 93.

98. *Charkaoui II*, *supra* note 12 at para 46.

99. *R v Bradford*, [2001] 139 OAC 341 at para 38, 52 OR (3d) 257.

100. *R v Bjelland*, 2009 SCC 38 at para 3, [2009] 2 SCR 651.

101. *Harkat*, (22 December 2008), *supra* note 75 at para 83.

102. *Harkat*, (9 December 2010), *supra* note 14.



to corroborate the summaries by reference to closed material, but questions of Ministerial compliance with its disclosure obligations, both prior to and following *Charkaoui II*, raise serious doubts about the effectiveness of this method. It is likely that the courts placed great weight on the good faith of CSIS employees to, inter alia, accurately transcribe intercepted communications. The designated judge would have carefully assessed the trustworthiness of relevant employees responsible for the summaries when they were examined and cross-examined during closed hearings.

Courts have adopted similarly deferential stances towards the Ministers and CSIS employees in other certificate cases. In the case of Hassan Almrei, for example, Justice Mosely found that the destruction of primary source material (in this case, electronic surveillance) did not prejudice Mr. Almrei, as public summaries kept him reasonably informed.<sup>103</sup> It bears mentioning, though, that signals intelligence did not form a prominent part of the Ministers' case against Mr. Almrei.<sup>104</sup> It also bears mentioning that Justice Mosley admonished the Ministers for a breach of candour for failing to include in their SIR information that weakened or contradicted their case. To make matters worse, they seem to have all but halted their investigation of Mr. Almrei after 2001, in the belief that they did not need to routinely update their knowledge of Mr. Almrei and the risk he posed to Canada. These failings were so severe that they resulted in a finding that the certificate against Mr. Almrei was unreasonable.<sup>105</sup>

This brings us to the last issue. Mr. Harkat argued that the Ministers failed to secure from foreign intelligence agencies relevant information regarding the terrorists with whom he allegedly associated. This information could have been used to identify weaknesses in the summaries and closed evidence, as well as to provide a more up-to-date picture of the threat environment, Islamic extremism, and the bin Laden network. All of this could have had a bearing on the reasonableness of the certificate, at least by providing a fuller picture of whether Mr. Harkat posed a threat to the security of Canada. Unsurprisingly, the foreign intelligence agencies concerned refused the formal requests of the Ministers.<sup>106</sup> The SCC did not find a breach of candour and good faith because, unlike in the Almrei case, the Ministers made a reasonable effort to acquire this information.

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103. *Almrei*, (14 December 2009), *supra* note 61 at para 491.

104. *Ibid* at para 491.

105. *Ibid* at paras 504-09.

106. For a copy of the letters of request sent, see *Re Harkat*, 2010 FC 1243, App A at paras 6-7, 380 FTR 255.

What is more, the Court held that the Ministers have “no general obligation to provide disclosure of evidence or information that is beyond their control.”<sup>107</sup>

### C. SUMMARY

In sum, *Harkat* seems to have resulted in the constitutionalization of the certificate regime. The legislative framework, including new provisions governing SAs, has survived a “second look,”<sup>108</sup> and the evolving practices of the Federal Court have largely aligned with the principles elucidated in *Charkaoui I* and *Charkaoui II*. While the *IRPA* provides for the possibility of an unfair process, this alone does not render it unconstitutional—what matters is the manner in which it is interpreted and applied. The Court directed designated (and appellate) judges to tend to the constitutionality of certificate proceedings on a case-by-case basis, using *Charter* principles, the language of the *IRPA*, and the evolving practices of the Federal Court. Also at issue—although far less prominently—was the extent to which the Ministers and CSIS complied with their statutory and constitutional obligations. Importantly, the Court did not seriously review executive practices or policies, focusing instead on the performance of legal institutions. Its concern was primarily with encouraging and facilitating the comprehensive and coherent application of internal norms by designated judges in order to better constrain the actuality of executive decision making.

Designated judges have accordingly faced a steep learning curve. Amidst a shifting constitutional and legislative landscape, they seem to have produced a fairly consistent body of law concerning the interpretation and application of the *IRPA* and the extent to which criminal law principles apply to certificate proceedings. The evolving practices of the Federal Court have remained subject to appeal and, in some instances, have been transformed into binding law through the SCC’s judgments in *Charkaoui I*, *Charkaoui II*, and *Harkat*. In fact, the Court’s judgments in these cases have served both as a framework for the production of new practices (such as with disclosure following *Charkaoui II*) and a means of clarifying and refining resultant jurisprudence.

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107. *Harkat*, *supra* note 13 at para 103.

108. Kent Roach, “Sharpening the Dialogue Debate: The Next Decade of Scholarship” (2007) 45:1 Osgoode Hall LJ 169 at 174-76; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45:1 Osgoode Hall LJ 1 at 6, 8, 19-25.

### III. TRULY EXCEPTIONAL? *HARKAT*, *SURESH*, AND DEPORTATION TO TORTURE

The constitutionalization of certificates sits uneasily alongside the supposed status of certificates as exceptional measures. A highly contested concept, exceptionality may be loosely defined as a state in which a sovereign asserts power that transcends the rule of law. Exceptional measures are, on this reading, those that cannot be justified by reference to constitutional principles or autonomous legal values, including the rule of law. Power is justified politically by reference to a real or fictitious emergency that threatens the existence of a political community.<sup>109</sup> But it may also be justified by means of invalid, unsound, or insincere interpretations of pre-existing legal norms.<sup>110</sup> In this latter instance, the executive (and possibly the legislative and executive branch) uses the form of law to rationalize injustice while the substance of law remains absent.<sup>111</sup>

We should be quite ambivalent about the way the SCC has reviewed the constitutionality of the certificate regime. On the one hand, *Charkaoui I* and *Charkaoui II* have resulted in meaningful improvements to procedural rights, including the provision of SAs and enhanced disclosure. In *Harkat*, the Court improved the capacity of SAs to represent named persons by directing designated judges to grant communication requests liberally, to safeguard solicitor-client privilege, to ensure the provision of a minimum core of disclosure, and to be vigilant against over-claiming of national security confidentiality. Coupled with enhanced disclosure pursuant to *Charkaoui II*, these changes have been meaningful. The permissibility of communication between SAs and named persons, for example, has helped SAs directly refute the veracity of the Minister's allegations and supporting evidence rather than simply challenge the inferences that may be drawn from the evidentiary record.<sup>112</sup> The accuracy or correctness of evidence is as important as—if not more important than—whether conclusions drawn from the evidence are reasonable. Vigilance against over-claiming of

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109. Gross, *supra* note 10; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: University of Chicago Press, 1985) at 5-6.

