

UNMASKING THE PUBLIC INTEREST IN DISCRETIONARY NATIONAL SECURITY DECISIONS IN CANADA

Yavar Hameed*

This paper explores three varied case studies within the author's civil liberties legal practice that involve discretionary administrative decisions made in the name of public safety and/or national security. The first case study relates to the criminalization of dissent in the decision to prosecute a man who was attempting to attend a Parliamentary committee meeting based on the suspicion that he was a Greenpeace activist. The second case study considers the use of a public safety rationale for refusing the transfer of prisoners to Canada under the International Transfer of Offenders Act. And the final case study looks at the Public Safety Minister's explanation for signing an immigration security certificate in 2008 that was tainted by torture. The author argues that, in each case, public safety or national security is raised to obfuscate the state's unfair or discriminatory exercise of discretionary authority.

Cet article, dans lequel il est question de décisions administratives discrétionnaires prises au nom de la sécurité publique ou de la sécurité nationale, examine trois études de cas différentes dans le contexte de son exercice du droit des libertés civiles. La première étude de cas porte sur la criminalisation de la dissidence dans la décision de poursuivre un homme qui a tenté d'assister à une réunion d'un comité parlementaire; décision fondée sur le fait qu'on le soupçonnait d'être un activiste de Greenpeace. La deuxième étude de cas porte sur l'utilisation du motif de sécurité publique pour refuser le transfert de prisonniers au Canada en vertu de la Loi sur le transfèrement international des délinquants. La dernière est axée sur l'explication donnée par le ministre de la Sécurité publique en 2008 pour la signature d'un certificat de sécurité pour l'immigration entaché par des actes de torture. L'auteur soutient que dans chaque cas, la sécurité publique ou la sécurité nationale est alléguée pour dissimuler l'exercice injuste ou discriminatoire, par l'État, de son pouvoir discrétionnaire.

* Hameed Farrokhzad, Ottawa.

1. Introduction

This paper explores three varied examples or case studies within the author's civil liberties legal practice that serve to "unmask" the state construction of public interest that suffuses discretionary decisions within different facets of Canadian national security. The examples chosen do not neatly fall within the parameters of state surveillance and control of terrorism or threats to the nation's security "en masse."¹ They do, however, explore the construction of security purportedly designed to protect the symbols and practice of Canadian democracy. Within this ambit (and as discussed below) fall decisions based on criminal prosecutorial discretion, ministerial discretion and state response to judicial orders respecting national security. By unmasking the public interest, one is confronted by the inherent subjectivity of political decision-making in the realm of national security, which contradicts the ethos of Canadian democratic values, due process and administrative fairness. What is revealed is an ideological practice that permeates the organs of the state and hegemonically reproduces itself within society. As part of a counter-hegemonic project to disrupt the abstraction of rights of those who are stigmatized or targeted by the state, this paper serves to situate discretionary decisions with reference to the "targets" of national security while exposing the absurdity and disjuncture between the lofty articulation of security and the arbitrary exercise of political power.

2. "Cutting Out": A History of National Security Exclusions

Under the guise of creating greater security for Canadians, the Canadian state uses national security as a device to identify and exclude demographic and ideological threats to the values that ostensibly preserve and enhance Canadian security. Gary Kinsman refers to this as the ideological practice of national security in Canada, which acts as a "cutting out device,"² abstracting the targets of national security decisions from their social context, so that they are more easily torn away from the human connections to which we associate and tether our conception of rights and the appurtenant responsibilities of the state. To this end, the practice of creating national security exclusions has been programmed into the

¹ *Getkate v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 965, [2009] 3 FCR 26 at para 41[*Getkate*].

² Gary Kinsman with Dieter K Buse and Mercedes Steedman, "How the Centre Holds – National Security as an Ideological Practice" in Gary Kinsman, Dieter K Buse and Mercedes Steedman, eds, *Whose National Security?: Canadian State Surveillance and the Creation of Enemies* (Toronto: Between the Lines, 2000) 278 at 283; see also Dorothy E Smith, "K Is Mentally Ill," in *Texts, Facts and Femininity* (New York: Routledge, 1990) at 30-32, 43.

genetics of Canada's reaction to security challenges whereby past and present events share a resonant interconnection that Kinsman and Gentile refer to as the "historical present."³ State policies dating back pre-Confederation to the Fenian invasions⁴ and spanning the Chinese head tax, the *Komagata Maru* incident,⁵ Japanese internment,⁶ the surveillance of Tommy Douglas,⁷ the Fruit Machine for detecting the threat of homosexual sedition,⁸ the RCMP "dirty tricks" campaign⁹ and surveillance of the BC Sikh community,¹⁰ among others, present a rich tapestry of exclusionary national security tactics within Canada that long pre-date the watershed moment of the 9/11 attacks in the United States.

