Learning from Britain's Mistakes: Best Practices and Legislative Revision in Canadian Immigration Law

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INTRODUCTION

In the decade following 11 September 2001, the Canadian and British governments adopted many controversial legal measures to fight terrorism. They especially turned to stricter immigration laws to exclude and remove more easily those aliens suspected of involvement in terrorism. This strategy has had a considerable cost to the principle of procedural fairness. Canadian and British legislation increasingly restricted aliens' rights to legal counsel and access to evidence in deportation proceedings involving national security issues. To compensate for such procedural restrictions, Canada has adopted a controversial British system of "special advocates." Under this system, specially designated lawyers are authorized to view secret evidence and represent the deportee in hearings from which he is excluded.

However, the European Court of Human Rights[1] and the House of Lords[2] later ruled that the British special advocate system violated the *European Convention on Human Rights*. These decisions held that the system denied an individual sufficient knowledge of the case against him and prevented effective legal instructions to the special advocate. Because Canada's lawmakers copied this procedurally flawed British law, they should now take these rulings into account in order to improve the existing Canadian version of special advocates. Lawmakers must do so in order to find the "best practice" that optimally balances due process rights with the State's national security concerns.

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1 *A and Others v United Kingdom*, Application no 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009.

2 *Secretary of State for the Home Department v AF*, [2009] UKHL 28.

The Canadian Parliament should therefore amend its special advocate system – which replicates the British one – to require (at least) more disclosure of evidence to the individual to be deported, as well as permit more communication between him and the special advocate. Parliament should make such changes expeditiously and on its own initiative before the system is challenged before the Supreme Court of Canada.

COMPARATIVE ANTI-TERRORISM LAW AFTER 9/11: A REFLECTION

In 2003, I examined Canada's *Anti-Terrorism Act*[3] of 2001 in a positive light.[4] As one American reviewer put it, this work

> reads as it bills itself: The article is a rousing thumbs-up for our northern neighbor's legislative response to the attacks of September 11. Comparing Canada's 2001 Anti-Terrorism Act to Britain's Anti-terrorism, Crime and Security Act 2001 and the United States' Patriot Act, Jenkins contends that Canada has found a superior way to balance protection of civil liberties with the fight against terrorism.[5]

At that time, I made two arguments to support my conclusion that, on the whole, Canadians had carefully improved upon foreign ideas to arrive at a tough, necessary, yet more rights-conscious legal response to terrorism.

First, I advocated a comparative approach to the creation and development of new anti-terrorism laws in Canada and elsewhere. Canada, the U.K., and the U.S. can learn from one another because they share similar national security concerns about terrorism, as well as a common law tradition that shapes and limits legal responses. Comparison thus encourages a best-practices approach to formulating legislation. With that approach, lawmakers look to foreign law in seeking the optimal balance between effective anti-terrorism measures and individual rights.

Second, using this comparative approach, I focused on the *ATA's* controversial changes to Canadian criminal law. Specifically, I compared terrorist offences, restrictions on financing terrorism, investigatory powers of the police, and hate crimes provisions found in Canadian, British, and American legislation. For example, the definition of terrorism in Canada's *ATA* was highly influenced by British law, but tailored to be narrower in scope. The *ATA* also subjected controversial provisions like

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[3] *Anti-Terrorism Act*, SC 2001, c 41 [*ATA*].

[4] David Jenkins, "In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law" (2003) 66 Sask L Rev 419.

[5] "The True North Strong and Free," Review, *Legal Affairs* (March/April 2004), online: legalaffairs <http://www.legalaffairs.org/issues/March-April-2004/elsewhere_marpar04.msp>.

investigative hearings and special recognizance conditions to sunset clauses, so that they would automatically expire after a statutory time-period.

THE EXPLOITATION OF IMMIGRATION LAW AFTER 9/11

My earlier article focused on anti-terrorism measures in the criminal law and did not address them in immigration law. I did not consider tougher, post-9/11 immigration procedures to be as controversial or constitutionally troubling as the anti-terrorism criminal provisions, because national legislatures and the executive branches in the U.S., U.K., and Canada have always possessed sweeping powers to control immigration and police national borders. New powers to detain immigrants were problematic, but did not seem to me to be as novel or far-reaching as the new criminal measures, which applied to the general public and potentially criminalized unpopular political or religious activities, beliefs, or associations. However, the Canadian and British governments have since used immigration law, instead of criminal law, as their primary tool in combating terrorism. These governments have had several incentives for doing so.