110. Benjamin, *supra* note 10; Agamben, *supra* note 10.

111. Dyzenhaus, *supra* note 10 at 72; Agamben, *supra* note 10, ch 2.

112. For an example of where the SA system is better than in the United Kingdom, see Amnesty International, *Left in the Dark: The Use of Secret Evidence in the United Kingdom* (London: Amnesty International Publications, 2012), online: <[www.amnesty.org/download/Documents/20000/eur450142012en.pdf](http://www.amnesty.org/download/Documents/20000/eur450142012en.pdf)>.

confidentiality has also had powerful impacts, as evidenced by the quashing of the certificate against Mr. Charkaoui<sup>113</sup> and Mr. Almrei.<sup>114</sup>

On the other hand, there remain outstanding procedural issues. SAs remain at a disadvantage, lacking the same levels of professional and administrative support available to government lawyers. Whereas the latter may confer with each other on cases and legal strategies, the former work alone, balancing their roles as SAs with private practice. Prohibitions on communication between SAs and named persons can adversely affect legal representation when one's legal strategy depends on the content of classified material—a problem again not faced by government lawyers.

Less discussed is a host of outstanding substantive issues, including protracted detentions, harm to dignity, and the risk of deportation to torture. In *Charkaoui I*, the Court provided a short, doctrinally flat decision on the question of discrimination<sup>115</sup> but provided some guidance on the length of time for which named persons may be detained.<sup>116</sup> Following the *Harkat* decision and the beginning phases of Mr. Harkat's removal, the question of deportation to torture has become the elephant in the room. *Suresh* ostensibly settled this issue in 2002, when the Court held that it is "generally" unconstitutional to deport someone to face a substantial risk of torture. However, it also decided that deportation to torture would be permitted under "exceptional circumstances."<sup>117</sup> This is to say that there is a presumption against deportation to torture, which the government may rebut if it demonstrates evidence of a "serious threat to national security."<sup>118</sup> The Court specified that:

[A] person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.<sup>119</sup>

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113. Re *Charkaoui*, *supra* note 59.

114. *Almrei*, (14 December 2009), *supra* note 61.

115. *Supra* note 11 at paras 129-32.

116. The Court held that lengthy "[e]xtended periods of detention under the certificate provisions of the *IRPA* do not violate s[ections] 7 and 12 of the *Charter* if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors," including the reasons for detention (*ibid* at para 110).

117. *Suresh*, *supra* note 15 at para 78.

118. *Ibid* at para 89.

119. *Ibid* at para 90.

The Court was clear that determinations of risk are fact-based, political, and entitled to deference if “the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada.”<sup>120</sup> Decisions concerning the risk a person poses as well as whether that person may be safely removed from Canada are findings of fact reviewable on a standard of patent unreasonableness. The Court did not clarify what counts as an “exceptional circumstance,” stating only that “[t]he ambit of an exceptional discretion to deport to torture, if any, must await future cases.”<sup>121</sup>

I do not want to tread too heavily into thorny theoretical debates about the exceptionality of certificates or deportation to torture. Instead, I would like to take a moment to reflect on the relationship between *Harkat* and *Suresh*, both in terms of what we may expect regarding the possible removal of Mr. Harkat and, more generally, the intersection of procedural and substantive justice in the context of security-based deportation proceedings.

#### A. BEYOND CERTIFICATES: THE (NON-)IMPACT OF CONSTITUTIONAL PRINCIPLES ON ADJUDICATIVE AND DISCRETIONARY DECISION MAKING

One of the principles elucidated with equal force in *Suresh* and the certificate trilogy—as well as the foundational case of *Singh v Minister of Employment and Immigration*<sup>122</sup>—is that the greater the risk of substantive injustice associated with a decision, the greater the procedural protections should be to which affected persons are entitled. Moreover, there should be a reliable system for ensuring that authoritative decision makers interpret and apply enabling statutory provisions and regulations in a manner consistent with constitutional principles. According to the SCC in the certificate trilogy, this vigilance is the condition under which it will tolerate provisions and practices that provide for the possibility of grave injustice. The “administrative” nature of a decision does not justify inadequate procedural protections before removing persons to face human rights abuses abroad.

The certificate trilogy shows that the actualization of this principle depends on a deep institutional commitment to and broad-based internalization of constitutional norms by relevant actors. Unfortunately, those who make decisions about deportation to torture lack this commitment and supporting institutional architecture. Consider the process by which people deemed security risks are

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120. *Ibid* at para 85.

121. *Ibid* at para 78.

122. [1985] 1 SCR 177, 17 DLR (4th) 422.

removed from Canada when there is a question of torture or similar abuse. The first stage in this process involves a finding of inadmissibility, which can occur in various ways. It may occur once a certificate has been found to be reasonable. Far more often, it occurs following an admissibility hearing, a refugee claim hearing, or a finding of inadmissibility by a Minister's Delegate (MD) in the absence of an oral hearing altogether.<sup>123</sup> The Minister is always represented in admissibility hearings and may intervene in refugee claim hearings for reasons that include national security. When there is an issue of, *inter alia*, national security, section 86 of the *IRPA* states that:

The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to "judge" be read as a reference to the applicable Division of the Board.<sup>124</sup>

This provision ensures that ordinary proceedings presided over by an Immigration and Refugee Board of Canada ("IRB") member are conducted expeditiously, informally, and with precisely the same legislative rules regarding the admissibility of evidence and the non-disclosure of classified material as used in certificate cases. They become, in other words, functional equivalents to certificate proceedings.

Once an applicant has been deemed to be inadmissible, he or she is subject to the second stage of removal. In most cases, an immigration official ("IO") will conduct a pre-removal risk assessment ("PRRA") to determine whether an applicant is at risk of persecution, torture, or similar abuse.<sup>125</sup> IOs will look at both the general human rights record of the country of origin and whether the claimant faces a particularized, personal risk. If the IO determines that there is a risk of persecution or torture, the third step involves the filing of a threat assessment by an analyst in the National Security Division of the Intelligence Directorate, CBSA. These two reports are then sent to an MD, while a redacted copy is sent to the applicant. If the MD agrees with the report, he or she will balance the danger the applicant poses to Canadian security with the risk of torture the applicant faces if deported. In situations where there is a substantial risk of torture, the MD will issue a "danger opinion" pursuant to section 115(2) of the *IRPA*, thereby invoking the *Suresh* exception. There is no right to an oral hearing concerning the issuance of a danger opinion, but affected persons are

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123. *IRPA*, *supra* note 22, ss 44-45, 107, 107(1).

124. *Ibid*, s 86.