While the discourse of national security has expanded in the last decade against a backdrop of an enhanced security infrastructure, new legislation and increased oversight mechanisms, the tendency towards exclusion and "cutting out" remains a constant theme in discretionary decisions, which seek to rest upon the concept of the public interest. Through the exercise of discretion, the Canadian state has demonstrated an overtly political and anti-democratic tendency in security related decisions, which it rhetorically justifies under the rubric of respect for democratic values, public safety and human rights. As illustrated in the three case studies set out below, the state's deliberate construction of this rhetorical gap is remarkable in its attempt to normalize political action, which minimizes or erodes constitutionally protected freedoms and/or basic administrative fairness. The first case study relates to the "protection" of democracy by criminalizing dissent in the botched prosecution of a Greenpeace look-alike. The second case study considers the appropriation of public safety as a blanket concept used by the state to stymie the transfer

³ Gary Kinsman and Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2010) at xiv-xv.

⁴ Andrew Parnaby and Gregory S Kealey, "The Origins of Political Policing in Canada: Class, Law, and the Burden of Empire" (2003) 41 *Osgoode Hall LJ* 211.

⁵ See Hugh JM Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: University of British Columbia Press, 1989).

⁶ Ann Gomer Sunahara, *The Politics of Racism* (Sunahara: Creative Commons License, 2000).

⁷ *Bronskill v Canada (Canadian Heritage)*, 2011 FC 983, [2013] 2 FCR 363 at paras 30-31.

⁸ Gary Kinsman, "'Character Weaknesses' and 'Fruit Machines': Towards an Analysis of The Anti-Homosexual Security Campaign in the Canadian Civil Service" (1995) 35 *Labour/Le Travail* 133.

⁹ The Canadian Security Intelligence Service, (Current Issue Review) (Ottawa: Library of Parliament, 2000) (84-27 E).

¹⁰ Hugh Johnston, "The Surveillance of Indian Nationalists in North America, 1908-1918" (1998) 78 *BC Studies* 3.

of prisoners to Canada under the *International Transfer of Offenders Act*. And the final case study draws back the curtain of national security to explore the former Public Safety Minister's rationale for signing a security certificate in 2008 that was tainted by torture.

A) Case Study One: The Protection of Democracy and the Problem of Looking like Greenpeace

We've got to remember what's going on here. This is democracy in play. This is the Government of Canada. These are people coming in for a very important committee hearing. People who are the public is invited in, provided they pass a security screen, and it is what we stand for – democracy, not the imposition of one person's will or upset on the majority. – Assistant Crown attorney Riad Tallim in his closing submissions to the Ontario Court of Justice in the trial of Terry Stavnyck, April 26, 2012¹¹

On December 7, 2009, nineteen Greenpeace activists managed to scale the Parliament Building in Ottawa. No one was hurt and no property was damaged, but a banner was unfurled protesting against the Conservative government's stand on climate change.¹² Nineteen protesters were charged and arrested, but Parliament Hill security staff were embarrassed by what was clearly a serious breach of security. Two days later, on December 9, 2009, Parliament Hill security including the Senate Protective Service (SPS) was briefed about what was one of an ongoing series of public meetings of the Special Committee on the Canadian Mission in Afghanistan. SPS security guards understood that this would be a controversial and heated meeting and were accordingly on high alert.¹³

Parliament had convened the Special Committee to look at Canada's involvement in Afghanistan and, more specifically, at or about this time, it sought to probe into the transfer of Afghan detainees to Afghan authorities by Canadian Forces. This prisoner transfer had already prompted a highly critical public statement by foreign service officer Richard Colvin who had intimated that senior officers within the Canadian Forces were aware of the mortal danger that was faced by Afghan detainees when transferred by Canadians to the Afghan forces, including the risk of death.¹⁴ Notwithstanding this disclosure, the transfers continued and public interest

¹¹ *R v Stavnyck* (26 April 2012), Ottawa 09-14033 (Ont Ct J), Trial transcript at 80, lines 25-31) [*Stavnyck* Transcript].

¹² "20 arrested at climate protest on Parliament Hill," CBC News (December 7, 2009), online: <www.cbc.ca/news/canada/ottawa/20-arrested-at-climate-protest-on-parliament-hill-1.795925> (accessed April 20, 2013).

¹³ *Stavnyck* Transcript, *supra* note 11 at 100, lines 26-31.

¹⁴ Steven Chase, "Canada complicit in torture of innocent Afghans, diplomat says," *The Globe and Mail* (November 18, 2009).

in the human rights implications of this transfer for Canada increased. This was a tense time; the “Afghan detainees file” placed the government under fire for a major public relations and human rights controversy involving the reputation of the Canadian Forces. The committee hearings themselves, however, posed no threat to any Member of Parliament or member of the Canadian Forces, apart from possibly the pressure felt by Colvin in providing his testimony to the Committee. And finally, there was no relationship between the Greenpeace ascent of the Parliament Building and the committee meeting of December 9, 2009. Climate change was not on the agenda of the Committee.