First, deportation proceedings afford a potential deportee fewer procedural rights than does prosecution under the criminal law. For example, governments have more latitude in immigration proceedings, than they do in criminal ones, to withhold evidence and the details of allegations. Second, Canadian and British courts considerably defer to ministerial decisions that an alien poses a risk to national security and should therefore be deported or detained. The State can therefore detain or deport an alien based on mere suspicion of that individual's involvement in terrorist activities without proving its case in a criminal trial. Because of this procedural flexibility and focus on risk, immigration law is arguably better suited than the criminal law for preventing acts of terrorism before they occur. Third, because aliens make up a small, legally vulnerable, and politically un-influential segment of society, governments can discriminate against them with little political cost. Indeed, by targeting aliens through immigration law, the Canadian and British governments are often viewed by some members of their electorate as taking decisive action against potential terrorists hiding amongst the population.

Exploiting such advantages, the Canadian and British governments have used immigration law to develop a procedural "third way" between the usual alternatives of deportation or criminal prosecution. In other words, these governments have sought to detain or otherwise seriously restrict the liberty of an individual, based on suspicion and using procedures much weaker than under the criminal law. In Canada and the United Kingdom, this third way has been marked by indefinite detention and control orders, special advocates and restricted rights to legal counsel, and secret evidence withheld from the individual in question.

THE PROCEDURAL "THIRD WAY"

1. In the UK

In the U.K., the *Anti-terrorism, Crime and Security Act 2001*[6] permitted the indefinite detention of an alien terrorist suspect who could not be deported to his home country due to a risk of torture there.[7] During immigration proceedings, the deportee could be denied access to the Government's evidence. He was also prohibited from communicating with the special advocate, who would represent him in hearings from which he was excluded.[8] However, in the first *A and Others* case, the House of Lords declared the *ATCSA* detention provisions to be incompatible with the *European Convention*, because they disproportionately infringed personal liberty and discriminated on the grounds of nationality.[9]

Parliament responded to this ruling by replacing indefinite detention with "control orders" under the *Prevention of Terrorism Act 2005*, whereby the Government could seriously limit the movements and activities of both aliens *and* nationals.[10] Parliament authorized the use of special advocates in all control order proceedings, including those against citizens. As mentioned in the introduction, the ECHR (in *A and Others* v *United Kingdom*)[11] and the House of Lords (in *Secretary of State for the Home Department* v *AF*)[12] later found this "third way" to violate the *European Convention*, as it permitted a deprivation of liberty based solely, or to a decisive degree, on material withheld from the individual and without giving him adequate opportunities to communicate with the special advocate.

2. In Canada

The development of a procedural "third way" in Canada closely paralleled the developments in Britain. Canada's security-certificate regime under the *Immigration and Refugee Protection Act* of 2001[13] allows indefinite detention of an alien, so long

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[6] *Anti-terrorism, Crime and Security Act 2001* (UK), c 24, ss 21-23 [*ATCSA*], repealed by *Prevention of Terrorism Act 2005* (UK), c 2, s 16(2)-(4) [*PTA*].

[7] *Chahal* v *United Kingdom* (1996), 23 EHRR 413 (deportation to a risk of torture prohibited under art. 3 of the *European Convention on Human Rights*).

[8] Special advocates were introduced in the UK with the *Special Immigration Appeals Commission Act 1997* (UK), c 68, s 6 [*SIACA*]. See also *Special Immigration Appeals Commission (Procedure) Rules* 2003, SI 2003/1034, rules 34-37.

[9] *Supra* note 1; See *Human Rights Act 1998* (UK), c 42, s 4 [*HRA*], allowing a court to issue a declaration of incompatibility.

[10] See *PTA*, *supra* note 6, s 3(5), and Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005/656, L.16).

[11] Supra note 1.

[12] *Supra* note 2.

[13] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 77-82 [*IRPA*], as amended by *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a*

as a risk of torture in his home country prevents deportation and he continues to pose a risk to national security. As originally enacted, the *IRPA*[14] authorized such detention pursuant to closed, *ex parte* immigration hearings, in which the person charged under the certificate regime was denied access to any legal representation and was not informed of the particulars of the charge. Under these security-certificate procedures, a non-deportable alien was subject to prolonged deprivation of liberty without having an adequate opportunity to know and challenge the government's case against him.

In *Charkaoui* v *Canada (Minister of Citizenship and Immigration)*,[15] the Supreme Court of Canada held that the security-certificate proceedings violated, *inter alia*, the right to a fair hearing under the *Charter*.[16] This decision prompted the Canadian Parliament in 2008 to adopt the U.K.'s special advocate system in special amendments to the *IRPA* (*IRPA Amendments*), in hopes that it would meet *Charter* requirements.[17] Parliament therefore chose to use a controversial foreign model, being legally challenged at the time before British courts and the ECHR, rather than develop a better procedural alternative on its own.[18]

A RETURN TO BEST PRACTICES: "MONITORING" FOREIGN LEGAL DEVELOPMENTS

The Canadian and British governments' recourse to the procedural "third way" has led to serious constitutional issues in both countries. Instead of adopting a rights-conscious, best practices approach to protecting national security, both governments have together run a security-driven "race to the bottom" to find the lowest, legally permissible standards of due process. In this race, they have pushed the political and legal limits of State power, prioritized security over rights, and failed to seek the most proportionate or balanced responses to national security concerns. In contrast to the criminal law's strong due process requirements, immigration law has given these governments opportunity to deprive an individual of personal liberty using the least exacting procedures possible.