125. *Ibid*, ss 112-14.

entitled to receive and submit written challenges against the information upon which the decision is made (excluding information protected by national security confidentiality). The applicant is also entitled to the reasons for the decision.<sup>126</sup>

We may usefully divide this process into two types. The first would be adjudicative in nature and would include certificate proceedings, admissibility hearings, detention reviews, and judicial reviews. Notice that these hearings relate to the *labelling* of persons as security threats, are presided over by independent and impartial adjudicators, and are both adversarial and oral. The second would be discretionary, in which the Minister or the MD makes a decision independent of an oral, adversarial hearing. Discretionary decisions relate to a range of subject matter, but for our purposes, it is important to note that they are decisions to *remove* persons who have been successfully labelled as security threats. This means that final decisions about whether there is a substantial risk of torture or similar abuse is a discretionary decision—albeit one that is notionally (though in many cases, not practically) subject to judicial review. The principles of the certificate trilogy seem to have had positive impacts on adjudicative decisions to label someone a security threat, while *Suresh* has had little to no impact on subsequent discretionary decisions to remove such persons in the context of torture or similar abuse.

Section 86 of the *IRPA*, for instance, ensures that proceedings before the IRB are subject to relevant provisions of Division 9 of the *IRPA*, even if the hearing is not, strictly speaking, a certificate proceeding. As part of this process, IRB adjudicators are authorized (and obligated) to appoint an SA.<sup>127</sup> Importantly, IRB members who preside over such hearings receive comprehensive training in secret evidence and national security law, while all secret hearings before the IRB involve an SA. Similarly, section 87.1 of the *IRPA* authorizes Federal Court judges to appoint SAs during judicial reviews that include secret evidence. This may occur during reviews of IRB decisions or of Ministerial decisions that rested in part on sensitive information. Presumably, SAs are appointed when secret evidence forms an important component of the decision under review. Yet there have been cases where the Federal Court has refused to appoint an SA. In the 2007 case of *Segasayo v Canada (Minister of Public Safety and Emergency Preparedness)*, for instance, Justice Blais held that the provision of SAs during

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126. *Suresh*, *supra* note 15.

127. Parliament elected to provide for the appointment of SAs before IRB members even though the constitutionality of reliance on closed material during admissibility hearings was upheld in the 2003 case of *Sogi v Canada (Minister of Citizenship and Immigration)*. See *Sogi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1429, [2004] 2 FCR 427.

the review of a Ministerial decision to deny an exemption was inappropriate.<sup>128</sup> He reasoned, first, that “only those subject to a security certificate face detention while awaiting a decision on their inadmissibility.”<sup>129</sup> Second, the extent of closed evidence in the case was much smaller than in a certificate hearing.<sup>130</sup> Finally, whereas the Court in *Charakaoui I* was concerned about deportation to torture, those not named in certificates are less likely to face that risk because they may still claim protection, either as a refugee or as a person in need of protection.<sup>131</sup> Similarly, the Federal Court refused to appoint an SA in *Kanyamibwa v Canada (Public Safety and Emergency Preparedness)*, noting that the claimant in this case was not at risk of torture or similar human rights abuses.<sup>132</sup>

I would cautiously say that the certificate trilogy has influenced adjudicative proceedings outside the context of certificates per se. There may well be a process of acculturation within the IRB that mirrors what has occurred within the Federal Court. However, the rationale of the Federal Court in refusing to appoint an SA during judicial reviews highlights some persistent and dangerous assumptions about the substantive injustices faced by persons deemed inadmissible on security grounds—even if the decision was right on the facts of a particular case. First, it is untrue that only persons named in certificates are detained pending determinations of admissibility. In point of fact, the CBSA regularly detains asylum seekers alongside those whose refugee claims have been rejected.<sup>133</sup> Problems with record keeping have prevented the isolation of the precise number of asylum seekers who have been detained (as well as for how long and on what grounds), as the CBSA classifies asylum seekers and persons whose claims have been rejected under the same category.<sup>134</sup> Nonetheless, Canada has been the subject of repeated international criticism for increasing its detention of asylum seekers, as well as for using provincial or municipal prisons for this purpose.<sup>135</sup>

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128. 2007 FC 372 at paras 28-29, [2008] 1 FCR 121.

129. *Ibid* at para 28.

130. *Ibid* at para 29.

131. Justice Blais stated that, unlike a security certificate, “even deportation is not a certainty in this case, since the applicant has been recognized as a Convention refugee, and is thus subject to section 115 of the Act” (*ibid* at para 28).

132. 2010 FC 66 at paras 50-56, [2011] 1 FCR 423. See also *Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 119, [2009] 3 FCR D-4.

133. Delphine Nakache, “The Human and Financial Cost of Detention of Asylum-Seekers in Canada” (December 2011), online: United Nations High Commissioner for Refugees <[www.unhcr.ca/beta/wp-content/uploads/2014/10/RPT-2011-12-detention\\_assylum\\_seekers-e.pdf](http://www.unhcr.ca/beta/wp-content/uploads/2014/10/RPT-2011-12-detention_assylum_seekers-e.pdf)> at 35-36.

134. The CBSA classifies both categories as “refugees” or “refugee claimants” (*ibid*).

135. *Ibid* at 24.



What is most relevant for our purposes is that detention inhibits the capacity of asylum seekers to make successful claims for protection, owing to such factors as lack of access to counsel, family members, the Internet, supporting information, or important documents.<sup>136</sup>

New measures allow for the automatic and mandatory twelve-month detention of groups of persons whom the Minister deems to be “irregular arrivals”—a category intended to apply to groups of persons believed to have arrived through human smuggling or trafficking routes and who cannot be examined or investigated in a timely manner.<sup>137</sup> Section 55 of the *IRPA* authorizes the detention of non-citizens whom an officer has reasonable grounds to believe are inadmissible and a danger to the public or a flight risk. Foreign nationals may be arrested and detained without a warrant, while permanent residents may simply be detained without a warrant. Detentions are reviewed regularly,<sup>138</sup> although the continuation of detention may be ordered on the basis of closed material.<sup>139</sup> What is more, continued detentions are allowed if the CBSA is still conducting an investigation, even if the grounds of the investigation do not relate to the initial reasons for the detention.<sup>140</sup> Section 55 has been used more frequently in recent years, specifically in relation to irregular migrants arriving by boat.<sup>141</sup> Finally, the government has prolonged detentions by vigorously challenging decisions to release affected persons. The detention continues until the challenge is finally resolved, resulting in prolonged, if not indefinite, detention.<sup>142</sup>

The Federal Court may have also underestimated the extent to which national security and other priorities related to risk management have affected the examination and investigation of irregular migrants. Two agencies are involved here: CSIS and CBSA. CSIS is, of course, the primary source of intelligence in certificate cases, but it may also investigate any applicant who poses a threat

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136. *Ibid* at 55.

137. See *IRPA*, *supra* note 22, ss 20.1, 55(3.1); Jennifer Bond, “Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act” (2014) 51:2 Osgoode Hall LJ 377.

138. The Immigration Division reviews detentions within the first forty-eight hours and seven days, and then again every 30 days. See *IRPA*, *supra* note 22, s 57.

139. *Ibid*, ss 83(1)(c)-(d), (i).

140. *Ibid*, s 58(1)(c).