At about 2:00 pm, SPS profiled a man who had had an exchange with security while in the Center Block of Parliament. He was redirected to attend the Committee hearings on Afghan detainees in the East Block. Upon reaching the East Block, this man, Terry Stavnyck, was prevented from entering the building by the SPS.¹⁵ Stavnyck stands about 6 foot 1”, weighs approximately 130 lbs and suffers from multiple sclerosis. At the time, he was clad in a winter coat and wore a t-shirt and jeans. He had long blonde hair tied in a ponytail that he was growing out to donate to a cancer survivor. He also wore a McGill baseball cap with a button bearing the motto: “War is not the Answer.”¹⁶

Though he successfully passed through the physical screening of his personal items and name check, he was told to collect his things and that he would have to answer some questions outside. Without any reasonable cause for suspicion, Stavnyck was told that he had to leave the Parliamentary precinct to answer some further questions.¹⁷ Unbeknownst to Stavnyck, he had been identified by SPS as a member of Greenpeace.¹⁸ Indeed, there was no reason for Stavnyck to have surmised the basis of his denial of access to Parliament because there was no objective factor linking Stavnyck to anything unlawful, subversive or inappropriate. Nor did SPS think that Stavnyck intended to climb the Parliament Building, or that he possessed any weapon or carried concealed contraband. When Stavnyck asked for clarification regarding the reason for his denial and asked to speak to a supervisor, however, he was told to leave or he would be carried out.¹⁹

¹⁵ *R v Stavnyck*, Reasons for Decision, Ontario Court of Justice, June 20, 2012 (unpublished) at para 3 [*Stavnyck* Reasons].

¹⁶ *Ibid* at para 2.

¹⁷ *Ibid* at para 3.

¹⁸ *Stavnyck* Transcript, *supra* note 11 at 39, lines 15-19.

¹⁹ *Ibid* at 51, lines 30-32.

Stavnyck stood his ground in the East Block. He crossed his arms and legs, sat down in the corner of the screening room and demanded to speak to a supervisor. No supervisor came. Instead, Stavnyck was lifted up by two 200-pound security guards, then forced to the ground, handcuffed, dragged out along the floor of the room, out the doors and down the concrete steps of the East Block, placed in the snow, and had snow stuffed in his face in response to his shouts for help.²⁰ If suffering such indignity was not enough, Stavnyck was put in jail for approximately twelve hours.²¹ He was then charged with assault and disturbing the peace and released on condition that he not attend within 500 meters of Parliament Hill. After a trial process that lasted approximately seven days over a period of two and a half years, Stavnyck was acquitted of all charges by the Ontario Court of Justice on June 20, 2012.²²

B) Prosecutorial Discretion and Policing Dissent

The discourse concerning security that surrounded the Stavnyck trial was one that entailed preserving the democratic process of Parliament and public access to a Parliamentary committee by suppressing the democratic right of a member of the public to access the committee. The rhetoric of the Crown attorney in this proceeding was essentially that the will of a minority could not be foisted upon the majority. Apart from the flawed notion of democracy that such a perspective illustrates, which allows for no voice for the dissenting minority, it showcases the very anti-democratic hallmarks of how security plays out, within Parliament – in this instance in a literal sense – and in the thinking of the Crown attorney whose role it is to ideologically define security and preserve against its derogation.

Stavnyck was abstracted from the context of his rights and viewed essentially as a trouble-maker. He was profiled as a Greenpeace activist without reason, as if being a member of Greenpeace in itself constituted a threat to the security of Parliament. Within the space of the parliamentary precinct, the Crown then removed the prospect of due process and legitimate inquiry in favour of a generalized notion of a majoritarian “will.” And yet the Crown narrative, which became the centerpiece for the year and a half long attack on the rights of the accused, completely displaced any voice or space for resistance. Objection, discomfort, or questioning of why someone would be disallowed from a contentious parliamentary committee, was not an issue considered by the Crown for democratic discourse.

²⁰ *Ibid* at 54-66, lines 30.

²¹ *Ibid* at 69, line 4.

²² *Stavnyck Reasons*, *supra* note 15.

What is troubling about this episode is that it was a manifestation of a screening process which could be and in fact was used to identify persons who did not “agree” with the position of the government relative to the continued transfer of detainees that was sanctioned by the top brass of the Canadian Forces. Accordingly, the role of the Crown prosecutor and the Ottawa Police Service in this instance was to act as an extension of the gatekeeping function of security guards to profile and exclude people who did not agree with the government line. One might parenthetically consider what kind of treatment Stavnyck might have received had he been wearing a button marked “War is the Answer.” In this case, where the only investigation and complaint was done by SPS, both the police and the Crown were acting upon a common interest to protect the presumption that SPS defines and exercises the parameters of control relative to who may enter Committee meetings.

