

Canada's Supreme Court authorizes secret trials and arbitrary, indefinite detention

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Canada's Supreme Court, in a February 28 ruling on the constitutionality of security certificates, unanimously upheld the state's prerogative to violate fundamental democratic rights enshrined in the Canadian Charter of Rights and Freedoms in the name of ensuring "public security."

Although the court ruled that the government does not have the right to carry out secret trials (one of the most controversial aspects of the security certificate process), its ruling, taken as a whole, constitutes not a blow against the attack on civil liberties, being carried by Canada's ruling elite on in the name of the war on terrorism, but rather an attempt to give a veneer of legality to the overturning of longstanding democratic and judicial principles.

The issue before Canada's highest court was the legality of the security certificate—a

ministerial decree that orders the indefinite detention and deportation of a noncitizen, whether visitor, refugee or landed immigrant, labeled by security agencies a potential threat to national security. Such a decree can be issued without the slightest proof substantiating the alleged threat.

In 2005 the Federal Court ruled security certificates constitutional and upheld the government's right to keep entire categories of evidence secret from the public, persons named in the security certificates, and their legal counsel, on the grounds of both national security and diplomatic relations, i.e., keeping good relations with foreign states, including authoritarian regimes that practice torture and use it to gather intelligence.

It was this decision that three persons imprisoned indefinitely under national security certificates appealed. Adil Charkaoui, Hassan Almrei and Mohamed Harkat petitioned the Supreme Court to declare security certificates unconstitutional because they violate the guarantees in the Canadian Charter of Rights and Freedoms to a swift trial and to the right to life, liberty and protection of the person and protection from arbitrary detention and cruel and unusual punishment.

The minister of public safety had used national security certificates to arrest Charkaoui in 2003, Almrei in 2002, and Harkat in 2001, claiming that there were grounds to suspect that they had terrorist ties. Mahmoud Jaballah and Mohammad Mahjoub were similarly arrested and detained.

Charkaoui was released in 2005 and Harkat in 2006, but they remain subject to severe restrictions, including the continuous wearing of a GPS bracelet and house arrest. Jaballah and Mahjoub were released in 2007 after seven years incarceration, and likewise are still subject to house arrest. Almrei is the only one still imprisoned in Millhaven Penitentiary, a maximum security prison, in Kingston, Ontario. All five now face deportation to their countries of origin where, the government admits, they potentially face torture and death.

Although Canada's immigration law has contained a provision for security certificates for some 30 years, fundamental changes in the rules governing them were made in the Anti-Terrorist Act adopted by the then Liberal government following the September 2001 terrorist attacks.

Before the adoption of the law in December 2001, the solicitor-general had to make a case before the Security Intelligence Review Commission (SIRC)—a civilian "watchdog" agency set up by parliament to oversee the activities of the Canadian Security Intelligence Service (CSIS)—explaining why the noncitizen represented such a threat to public safety that they should be detained without charge. SIRC was mandated with examining the documents presented by the minister and obligated to send the affected person a "summary of the facts at hand." It also had to provide the prospective "security certificate" detainee, as well as the minister, with a copy of its findings. In the event a security certificate was issued against an individual, he or she then had the right to contest this decision, with their legal counsel present, before a tribunal whose job was to rule on the admissibility and the secrecy of the government's evidence.

The abolition of this procedure has effectively given the government the power to kidnap and throw into prison indefinitely any person its designates a security risk, since this procedure is employed when the state does not have sufficient evidence to lay charges and the law specifically empowers the government to keep the evidence on which it has labeled someone a threat to Canada's national security secret.

The new law does require that a Federal Court judge attest that the government has acted reasonably in issuing a security certificate against a given individual. But, despite the potentially drastic consequences for the designated person, this examination is carried out in the absence of the detainee and his/her lawyer. The government, i.e., the accuser, has no obligation to show the judge all of the evidence at its disposal; it alone gets to decide what is disclosed, and the government is under no obligation to prove anything. It simply has to convince the judge that it has reasonable grounds to suspect that the individual is a potential threat to Canada's security—in other words, that CSIS or another police or intelligence agency deems it so.

There is no appeal of the judge's decision nor is there any other form of judicial review. Once the certificate has been judged "reasonable," the law declares the deportation order to apply immediately, without regard to the risk of torture. In 2002 the Supreme Court ruled that in exceptional cases someone can be deported even if the deportee faces a high risk of torture or of death.

The unanimous decision by the nine judges of the Supreme Court on the constitutionality of security certificates was read by Chief Justice Beverley McLachlin. Her brief used the pretext of the war on terrorism to advance a constitutional basis for the assault carried out by the Canadian ruling class on democratic rights. "One of the most basic responsibilities of a government is to assure the security of its citizens," she affirmed.

McLachlin admitted that keeping the state's evidence hidden from a security-certificate detainee and the secret character of the Federal Court's reviews of security certificates violates the right to life, liberty and security inscribed in the Charter, and that this violation cannot be justified. But in the same breath, she added that the demands of security can require that evidence remain secret. To solve this thorny dilemma she,

on behalf of the whole court, suggested the government adopt a procedure used in Britain, where special security-cleared lawyers act in the name of detainees in secret hearings.

The Court acknowledged that the holding of secret hearings and trials violates the basic democratic principle that an accused facing imprisonment must know the crime of which he or she is accused. McLachlin further states: “The judge is ... not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?”