141. Nakache, *supra* note 133 at 58.

142. *Canada (Minister of Citizenship and Immigration) v B386*, 2011 FC 175 at para 11, [2012] 4 FCR 220.

to national security.<sup>143</sup> In fact, most files are handled by the CBSA, which has grown considerably in size and sophistication since it was established in 2003. The CBSA is authorized to examine and investigate all applicants who may be inadmissible on security and other grounds. In these cases, CBSA officers rely on the Security Intelligence Section (SIS) of the Intelligence Operations and Analysis Division of the CBSA for intelligence and other information.<sup>144</sup> Officers also receive assistance from the National Security Screening Division (NSSD) of the International Operations Directorate of the CBSA, if foreign intelligence or information is needed.<sup>145</sup> The SIS and NSSD conduct independent security intelligence and information gathering, risk assessments, and investigations<sup>146</sup> using human sources (including confidential informants),<sup>147</sup> signals intelligence,<sup>148</sup> and foreign intelligence. The CBSA is also legislatively authorized to participate in bilateral correspondence and information sharing with agencies operating within an applicant's country of origin.<sup>149</sup>

In recent years, the CBSA has increasingly focused on the intersection of criminality and (irregular) migration, employing technologies and practices similar to those used by police services.<sup>150</sup> It has a Criminal Investigations Division and partners with domestic and foreign police services through "Joint

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143. This is part of its statutory mandate to "provide security assessments to departments of the Government of Canada" and to "conduct such investigations as are required for the purpose of providing security assessments." See *CSIS Act*, *supra* note 93, ss 13(1), 15(1); Citizenship and Immigration Canada, *ENF 2/OP 18: Evaluating Inadmissibility* (Ottawa: Citizenship and Immigration Canada, 2013), online: <[www.cic.gc.ca/english/resources/manuals/enf/enf02-eng.pdf](http://www.cic.gc.ca/english/resources/manuals/enf/enf02-eng.pdf)> at 49-50.

144. *Ibid* at 19.

145. *Ibid* at 15.

146. Arar Report, *supra* note 43; Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Office of the Auditor General, 2007), online: <[www.oag-bvg.gc.ca/internet/docs/20071005c\\_e.pdf](http://www.oag-bvg.gc.ca/internet/docs/20071005c_e.pdf)>, ch 5.

147. Jim Bronskill, "Canada's border agency enlisting informants, prompts internal review," *Canadian Press* (15 January 2014), online: <[www.thestar.com/news/canada/2014/01/15/canadas\\_border\\_agency\\_enlisting\\_informants\\_prompts\\_internal\\_review.html](http://www.thestar.com/news/canada/2014/01/15/canadas_border_agency_enlisting_informants_prompts_internal_review.html)>.

148. Canada Border Services Agency, *Policy on the Overt Use of Audio-Video Monitoring and Recording Technology* (Ottawa: Canada Border Services Agency, 2011), online: <[assets.documentcloud.org/documents/372080/cbsa-policy-on-overt-use-of-av-aug2011.pdf](http://assets.documentcloud.org/documents/372080/cbsa-policy-on-overt-use-of-av-aug2011.pdf)>.

149. *Canada Border Services Agency Act*, SC 2005, c 38, s 13 [*CBSA Act*]. See also Jon Woodward, "Canada deported man to torture in Sri Lanka: affidavit," *CTV News* (8 October 2013), online: <[bc.ctvnews.ca/canada-deported-man-to-torture-in-sri-lanka-affidavit-1.1489741](http://bc.ctvnews.ca/canada-deported-man-to-torture-in-sri-lanka-affidavit-1.1489741)>.

150. Canadian Border Services Agency, *CBSA Enforcement Manual*, No 1 (Ottawa: Canada Border Services Agency, 30 April 2009) at 2-6, online: <[vancouverlaw.ca/resources/Customs-Enforcement-Manual-1-of-3.pdf](http://vancouverlaw.ca/resources/Customs-Enforcement-Manual-1-of-3.pdf)>, ch 1.

Force Operations.”<sup>151</sup> The CBSA thus engages in both security intelligence and law-enforcement activities, but in this case, both functions are housed within the same agency. This arrangement mirrors the blurring of the roles and responsibilities of CSIS and the RCMP and is reminiscent of pre-CSIS years when security intelligence was collected by the RCMP. It should be recalled that the rights impacts associated with this ambiguity motivated the SCC, in *Charkaoui II*, to impose upon CSIS standards of disclosure normally applicable to police agencies. It should also be noted that a foundational principle of national security since the MacDonald Commission is that security intelligence and policing be kept separate.<sup>152</sup> Importantly, the CBSA is not yet subject to independent review nor has there been significant *Charter* review of its activities.<sup>153</sup>

Thus, “ordinary” proceedings and certificate proceedings rest on the same substratum of executive practices regarding detention, intelligence gathering, and intelligence sharing. As in the certificate context, these practices can lead to arrest, detention, prosecution, and possibly grave human rights abuses following removal. After the arrival of the MV Sun Sea, for example, Canada removed Sathyapavan “Sathi” Aseervatham on the basis of past criminality and his involvement in organizing the MV Sun Sea’s voyage. There are reports that Sathi was immediately detained by Sri Lankan authorities upon his arrival and subsequently tortured.<sup>154</sup> Given that refugee determination hearings are private, it is unclear how Sri Lankan authorities knew of the timing of his arrival or why they suspected him of being linked to terrorist organizations. It has been suggested that the CBSA shared identity documents with Sri Lankan authorities,

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151. Canada Border Services Agency, *CBSA Participation in Joint Force Operations: Evaluation Study*, (Ottawa: Canada Border Services Agency, 9 February 2012), online: <[www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2012/jfo-opc-eng.pdf](http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2012/jfo-opc-eng.pdf)>.

152. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: Second Report: Freedom and Security under the Law, vol 1 (Ottawa: Minister of Supply and Services Canada, 1981); Wesley K Wark, “Canada and the Intelligence Revolution” in Heike Bungert, Jan G Heitmann & Michael Wala, eds, *Secret Intelligence in the Twentieth Century* (Portland, Oreg: Frank Cass, 2003) 170.

153. For a list of good suggestions about how to enhance the review of the CBSA, see British Columbia Civil Liberties Association, “Backgrounder” (5 March 2014), online: <[bccla.org/wp-content/uploads/2014/03/20140305-CBSA-accountability-release-backgrounder.pdf](http://bccla.org/wp-content/uploads/2014/03/20140305-CBSA-accountability-release-backgrounder.pdf)>.