The implications of private security guards being the arbiters of who may be permitted to attend a public parliamentary committee meeting, without fetter and based upon absolute discretion, including the right to rely upon false and groundless profiling, is inimical to democracy.²³ The notion that the prospect of seeking explanation from parliamentary security can legitimately be met by forced eviction and arrest is also reflective of a totalitarian system. This is not to say that there can be no instance where resistance within the parliamentary precinct or elsewhere may be met by the force of the criminal law as enforced by parliamentary security; but the choice of invoking the criminal law in a situation that relates to a matter of non-violent freedom of expression within the parliamentary precincts reveals the lengths to which the state will go in order to suppress lawful dissent by using the language of democracy to both displace and attack fundamental rights in a free and democratic society.

C) Case Study Two: The ITOA and the Administration of Injustice

The *International Transfer of Offenders Act (ITOA)*²⁴ provides a statutory scheme for the repatriation of Canadian citizens who have committed crimes outside of Canada so that they may complete the duration of their sentence in Canada. The objectives of the Act are to promote the rehabilitation and reintegration of the offender as well as administration of

²³ The abusive screening and control function exercised by the SPS has been noted in other cases, but has not previously been the subject of a judicial decision; see Tom Korski, “Senate security guards have a run-in with a Hill visitor,” *Hill Times* (July 20, 2012), online: <www.hilltimes.com/political-reporting/2012/07/02/senate-security-guards-have-a-run-in-with-a-hill-visitor/31272> (accessed July 20, 2012).

²⁴ SC 2004, c 21.

justice (which includes public safety concerns).²⁵ Prior to 2006, 100% of offenders who applied for transfer were transferred under the Act, whereas since 2006 the rate of refusal has increased from 2% in 2006 to 73% in 2010.²⁶ It is evident that the sharp upturn in refusals coincides with the political shift from a federal Liberal government to a once minority and now majority Conservative government, which has pushed through legislation prioritizing a “tough on crime” agenda.²⁷ On its face, this sea-change in response by the Canadian state in response to prisoner transfer requests reveals the decision-making process to be nakedly political. There has been no evidence adduced that since 2006, a new public safety threat has arisen in the context of prisoner transfers. The Minister of Public Safety, however, now takes a diametrically opposite view towards the public interest in response to requests for prisoner transfers that were hitherto consistently granted under the previous government.

The malleability of the “public interest” to suit the political agenda of the government of the day in a manner inconsistent with the rule of law and the will of Parliament reveals the arbitrary character of the definition of public safety in relation to international prisoner transfers. The veil of national security privilege, which immunizes national security matters from the prying eyes of public concern is not similarly manifest in prisoner transfer denials based on a general advertence to public safety. Moreover, *ITOA* decisions are subject to review before the Federal Court, which requires them to be intelligible, transparent and justified in their reasons. In this regard, the function of judicial review also acts as a window onto the internal mechanics of transfer decisions. The Minister under the *ITOA* is vested with the authority to approve or deny transfer requests based on a non-exhaustive list of statutory factors and is free to rely upon other considerations, so long as these promote the objectives of the Act: to promote the rehabilitation and reintegration of the offender in Canadian society and the administration of justice.²⁸

Despite the available avenue of judicial review, Ministerial decisions are afforded the highest degree of deference and constitute an area where

²⁵ *Ibid*, section 3.

²⁶ Correctional Service Canada, *Annual Report on the International Transfer of Offenders 2009-2010*, online: <www.csc-scc.gc.ca/international-transfers/004001-1001-eng.shtml#_Toc295302482>, accessed: April 20, 2013.

²⁷ “Feds on collision course with courts over omnibus crime law,” CBC News (September 20, 2012), online: <<http://www.cbc.ca/news/politics/feds-on-collision-course-with-courts-over-omnibus-crime-law-1.1245486>> (accessed April 21, 2013).

²⁸ *ITOA*, *supra* note 24, section 3.

the courts will tread very lightly.²⁹ Nevertheless, decisions cannot be made in contradiction to the evidence on the record without some clear basis. It is by confronting the Minister's decision with the requirements of a reasonable decision that the Federal Court has found on a series of occasions that the Minister has failed to render a reasonable decision and that his decision should accordingly be set aside. It is highly significant that such frequent judicial intervention should be made in the context of Ministerial decisions.