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consequential amendment to another Act, SC 2008, c 3, s 4 [*IRPA Amendments*].

[14] See *IRPA*, *ibid*, s 78.

[15] *Charkaoui* v *Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, 1 SCR 350.

[16] *Canadian Charter of Rights and Freedoms*, s7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[17] See *IRPA*, *supra* note 13, ss 83-87.1, as amended by *IRPA Amendments*, *supra* note 13, s 4.

[18] For example, Parliament could have looked to a form of special advocate that was previously used in some immigration hearings before Canada's Security and Intelligence Review Committee. That system was discontinued in 2002. For a summary of that committee's procedures, see 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" (August 2007) at 5-10, online: University of Ottawa <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>.

One method of combating this "race to the bottom" is a sophisticated comparative approach by all three branches of government in borrowing or adopting foreign counter-terrorism laws.[19] The search for best practices, which proportionally balance rights with security, requires intellectual effort with methodological concerns and a political commitment to optimal solutions. This approach requires more than "rights-proofing" legislation, whereby governments craft laws to meet only the minimal, baseline legal protections of rights, either under the Canadian *Charter* or the *European Convention*.[20] It instead requires governments to aspire to the best possible rights protections when creating laws that address specific national security concerns. In this light, foreign jurisdictions not only provide models for new anti-terrorism laws, but are laboratories where those models can be observed in operation over a period of time. Used carefully, comparative law can be a powerful tool for reflecting upon and eventually finding the right balance between liberty and security.

This commitment to best practices must therefore continue even after a legislature has incorporated foreign ideas into national anti-terrorism law. For example, Canadian lawmakers should have been paying attention to the continuing debates and legal challenges surrounding Britain's special advocate system, after its adoption in the *IRPA Amendments* of 2008. Although foreign decisions such as *A and Others* and *AF* are not binding in Canada, they nevertheless address similar legal issues as *Charkaoui* and concern a special advocate system nearly identical to that in Canada. In doing so, they suggest that the system is not the best, most proportional way to balance rights and national security in security certificate cases.

When executive officials and legislators seek best practices in this way, it has constitutional significance on both normative and structural levels. First, when lawmakers critically re-examine controversial laws and improve them on their own initiative, they recognize that rights claims have normative validity beyond their enforceability in the courts. Second, lawmakers' self-restraint encourages public trust (especially among politically vulnerable minorities), justifies reasonable judicial deference to political decisions about national security, and reduces potential points of friction between the political branches and the courts. The best practices approach therefore promotes coordinate constitutional interpretation by the executive and legislature, whereby the judiciary does not necessarily have the loudest or last word on contested constitutional issues. That is, when the political branches try to limit rights as little as possible, courts will have less cause to criticize or second-guess anti-terrorism

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[19] I detail just such a response in David Jenkins, "There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology" (forthcoming, 2011) *Columbia Human Rights Law Review*.

[20] On "*Charter*-proofing," see Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Ronald J Daniels, Patrick Macklem, and Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 131 at 131-38; I discuss rights-proofing further in the context of special advocates systems in Jenkins, *ibid.*

legislation. Monitoring and self-correction are evidence of lawmakers' commitment to rights, as they look for new, more effective legal protections for national security.

CONCLUSION

After the Supreme Court of Canada's decision in *Charkaoui*, the Canadian Parliament failed to seek out the best possible procedural protections in security certificate cases. Instead, it simply adopted the existing British system of special advocates, which the ECHR and the House of Lords would later criticize. This legislative gamble of "gaming" the *Charter*[21] – by rights-proofing the special advocate system against what some thought to be the *Charter's* minimum standards – suggests the Canadian government's lack of earnestness about rights. If truly committed to properly balancing rights with security, Canada's current government and Parliament will heed these foreign courts and re-evaluate, improve, or replace the existing special advocate system. They should do so, notwithstanding the pending appeal of the Federal Court's decision in the *Harkat* case,[22] finding the special advocate system constitutional. The political duty to balance rights with security as optimally as possible exists irrespective of the results of litigation. If and when lawmakers in Ottawa carry out this obligation, the British experience will clearly show Canada's special advocate system to be far from the best practice available.

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[21] Thanks to Michael Plaxton (Saskatchewan) for this term.

[22] *In the Matter of Harkat*, 2010 FC 1242.