154. *CBSA Act*, *supra* note 149.

possibly in order to complete its investigations.<sup>155</sup> The Federal Court has on several occasions allowed this practice, despite the risk it poses to asylum seekers.<sup>156</sup>

This brings us to common presumptions about the nature and frequency of deportations to torture or similar abuse. Justice Blais asserted that those named in certificates are more likely than others to face this risk. It turns out this is not true: Persons named in certificates have in fact been comparatively less likely to face this risk. In *Mahjoub v Canada (Minister of Citizenship and Immigration)*,<sup>157</sup> Justice Dawson held that a danger opinion issued against Mr. Mahjoub was unreasonable, on the grounds that there was an inadequate factual foundation for the assertion that he posed a danger to the security of Canada. The MD in question relied only on the narratives contained in the Minister's SIR and the fact that the certificate issued against Mr. Mahjoub had been found to be reasonable in 2001. She was not, however, provided with confidential reference appendices that would have placed the narrative in fuller context and provided more up-to-date information regarding the danger Mr. Mahjoub posed to Canada after having been publicly labelled as a terrorist and detained for years. The court noted that one's past activities may render one inadmissible. However, the court also noted that:

The effect of the passage of time, and the effect of the person's apprehension and detention, should be considered so that ... their future behaviour may be assessed. It may be, for example, that the fact of apprehension and disclosure of a person's associations or activities will neutralize their future ability to conduct clandestine activities.<sup>158</sup>

Similar rulings were made in the cases of *Re Jaballah*<sup>159</sup> and *Almrei v Canada (Minister of Citizenship and Immigration)*.<sup>160</sup> Subsequent cases involving Mr. Mahjoub have dealt more squarely with the substantive issue of deportation to torture. After reconsidering the file in light of a fuller factual record that included closed material, an MD again concluded that Mr. Mahjoub posed a threat to Canadian security and that he could be safely removed from Canada. In 2006,

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155. Canadian Council for Refugees, "CCR expresses deep concerns over Canadian response to Sri Lankans fleeing human rights abuses" (11 October 2013), online: <ccrweb.ca/en/public-statement/2013-10-11>.

156. *Canada (Minister of Citizenship and Immigration) v X*, 2010 FC 1095, 375 FTR 204, Phelan J; *Canada (Minister of Citizenship and Immigration) v X*, 2010 FC 1009, 193 ACWS (3d) 1285, Lemieux J.

157. 2005 FC 156, [2005] 3 FCR 334.

158. *Ibid* at para 55.

159. 2006 FC 1230 at paras 72-86, [2007] 2 FCR D-8.

160. 2005 FC 355 at paras 83-94, [2005] 4 FCR D-3 [*Almrei*, (11 March 2005)].

Justice Tremblay-Lamer upheld the former determination but quashed the decision on the grounds that it was unreasonable to conclude that Mr. Mahjoub would not face a substantial risk of torture if deported. The onus of proving a risk of torture is on the claimant, who must provide evidence concerning the human rights record of the home state as well as a personalized risk (*i.e.*, a risk that is greater than that of the general population). Justice Tremblay-Lamer found that the MD had “selectively relied on information that went against the bulk of the evidence in concluding there was no institutionalized torture in Egypt” and arbitrarily rejected “important, credible evidence on this issue.”<sup>161</sup> A similar judgment was made in the case of Mr. Almrei.<sup>162</sup>

All other instances of deportation to torture have occurred outside the context of certificates. The case of *Sogi v Canada (Minister of Citizenship and Immigration)*<sup>163</sup> is an especially good example. Immigration officials decided in 2003 and in 2005 that Mr. Bachan Singh Sogi (who previously had been deemed inadmissible for reasons relating to national security) would face a substantial risk of torture should he be returned to India.<sup>164</sup> The MD issued a danger opinion, asserting that Mr. Sogi could nonetheless be deported pursuant to the *Suresh* exception. The Federal Court quashed the danger opinion on grounds unrelated to the justifications offered in support of deportation to torture.<sup>165</sup> The government subsequently reassessed the risk, and, in 2006, an MD decided that Mr. Sogi could now be safely removed. The Federal Court refused to grant a stay of removal pending a review of the reasonableness of this decision.<sup>166</sup> During this process, the United Nations Committee Against Torture (“CAT”) twice requested that Canada stay the removal until it had time to issue its own decision on the case. Canada ignored these requests and deported Mr. Sogi anyway. Shortly thereafter, the CAT issued an advisory opinion that there was in fact a substantial

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161. *Mahjoub v Canada* (Minister of Citizenship and Immigration), 2006 FC 1503 at para 68, [2007] 4 FCR 247.

162. *Almrei*, (11 March 2005), *supra* note 160 at paras 57-62.

163. 2004 FC 853, [2005] 3 FCR 517.

164. *Ibid* at para 3.

165. *Ibid* at paras 18-21.

166. *Bachan Singh v Canada (Citizenship and Immigration)*, 2006 FC 799 at paras 3-8 (available on WL Can).

risk of torture.<sup>167</sup> It has been reported that Mr. Sogi was “imprisoned, beaten and subjected to ill-treatment” after his removal.<sup>168</sup>

In *Dadar v Canada (Minister of Citizenship and Immigration)*,<sup>169</sup> an MD decided that the claimant would not face a substantial risk of torture if returned to Iran. The claimant applied to the CAT, who found that he did in fact face a substantial risk of torture.<sup>170</sup> The Federal Court refused to intervene or to grant a stay of proceedings in light of the CAT’s views.<sup>171</sup> In 2011, the CAT again found that the decision of an MD was erroneous, this time in the case of Somali national Jama Warsame.<sup>172</sup> In 2007, an immigration officer had found that Mr. Warsame would face a substantial risk of torture if returned to Somalia, in part because of widespread and systematic human rights abuses. There was a personalized risk, as Mr. Warsame had never been to Somalia (he was born in Egypt and had lived in Canada since the age of four), did not speak local languages, and had no resources upon which to rely for safety. Subsequently, an MD decided that there was in fact no personalized risk. Importantly, Mr. Warsame could not have the decision of the MD judicially reviewed because he lacked the financial capacity to hire a lawyer.<sup>173</sup> He was fortunate enough to have secured refugee status while in transit in the Netherlands, raising questions about the correctness (if not the good faith) of the MD’s determination.<sup>174</sup>

In *Muhammad v Canada (Citizenship and Immigration)*,<sup>175</sup> there was a serious issue of political interference with respect to an MD’s finding that the claimant, Arshad Muhammad, was not at risk of torture if returned to Pakistan. The claimant had initially been denied refugee status in 2003 due to

167. *Decision: Communication No 297/2006*, UN Committee Against Torture, 39th Sess, Annex, UN Doc CAT/C/39/D/297/2006 (2007), online: <[www.univie.ac.at/bimtor/dateien/cat\\_2007\\_sogi\\_vs\\_canada.pdf](http://www.univie.ac.at/bimtor/dateien/cat_2007_sogi_vs_canada.pdf)>.

168. Amnesty International Canada, “Matching International Commitments with National Action: A Human Rights Agenda for Canada” (December, 2012), online: <[www.amnesty.ca/sites/default/files/amnesty\\_humanrights\\_v6.pdf](http://www.amnesty.ca/sites/default/files/amnesty_humanrights_v6.pdf)> at 20.