It is striking not only that the Minister has gotten it wrong – in terms of repeatedly rendering unreasonable decisions – but also that he refuses to get it right. In the case of *LeBon v Minister of Public Safety*, the Federal Court of Appeal directed the Minister to redetermine a decision that denied the applicant's transfer to Canada on the ground that he might commit an organized crime offense upon his return to Canada.³⁰ In its reasons for decision, the Court of Appeal made particular mention of two unanswered questions in the decision. The Court directed the Minister to indicate why his decision departed from the opinion of Correctional Service Canada, and secondly how the factors against the applicant's transfer to Canada outweighed those in favour of his return.³¹

Rather than addressing the questions set out by the Court of Appeal, the Minister decided that he would refuse the transfer again by essentially rephrasing his previous reasons for decision. This second refusal decision of the Minister was subsequently set aside by the Federal Court; the Court indicated that the Minister demonstrated a reasonable apprehension of bias and closed mind to the evidence in support of the applicant's rehabilitation and reintegration potential and further stated that the Minister paid only "lip service" to the reasons of the Court of Appeal.³² The Minister was also directed to accept the transfer of the applicant back to Canada pursuant to the Court's remedial jurisdiction under section 18.1(3) of the *Federal Courts Act*.³³

Although once bitten, the Minister displayed no shyness in his further response to the Court. Rather than accept the highly critical remarks of the Federal Court referencing the prior decision of the Court of Appeal, the

²⁹ *Del Vecchio v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1135, (2011), 398 FTR 75 at para 21.

³⁰ *LeBon v Canada (Attorney General)*, 2012 FCA 132, (2012) NR 310 [*LeBon CA*].

³¹ *Ibid* at para 21.

³² *LeBon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500, (2012), 423 FTR 312 at para 13.

³³ *Federal Courts Act*, RSC 1985, c F-7, s 18.1.

Minister decided to appeal the Federal Court's jurisdiction in respect of its authority to direct him to make a transfer. The Minister obtained a stay of the direction to consent to the transfer before the Federal Court of Appeal and proceeded to address the merits of the appeal regarding the remedial jurisdiction of the Federal Court under the *Federal Courts Act*.³⁴ In a resounding rejection of the Minister's appeal, the Court of Appeal issued a unanimous decision from the bench holding that the Federal Court was justified in its decision under the law regarding *mandamus*.³⁵ In making its ruling, moreover, the Court examined the specific circumstances and evolution of the case that had led to considerable procedural delays. As a remedy to account for the delays caused by the Minister's repeated unlawful and unreasonable decision-making, the Court justified the Federal Court's ruling under the law of *mandamus*.

In *LeBon*, the Court clearly ventured into seldom-trodden territory by requiring that the Minister abide by the mandatory ruling of the Federal Court.³⁶ The repeated intransigence of the Minister offered the Court effectively no choice but to exercise its judicial power in order to ensure respect for its own authority. The tug of war between the Minister and the courts did not end with the Court of Appeal's ruling, however. The Minister got the last word by publishing his "reasons" for consent on the Department of Public Safety's website, which reiterated his previous decision with the closing caveat that he had been ordered to accept the transfer and he would do so.³⁷

The obvious bias in the Minister's agenda and the denial of prisoner transfers demonstrates a pattern of political and ideological influence – resistant to the courts and resistant to the rule of law. The criterion of "public safety" has been stretched to such an extent as to make it useless, misleading or a catch-all for anything that may capture the subjective concerns of the Minister. The lack of procedure, reliability and consistency in the Minister's approach is indicative of a kind of reactionary approach driven by results rather than by respect for the law. While the legal battles may continue and the scope for judicial intervention in ministerial decisions may be increasing, this is cold comfort for Canadians incarcerated abroad who, at the time of writing, do not have a *Charter*-

³⁴ *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 18, (2013), 444 NR 86.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Public Safety Canada, "Minister of Public Safety releases decision on LeBon case," News Release, March 6, 2013, online: <<http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2013/20130306-eng.aspx>>, accessed: April 20, 2013.

protected right to serve their sentence in Canada and whose right to reenter Canada remains at the whim of the Minister.³⁸

While the *LeBon* case references a discretionary decision based upon “public safety” as opposed to national security, functionally (and ideologically) there is no distinction between these categories. Contrary to the Federal Court’s definition of what constitutes a threat to the security of Canada,³⁹ the Minister has explicitly opined that drug offenses do constitute a threat to Canadian national security.⁴⁰ Although the Minister’s interpretation in this regard has explicitly been rejected by the Federal Court,⁴¹ it is interesting to note the ambit of national security as invoked by the Minister himself. Significantly, in the absence of a formal invocation of national security privilege, the judicial review of *ITOA* decisions denying offender transfers on the ground of public safety allows for a strikingly candid consideration of what lies behind the veil of public safety/ national security.