Yet, having concluded that because they are held in secret, the federal court’s hearings into the validity of security certificates are unconstitutional, the chief justice was quick to come forward with arguments as to why the state should be permitted to prevent the public, the detainee and their legal counsel from knowing the evidence on which the state has determined an individual a national security threat: “The imperative of the protection of society may preclude [revealing the state’s evidence]. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. That is a reality of our modern world.”

In other words, respect for fundamental rights is incompatible with the struggle against terrorism and the defense of national security.

Citing the British precedent, Canada’s Supreme Court recommends security-cleared lawyers act in secret proceedings on behalf of persons deemed security threats and in that role seek to test the state’s evidence.

But this practice is widely contested in Britain, including by many of the special advocates themselves, who charge that the legal restraints under which they must act effectively make them auxiliaries of the state.

An April 2005 report published in the United Kingdom by the Constitutional Affairs Committee of the House of Commons pointed to the severe disabilities under which the special advocates function. As Canada’s Supreme Court admitted in its own judgment: “The Committee listed three important disadvantages faced by special advocates: (1) once they have seen the confidential material, they cannot, subject to narrow exceptions, take instructions from the appellant or the appellant’s counsel; (2) they lack the resources of an ordinary legal team, for the purpose of conducting in secret a full defense; and (3) they have no power to call witnesses.”

In other words, they are legally prevented from mounting a defence on behalf of those they ostensibly represent: They can’t discuss the state’s allegations with the person named a security threat so as to test the veracity of the state’s evidence, nor can they call witnesses to refute claims made by the state.

But having cited the objections made by the British special advocates, Canada’s judges wring their hands, effectively arguing that this practice constitutes a reasonable balance between the rights of the individual and the needs of the state.

Yet the disabilities under which the British special advocates must function go right to the heart of what the Supreme Court denounced when it declared the secret trials to be illegal—the denial of the detainee’s right to know the charges and the state’s evidence against him and of the right to contest and refute the veracity of that evidence, by having his legal counsel interrogate government witnesses and present counter-evidence and witnesses.

In its February ruling, the Supreme Court also found that it is acceptable to detain a person indefinitely without charge or even knowledge of the reasons for his detention and with the prospect of being expelled to a country which practices torture. Canada’s highest court was only ready to admit that in certain circumstances indefinite detention without charge

may constitute cruel and unusual punishment.

The five security-certificate detainees were long held in atrocious conditions of isolation and cold, without access to their lawyers, to their families, to necessary medical treatment or to conditions normally offered to every Canadian prisoner. They carried out several hunger strikes, simply to gain access to medical care and television. (See “Prisoners continue hunger strike at Canada’s Guantanamo”)

A special prison was built to house the detainees in the middle of the maximum security Millhaven Penitentiary in Kingston. It was nicknamed “Guantanamo North,” a reference to the infamous American prison in Cuba’s Guantanamo Bay, that other black hole where so-called terrorists dubbed “illegal combatants” are rotting.

The conditions of detention at Millhaven are so bad that a judge felt compelled to make the following comments in response to an appeal for release by Mohammad Mahjoub, the oldest detainee, who was in the 83rd day of hunger strike after being jailed for seven years, cut off from his family and in poor health: “The applicant today is an ailing and aging man preoccupied with his health and the lack of contact with his family apart from telephone calls and occasional visits.” The judge added that Mahjoub’s detention “could reasonably be described as indefinite.”

The Supreme Court has granted the government one year to modify the law governing security certificates. In the meantime, the Court has explicitly allowed the government to use the existing procedure against other persons or against the plaintiffs. The Courts adds that if the government has not modified the law within one year, it will be up to the plaintiffs to appeal to the Court to rescind the security certificates.

The corporate media has presented this judgment as a victory for democratic rights and a blow to the holding of secret trials, while at the same time expressing satisfaction that the Supreme Court did not limit the capacity of the state to carry out the “fight against terrorism.”

The *New York Times* in a February 25 article hailed the ruling as proof that in Canada the fight against terrorism is being waged while respecting individual rights.

The legal commentator for the Quebec newspaper *La Presse*, Yves Boisvert, stated approvingly in a February 26 opinion piece that the judgment “recognized the right of the State to take exceptional measures against foreign citizens deemed merely suspect in the name of public security,” and that the decision “does not at all hamper our ability to struggle against terrorism, and so even the Conservative government can live with this.”

The *Globe and Mail*, Canada’s business paper, welcomed the “pragmatic solution” the Court has come up with to resolve a reputed moral dilemma in this “age of terror.” Underlining that the Court authorized the indefinite detention of noncitizens suspected of terrorism, the *Globe* stated, “Although the Court criticized the controversial rules of the secret trials, these can easily be repaired.” Its editorial emphasized that “the long-term impact of the decision will preserve the ability of the government to protect Canadians from terrorists.”

The Harper Conservative government, for its part, quickly accepted the Court’s ruling and announced that a new bill that follows the Court’s stipulations will be presented to parliament forthwith.

Authored by the chief justice, the Supreme Court’s decision in the national security certificate case represents a sharp rightward turn. It constitutes a green light for the assault on democratic rights and longstanding juridical principles that the Canadian ruling elite is carrying out under the pretext of the fight against terrorism.



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