169. 2004 FC 1381, 134 ACWS (3d) 470 [*Dadar*, (12 October 2004)].

170. *Decision: Communication No 258/2004*, UN Committee Against Torture, 35th Sess, Annex, UN Doc CAT/C/35/D/258/2004 (2005), online: <[www.un.org/en/ga/search/view\\_doc.asp?symbol=CAT/C/35/D/258/2004](http://www.un.org/en/ga/search/view_doc.asp?symbol=CAT/C/35/D/258/2004)> [*Communication No 258/2004*].

171. *Dadar v Canada* (Minister of Citizenship and Immigration), 2006 FC 382, 147 ACWS (3d) 277.

172. *Views: Communication No. 1959/2010*, UN Human Rights Committee, 102d Sess, Annex, UN Doc CCPR/C/102/D/1959/2010 (2011), online: <[www.un.org/en/ga/search/view\\_doc.asp?symbol=CCPR/C/102/D/1959/2010](http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/102/D/1959/2010)>.

173. *Ibid* at para 2.6.

174. Amnesty International Canada, *supra* note 168 at 21.

175. *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448, 242 ACWS (3d) 896.

his membership in a terrorist organization. He fled, spending the next eight years in hiding. In 2011, he was apprehended after his name and picture had been posted on the CBSA's "Most Wanted" website. An IO prepared a PRRA and concluded that Muhammad faced a personal risk of torture due to the fact that the allegations against him were widely publicized and likely known by Pakistani authorities.<sup>176</sup> The claimant argued before the Federal Court that the MD's decision was unreasonable, owing in part to political interference. Among the noted irregularities was a highly unusual meeting between the MD and the Director General of the Border Operations of CBSA, Glenda Lavergne, before the MD had rendered her decision. Court-ordered disclosure of correspondence revealed that Lavergne had expressed concern that a positive finding would affect the reputation and viability of the most wanted list.<sup>177</sup> The Court found that the MD's decision to ignore the PRRA was unreasonable because it was unsupported by the factual record. It also ruled, however, that there was no reasonable apprehension of bias and that there was insufficient evidence of a lack of independence and impartiality.<sup>178</sup>

These cases highlight a serious lack of consistency and that the decisions of IOs and MDs are not always well supported by factual records. In some situations, persons have been recognized by IOs to be in need of protection, only to have MDs make the opposite finding under highly politicized circumstances. Consistency is hampered by a host of institutional barriers pervasive within immigration and refugee law, including the financial inability of most refugee claimants to hire lawyers,<sup>179</sup> the elimination or reduction of rights to appeal, the prevalence of expedited refugee claim hearings, the use of Designated Countries of Origin criteria, the refusal of the Federal Court to order stays of removal pending reviews of Ministerial decisions, and the inconsistency of Federal Court decisions on the certification of applications for judicial review of such decisions.<sup>180</sup> Another difficulty is that claimants must adduce evidence both of the general human rights record of their country of origin and a particularized, personal risk. Since decisions of the MD on questions of fact are reviewable only

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176. *Ibid* at para 7.

177. *Ibid* at paras 111-23.

178. *Ibid* at paras 145-56.

179. On the correlation between legal representation and successful refugee claims, see Sean Rehaag, "The Role of Counsel in Canada's Refugee Determinations System: An Empirical Assessment" (2011) 49:1 Osgoode Hall LJ 71.

180. Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1.

on a standard of unreasonableness, it is quite possible for there to be incorrect but reasonable decisions concerning the risk of torture.

All of this is to say that certificates are just one component of a far broader set of measures by which the state investigates, detains, and deports non-citizens deemed to be security risks. Together with certificates, rather ordinary measures that have long been a part of our immigration and refugee law framework form part of an alternate legal order organized around an interconnected set of legislative provisions and executive practices highly attuned to security. While cases such as *Charkaoui I*, *Charkaoui II*, *Harkat*, and *Suresh* establish constitutional boundaries of security-based detention and deportation practices, the institutional framework necessary for minimal adherence to the rule of law seem to have been strenuously applied only to the most conspicuous part of this alternate order—certificates. The usual justification for this (*i.e.*, that certificates are an exceptional case) is unpersuasive, as the risk of deportation to serious human rights abuses is actually higher for those whose removal begins through ordinary processes than for those named in certificates.

#### B. WHERE TO FROM HERE? REVISITING *SURESH*

Some of these issues may be resolved by revisiting *Suresh*. The likelihood of this happening is uncertain, as some Federal Court judges have been reluctant to seriously engage with the question of torture abroad, on the dubious grounds that these are extraterritorial matters and hence beyond the reach of the *Charter*.<sup>181</sup> With a fuller factual record of the intersection of security, migration, and torture post-9/11, the emergence of new domestic and international norms, a less heightened sense of emergency, and the best practices of foreign jurisdictions at its

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181. *Amnesty International Canada v Canada (Minister of National Defence)*, 2008 FCA 401, [2009] 4 FCR 149; Catherine Dauvergne, "How the *Charter* Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663; Eva Kapustová, *Different Perceptions of the Obligation not to Refoulee: The European and the Canadian Approach* (LLM Short Thesis, Central European University, 2012) [unpublished]; Kent Roach, "The Dangerous Game of Complicity in Torture" (2012) 58:3 & 4 Crim LQ 303.



disposal,<sup>182</sup> the SCC would be justified in finding that principles of fundamental justice have developed to such a degree that deportation to torture is no longer permissible under any circumstance.<sup>183</sup> What would this mean?

One answer is that Canada would explore the feasibility of seeking “diplomatic assurances” against torture, much as it does with respect to extradition to countries that impose capital punishment. The Court has said very little about the adequacy of assurances. International perspectives shed light on this issue. In *Othman (Abu Qatada) v the United Kingdom*,<sup>184</sup> the United Kingdom tested the tolerance of the European Court of Human Rights (“ECHR”) for assurances. The ECHR held that there are circumstances in which assurances reduce the personalized risk of torture to the point that deportation is legally permissible. This applies even when the state that provides the assurance engages in systematic, widespread torture.<sup>185</sup> The strength of assurances must be assessed in consideration of the following factors:

1. [W]hether the terms of the assurances have been disclosed to the Court... ;
2. [W]hether the assurances are specific or are general and vague... ;
3. [W]ho has given the assurances and whether that person can bind the receiving State... ;