In contrast to the matter of security certificates, as discussed below, the veil of secrecy can be pierced upon judicial review of an *ITOA* decision in view of the principles set out by the Supreme Court in *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*.⁴² Because the record for judicial review must be the record upon which the Minister has based his decision, it is incumbent upon the Minister to render an intelligible and transparent decision based on the record as disclosed pursuant to the *Federal Courts Rules*.⁴³ Accordingly, national security privilege does not obfuscate a clear portrait of the reasons that animate the decision made by the Minister under the *ITOA* to deny transfer on the ground of public safety. As evidenced by the case of *LeBon*, the animating concerns of the Minister may run counter to all of the evidence, reasonable analysis, and the very opinions of security intelligence bodies designed to advise on such matters. The implications for the kind of politicized decision-making evidenced by the Minister are grave in that they illustrate

³⁸ At the time of writing, the issue of whether Canadian offenders have a right pursuant to section 6 of the Canadian *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, to have their sentence transferred to Canada is under deliberation by the Supreme Court; see *Pierino Divito v Minister of Public Safety and Emergency Preparedness*, SCC File No 34128 (appeal heard: February 18, 2013).

³⁹ *Getkate*, *supra* note 1 at para 41.

⁴⁰ *Grant v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 958, (2010), 373 FTR 281 at paras 17 and 39.

⁴¹ *Ibid* at para 49.

⁴² 2011 SCC 62, [2011] 3 SCR 708 at paras 14-16. As applied in the *ITOA* context, see *LeBon CA*, *supra* note 30 at para 17.

⁴³ SOR/98-106.

the ideological gloss that the Minister may bring to matters of public safety that is unsupported by fact. The Minister may politically express his moral disapprobation for a crime that has been committed, but the attempt to recast such bare inclination as a manifestation of “the public interest” for denying an offender transfer is both misplaced and dangerous. The construction of public safety upon moral grounds as opposed to an evidence-based consideration of harm to society reveals an anti-democratic spirit that conflicts with the expectations of fairness and consistency under the rule of law. That the Minister revealed himself to be so explicitly intent upon asserting his own unfettered discretion in dictating the boundaries of public safety in the face of clear statutory limits defined by Parliament demonstrates the privileged and elitist perspective from which the state approaches the discussion of public safety. The complete disregard for administrative fairness for the offender in favour of the Minister’s own exercise of discretion is inimical to the public interest. The attempt by the Minister to hide behind the public interest in such circumstances is symptomatic of the camouflage that surrounds matters of national security more generally. In order to properly understand and resist such abuse of discretion, it must be contextualized within the broader pattern of its systemic occurrence. The judicial censure of the Minister by the Federal Court of Appeal is not a cure for this abuse; it merely opens a small (and rare) window onto the hegemonic operations of the ideological practice of national security. Where such an opening presents itself, there is an opportunity for drawing back the broader veil of security that cloaks such decisions and for directly naming the political abuse that must be seriously and publicly recognized as an affront to the system of administration of justice.

D) Case Study Three: Reflections on the Law and Ministerial Discretion under IRPA

Section 6 of the *Immigration and Refugee Protection Act (IRPA)*⁴⁴ creates a non-delegable statutory responsibility for the Minister of Public Safety (along with the Minister of Citizenship and Immigration) to sign a security certificate for the detention and deportation of non-citizens determined to be a threat to Canadian national security. Basic administrative law principles require that for a non-delegable decision to be lawful the decision-maker must personally decide the issue⁴⁵ and in so doing review the relevant material relating to the decision. It is in this context that, for the first time, a former member of cabinet was called as a witness to

⁴⁴ SC 2001, c 27, s 6.

⁴⁵ *Environmental Resource Centre v Canada (Minister of Environment)*, 2001 FCT 1423, (2001), 214 FTR 94 at paras 158-59.

provide evidence regarding his signing of a security certificate in the case of Mohamed Mahjoub.

The testimony of Stockwell Day provided to the Federal Court of Canada on September 6, 2012 offered rare insight behind the curtain of discretionary decision-making in respect of the immigration security certificate.⁴⁶ The rarity of such a probing gaze arises in part from the time window that protects sitting Members of Parliament from testifying in court proceedings – up to 40 days prior to and post the sitting of Parliament, as well as during the session.⁴⁷ The rare circumstance of Stockwell Day who was intimately involved at the apex of national security decision-making in 2008 as Minister of Public Safety and Emergency Preparedness and his subsequent retirement from politics placed him outside of the scope of protection of Parliamentary privilege. At one level, the protection of members of Parliament from judicial scrutiny is reasonable given the problems that protracted litigation can mean for a public official who would be derailed from his or her duties by being called to attend court. Whether as a direct or indirect result of this rule, however, there is an added state benefit of protecting governmental decision-making from the prying eyes and rigorous testing of legal cross-examination.

Perhaps unsurprisingly, in his evidence before the Federal Court, Day failed to recall any specific or general detail of the information reviewed by him in Mohamed Mahjoub's case.⁴⁸ He did not remember the briefings, those who might have briefed him, when he would have been briefed and the scope of materials that he reviewed in respect of the Mahjoub security certificate. He indicated that he was briefed by "any number of people" on a range of issues, but had no notes or contextual document that could refresh his memory on what information he reviewed in order to make the life-altering decision for Mohamed Mahjoub to place him under immigration detention. The conditions of this detention represent some of the strictest conditions of bail in Canadian judicial history,⁴⁹ which

⁴⁶ Michelle Sheppard and Nicholas Keung, "Stockwell Day defends his actions in terror case" *The Toronto Star* (September 6, 2012), online: <<http://www.thestar.com/news/canada/2012/09/06/stockwell-day-defends-his-actions-in-terror-case.html>> (accessed April 20, 2013).

⁴⁷ *Telezone Inc v Canada (Attorney General)* (2004), 69 OR (3d) 161 (CA). For application of rule in federal Parliamentary context, see *Pankiw v Canada (Human Rights Commission)*, 2006 FC 1544, [2007] 4 FCR 578.

⁴⁸ *Mahjoub (Re)*, DES-07-08, Transcript of Evidence for September 6, 2012, at 150 [*Mahjoub* Transcript].

⁴⁹ See eg the personal account of the analogous conditions in the case of Mohamed Harkat in Mike Larsen, Sophie Harkat and Mohamed Harkat, "Justice in Tiers: Security Certificate Detention in Canada" (2008) 17:1 *Journal of Prisoners on Prisons* 1.

prompted Mahjoub's voluntary return to prison in 2009⁵⁰ before his subsequent re-release later that year on stringent conditions.

More surprising was the fact that Day did not understand the basics of how the Canadian Security Intelligence Service (CSIS) had been collecting information in support of security certificates up until 2008. Rather than acknowledging that CSIS relied on information tainted by torture where such sources could ostensibly be corroborated by the Service,⁵¹ Day repeated the mantra that CSIS does not use information from torture.⁵² The record shows, however, that – using a standard of reasonable grounds to believe – CSIS did rely on information derived from torture, which was the subject of a critical decision of the Federal Court dated June 9, 2010 which excluded the only criminal charge against Mahjoub.⁵³

Despite the clear judicial finding that CSIS did rely on torture-tainted evidence in its collection of information in support of the Mahjoub security certificate, Day maintained the position that CSIS does not use information derived from torture. He also made the curious and ambiguous suggestion that the Federal Court's determination in June 2010 was made under a different law or a different standard than he applied in signing the certificate.⁵⁴ Subsequently, Day attempted to reconfirm his decision by stating that Bill C-3, which resulted in the amendments to the *IRPA* that came into force on February 22, 2008, created different law than that applied by the Federal Court in June 2010:

With the amendment to C3 there was a difference, as articulated not just in the memo by Mr. Judd in terms of what might be coming forth, but it was a different piece of

⁵⁰ *Canada (Citizenship and Immigration) v Mahjoub*, 2009 FC 439, (2009), 345 FTR 139.

⁵¹ The “corroboration standard” was plainly admitted by Barbara Campineau, the CSIS supervisor of the lead analyst who prepared the “Security Intelligence Report in support of the Security Certificate for Mohamed Mahjoub”, in her testimony before the Federal Court, July 7, 2011.

⁵² *Mahjoub* Transcript, *supra* note 48 at 123-24.

⁵³ The “torture decision” of the Federal Court excluded evidence of the only publicly-known criminal charge against Mahjoub for which he was convicted in absentia in Egypt, in the “Returnees from Albania” case, on the basis that there were reasonable grounds to believe that the conviction was based on torture-derived evidence; see *Mahjoub (Re)*, 2010 FC 787, (2010), 373 FTR 36.

⁵⁴ Day did not explain what the “different set of legislation guidelines” were that animated his decision. One hopes that indeed he was being guided by the *Immigration and Refugee Protection Act*, but it would be speculative to try to unpack his answer as the operative provisions of the *IRPA* which came into force on February 22, 2008 were extant in June 2010 and continue until today.

legislation. There was a different piece of legislation with this amendment to Bill C3.⁵⁵

Day did not attempt to define this “difference” or explain how this difference impacted upon the Federal Court’s decision of June 2010. His failure to elaborate may have been due to the fact that there was no actual difference or amendment to the law. After insisting on an earlier incarnation of the legislation as justification for his decision to sign the certificate, Day then admitted that the law before the Federal Court in June 2010 was the same law that was before him in February 2008 when he signed the certificate. This about-face is confusing, even more so as it is punctuated by an equally perplexing yet emphatic statement about his response to judicial decisions: “I don’t reflect on the decision of the Court. I live by it.”⁵⁶

That compliance with a court order can be done without reflection is an absurd statement. As in the case of Minister Toews’ decision in *LeBon*, however, action without reflection appears to be a recurrent theme in security-related discretionary decisions. I would suggest that the risk of reflection is not that it would increase the prospect of the state’s non-compliance or deviation from the letter and spirit of the court order, but that it provides space for intransigence or willful blindness in order to espouse rhetorical political platitudes that are plainly at odds with the evidence. Indeed, without some buffer to distance itself from judicial decisions that draw back the curtain of national security, the entire security edifice risks folding like a house of cards.