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182. Arar Report, *supra* note 43; House of Commons, Standing Committee on Public Safety and National Security, *Review of the Findings and Recommendation Arising from the Iacobucci and O'Connor Inquiries* (June 2009) (Chair: Garry Breitkreuz); Nathalie Des Rosiers & Sukanya Pillay, “Report to the UN Committee Against Torture 48th Session, May 2012: Regarding List of Issues to be Considered in Connection of the Sixth Periodic Report of Canada (CAT/C/CAN/6)” *Canadian Civil Liberties Association* (April 2012), online: <ccla.org/cclanewsites/wp-content/uploads/2015/05/FINAL-CCLA-UNCAT-MAY-2012.pdf>; *Report of the Committee against Torture*, UNGAOR, 66th Sess, Supp No 44, UN Doc A/66/44, (2011); Aoife Duffy, “Expulsion to Face Torture? *Non-refoulement* in International Law” (2008) 20:3 Int’l J Refugee L 373; Thomas Poole, “Recent Developments in the ‘War on Terrorism’ in Canada” (2007) 7:3 HRL Rev 633; Alex Neve, “Extraordinary Rendition, the Canadian Edition: National Security and Challenges to the Global Ban on Torture” (2007) 2:1 Societies Without Borders 117; Vijay M Padmanabhan, “To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement” (2011) 80:1 Fordham L Rev 73; Office of the High Commissioner for Human Rights, “Expulsions of Aliens in International Human Rights Law” (September 2006), online: <www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf>.

183. For commentary on this point, see Craig Forcece “Touching Torture with a Ten Foot Pole: The Legality of Canada’s Approach to National Security Information Sharing with Human Rights-Abusing States” (2014) 52:1 Osgoode Hall LJ 263.

184. No 8139/09, [2012] ECHR 56, 55 EHRR 1 [*Othman*].

185. *Ibid* at para 193.

4. [I]f the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them... ;
5. [W]hether the assurances concerns treatment that is legal or illegal in the receiving State... [;]
6. [W]hether they have been given by a Contracting State... ;
7. [T]he length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances... ;
8. [W]hether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers... ;
9. [W]hether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible... ;
10. [W]hether the applicant has previously been ill-treated in the receiving State... ; and
11. [W]hether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State... <sup>186</sup>

While in this case the assurances were complied with, many view assurances as inherently unreliable.<sup>187</sup> There is no shortage of cases in which countries have not abided by their promises to respect human rights. In *Agiza v Sweden*,<sup>188</sup> Sweden was found to be in contravention of international law when it deported Ahmed Agiza to Egypt on the strength of an assurance against torture. Once returned, Agiza was subject to beatings and electronic shocks. The most relevant example would, of course, be that of Maher Arar, who was subjected to torture after he was "returned" to Syria by the United States on the strength of an assurance against torture.

In my view, the most valuable approach would be to improve the institutional architecture employed to examine asylum seekers to ensure that decisions about

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186. *Ibid* at para 189.

187. Human Rights Watch, "Diplomatic Assurances' Against Torture: Questions and Answers" (November 2006), online: <[www.hrw.org/sites/default/files/related\\_material/ecaqna1106web.pdf](http://www.hrw.org/sites/default/files/related_material/ecaqna1106web.pdf)>.

188. *Decision: Communication No 233/2003*, UN Committee Against Torture, 34th Sess, Annex, UN Doc CAT/C/34/D/233/2003 (2005), online: <[www.un.org/en/ga/search/view\\_doc.asp?symbol=CAT/C/34/D/233/2003](http://www.un.org/en/ga/search/view_doc.asp?symbol=CAT/C/34/D/233/2003)>.

the risk of torture are based on law and the facts, and to provide more adequate mechanisms for the review of these decisions (and underlying intelligence practices). This could happen in various ways, including greater disclosure during security-based admissibility, detention review, and refugee claim hearings. There is some indication that the Federal Court is moving in this direction. In *Seyoboka v Canada (Minister of Citizenship and Immigration)*,<sup>189</sup> Justice de Montigny found that those facing allegations of international criminality and other serious charges in the context of adversarial IRB hearings are entitled to “a high degree of procedural fairness”<sup>190</sup> and expanded disclosure, pursuant to *Charkaoui II*. Relying on this case, Justice Harrington found in *B135 v Canada (Minister of Citizenship and Immigration)*<sup>191</sup> that the Minister was obligated to disclose certain evidence to an IRB member during a refugee claim hearing concerning a passenger of the MV Sun Sea. This evidence indicated that several passengers who had been returned to Sri Lanka were detained, beaten, and subjected to ill-treatment and that the whereabouts of one passenger was unknown.<sup>192</sup>

International and foreign standards are also relevant to the processes by which MDs make decisions about the risk of torture, especially when those decisions are based on material that may not be disclosed to the affected person. The ECHR and other international and foreign courts have recently ruled that asylum seekers do not have the right of access to closed material upon which decision makers rely when determining the risk of torture.<sup>193</sup> However, this decision was predicated in part on the fact that the Special Immigration Appeals Commission (“SIAC”) in the United Kingdom makes final decisions about risk of torture after an oral hearing in which the interests of affected persons are represented by SAs. The SIAC—which is responsible for reviewing decisions of the UK government with respect to detention and deportation—is composed of a judge, a senior member of the Asylum and Immigration Tribunal, and a layperson with expertise in national security and independent adjudicators. The SA system adopted in Canada was modeled in large part after the SIAC system. Unlike in the United Kingdom, though, our SA system has been effectively confined to adjudicative proceedings and does not extend to Ministerial decisions about the risk of torture. We might consider employing something similar to the SIAC

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189. 2009 FC 104, [2010] 2 FCR 3.

190. *Ibid* at para 35.

191. 2013 FC 871, 235 ACWS (3d) 183.

192. *Ibid* at para 23.

193. Othman, *supra* note 184; *ZZ v Secretary of State for the Home Department*, C-300/11, [2013] ECR I-363; *R (on the application of BB) v Special Immigration Appeals Commission*, [2011] EWHC Admin 336, [2012] QB 146.

system in cases in which deportation to torture intersects with national security or similar imperatives (*i.e.*, make decisions to deport in the context of torture less discretionary and more adjudicative).

In the alternative, courts should reconsider the adoption of deferential stances towards the findings of MDs in the context of security. With respect, the Canadian government has lost trust on this issue, owing to its roles in the torture of Maher Arar, Abdullah Almaki, Ahmad El Maati and Muayyed Nureddin; the human rights abuses perpetrated against Omar Khadr; the Afghan Detainee issue; and recently publicized documents concerning the CSIS stance on the permissibility of relying on torture for “actionable” intelligence.<sup>194</sup> Matters have not been improved by the Canadian government’s disrespect for the roles and responsibilities of the CAT. In three cases, Canada deported persons despite the fact that the CAT found there to be a substantial risk of torture. In one case, the affected person was deported notwithstanding this finding, and in another, the affected person was removed before the committee had concluded its deliberations. In this latter case, two requests for a temporary suspension of removal were ignored.<sup>195</sup> It is true that the views of the CAT are not binding, but they may be viewed in some measure as findings of fact, or at least bases for appraising the reasonableness of decisions of IOs and MDs. Insofar as there were substantial risks of torture in these cases, and no good reason provided as to why the *Suresh* exception applied, the removal of these men was arguably contrary to the *Charter*.

#### IV. CONCLUSION

If viewed simply within the context of SCC judgments and Division 9 of the *IRPA*, the certificate regime may seem to be unique. It is perhaps on the basis of its putatively distinctive form, in addition to its grave implications for human rights, that the SCC thrice imposed stringent constitutional constraints on the decisions of those operating within this setting. Yet certificates remain but one part of a larger process by which migration in general—and irregular migration in particular—has been securitized. It is worth remembering that Parliament transferred jurisdiction over certificate proceedings from SIRC to the Federal Court following an emergency session that was convened to deal with the irregular arrival of 174 Sikh asylum seekers in 1987.<sup>196</sup> In the late 1980s and

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194. Forcese, *supra* note 183.

195. Communication No 258/2004, *supra* note 170; Dadar, (12 October 2004), *supra* note 169.

196. Colson, *supra* note 5 at 134.

early 1990s, Parliament, CSIS, the Department of National Defence, and the Department of Foreign Affairs and International Trade all identified irregular migration as a distinct security threat for the first time, owing in part to the threats posed by terrorism.<sup>197</sup>

Irregular migration—which may be defined as the process by which people enter or reside in a country without that country’s legal permission<sup>198</sup>—has since risen high on Canada’s national security agenda. We have responded with “smarter” approaches to border control characterized by a number of themes, including greater emphasis on risk management, enhanced surveillance and screening of migrants,<sup>199</sup> and greater information sharing and institutional cooperation at the domestic and international levels.<sup>200</sup> Following the widely publicized arrivals of two boats of Tamil asylum seekers on Canadian shores in 2009 and 2010, organizational changes and capacities have been further influenced by legislation. Parliament has tightened restrictions on irregular migrants through a range of preventive and deterrent measures, such as visa regimes, carrier sanctions, expedited refugee claim hearings, limitations on rights of appeal, Designated Country of Origin criteria, the criminalization of irregular entry, mandatory detention for groups of migrants classified as “irregular arrivals,” enhanced surveillance, and biometrics.<sup>201</sup>

Certificates are perhaps the most conspicuous but far from the only, oldest, or most commonly used of these measures. The disaggregation of certificates from this larger context is evident in the way in which discussions about them have

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197. *Ibid* at 132-38; Aiken, “Of Gods and Monsters,” *supra* note 5; Sherene H Razack, “‘Simple Logic’: Race, the Identity Documents Rule and the Story of a Nation Besieged and Betrayed” (2000) 15 *JL & Soc Pol’y* 181; Reginald Whitaker, “Refugees: The Security Dimension” (1998) 2:3 *Citizenship Stud* 413 at 427; Yasmeen Abu-Laban, “Welcome/STAY OUT: The Contradiction of Canadian Integration and Immigration Policies at the Millennium” (1998) 30:3 *Can Ethnic Stud* 190; Yasmeen Abu-Laban & Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity, and Globalization* (Peterborough, Ont: Broadview Press, 2002); Rose Baaba Folsom, ed, *Calculated Kindness: Global Economic Restructuring and Immigration and Settlement in Canada* (Halifax: Fernwood, 2004); Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005).
198. Bastian A Vollmer, “Policy Discourses on Irregular Migration in the EU – ‘Number Games’ and ‘Political Games’” (2011) 13:3 *Eur J Migr & L* 317.
199. Meyers, *supra* note 6; Friman, *supra* note 6.
200. Hudson, *supra* note 7; Moens, *supra* note 7; Canada’s Economic Action Plan, *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness* (Ottawa: Government of Canada, 2011), online: <actionplan.gc.ca/sites/eap/files/bap\_report-paf\_rapport-eng-dec2011.pdf> [*Beyond the Border*].
201. François Crépeau, Delphine Nakache & Idil Atak, “International Migration: Security Concerns and Human Rights Standards” (2007) 44:3 *Transcult Psychiatry* 311.

been structured by the grammar of constitutional rights and principles germane to criminal law. This disaggregation has produced a rather unique institutional approach to managing the intersections among security, migration, and asylum. Factors influencing the constitutionalization of certificates include concerted social and political mobilization, powerful legal advocacy, media awareness, and the internalization and operationalization of human rights norms by judges of the Federal Court, Federal Court of Appeal, and SCC. The authenticity and quality of this institutional experiment is open to question, but a strong case can be made that executive decision making has been subjected to the rule of law. In any event, after *Harkat*, the current regime is likely to be as good as it gets.

But the construction of this regime may have come at the cost of bracketing some important substantive justice issues, as well as how these issues are and are not handled by decision makers in analogous institutional settings. At best, the certificate trilogy stands for the principle that named persons are entitled to heightened procedural fairness by virtue of the impact that security-based detentions and deportations have on life, liberty, and security of the person. High on this list are the ways in which being labelled a terrorist heightens the risk of persecution, torture, and similar abuses among those who are returned to certain countries. What is hard to fathom is why one would think that this impact is unique to certificates or that it is any more tolerable when it arises pursuant to ordinary immigration and refugee law measures. Why have procedural safeguards been heightened in the former context but not (or even reduced) in the latter?

Throughout the certificate trilogy, the Court has stated that the applicability of *Charter* principles depends on the impacts that laws, policies, and practices have on the integrity of affected persons, not on how one formally classifies those laws (*e.g.*, as criminal or administrative). It was on the basis of subsequent analogies between certificates and security intelligence agencies, on the one hand, and criminal proceedings and law-enforcement agencies, on the other, that the Court applied principles germane to the latter and to the former. Yet the migration of human rights norms from criminal to certificate contexts has not been followed by the migration of rights from certificates to functionally connected or even equivalent proceedings. The reasons offered for this have typically involved formal, if not hierarchical, distinctions between certificates and all other security-based detention and deportation proceedings. These distinctions rest on dubious assumptions about the putatively lighter impacts the latter have on the rights of asylum seekers. Similarly, the practices of the CBSA have hitherto not received the same level of independent judicial or administrative review as CSIS in this context.

It is for these reasons that one would do well to analyze *Harkat*, not just for what it says about the certificate regime but for what it can and should say about other, neglected corners of the security and migration nexus. If the Court is serious that the very real risks of substantive injustice faced by named persons necessitate procedural safeguards at least as robust as those now used in certificate proceedings, and if (as the evidence shows) this risk is at least as great for those caught up in more ordinary proceedings, then it should prioritize ensuring the more effective operationalization of the principles it laid down in *Suresh*. Absent movement in this area, the procedural gains made in the context of reviews of the reasonableness of certificates will be vastly outweighed by the continued existence of woefully inadequate procedures by which decisions about deportation to torture are made and reviewed. This will only increase the sense among skeptics that the constitutionalization of the certificate regime uses the form of law to mask the emptying out of its substance.