The cat-and-mouse game of trying to extract a straightforward answer from a former politician is circular and somewhat frustrating. There is some merit, however, in examining the language of the former Minister in defending his decision to sign the Mahjoub certificate. What is apparent from the above exchange is that Day did not admit that his decision was erroneous; he denied that the legal implications of the Court’s decision on torture touch upon the cogency or validity of his decision to sign the certificate; and he was emphatic in stating that he had never thought through the implications of a Federal Court decision regarding CSIS’s use of torture-tainted information in support of Mahjoub’s security certificate. Significantly, by attempting to defend his decision, Day was in a sense forced to make self-contradictory and absurd statements. That a security certificate may be signed by a Minister as a result of absurdity and basic legal and factual misapprehension would (one would think) destroy public confidence in the statutory scheme, while undermining the political

⁵⁵ *Mahjoub* Transcript, *supra* note 48 at 130.

⁵⁶ *Ibid.*

credibility of its supporting national security infrastructure. That mass public challenge to the security certificate system does not erupt stems in part from the mesmerizing hold that national security decisions have over the public conscience, and the related problem of the failure of critical discourse to gain political and popular traction on the question of the state's competency in justifying its own project.

Like the example of the judicial review of an *ITOA* decision, the ability to draw back the curtain on the discretionary decision-making process relating to matters of pressing national security is rare – rarer still in the area of alleged terrorism. Accordingly, in this rare moment, the faulty rationale, contradictory statements and reactionary defensiveness of the decision-maker deserve serious public scrutiny. While such investigation will not cause the faulty mechanics of security certificates to suddenly implode, it does offer an important vantage from which to assess discretionary national security decisions within a systemic pattern of abuse of the public interest. The resulting modicum of transparency should act as a catalyst for probing for even greater clarity and transparency to understand whether similarly faulty and erroneous analyses serve to underpin other significant national security decisions of our day.

The *post-facto* exercise of parsing the words of a former Minister, more than four years after his decision, does not reveal the truth of whether Mahjoub was or is a danger to Canada's national security, but it does reveal the system's attempt to obfuscate, rely on rhetoric and distance itself from an ingenuous or considered context of the law and its implications. The malleability of the rhetoric of national security allows it to render the absurd normal. Yet the pretense of normalcy in this instance has to some degree been broken by the exceptional circumstance of holding a public conversation with the decision-maker. The prevalence of absurdity, contradiction and self-serving rhetoric in this conversation must give us pause when assessing the public interest behind security certificates generally and the signing of the Mahjoub certificate in particular.⁵⁷ As a political game designed to rhetorically justify security certificates, some may be satisfied by the responses of Stockwell Day; in the arena of the most critical issues of civil rights concern in Canada,⁵⁸ however, vacuous

⁵⁷ An obvious parallel in the case of Adil Charkaoui raises the adverse inference in the circumstance of the Government of Canada's withdrawal of its security certificate case in 2008 in response to Court ordered disclosure of evidence in support of the certificate against Charkaoui; see *Charkaoui (Re)*, 2009 FC 1030, [2010] 4 FCR 448.

⁵⁸ Notwithstanding the 2008 government amendments to the security certificate process, the regime remains a subject of critical commentary and ameliorative recommendations by the United Nations and a blight on Canada's human rights record; see United Nations Committee Against Torture, CAT/C/CAN/CO/6 (25 June, 2012).

rhetoric must not pass as being an acceptable safeguard for human rights and democracy, or morally justificatory for the social cost reaped by invasive national security decisions. The frailty of reason and rhetorical justifications of the decision-maker apparent in the judicial review of discretionary decisions of national security reveal a telling picture of the lack of rigour, logic, evidence-based analysis and consistency in such decisions. Far from instilling public confidence in the important institutions, which have apparently been designed to protect national security, this review shows a striking example of an abusive exercise of discretion which systematically subordinates (and colonizes) the public interest of ensuring due process and respect for human rights.

3. Conclusion

The ideological practice of national security disguises the political underpinning of discretionary decisions concerning public safety, hiding it under the rubric of democracy, public interest and rhetorical justification. The sufficiency of such justification, however, lacks luster when probed under legal scrutiny. Moreover, through the legal process of attacking discretionary decisions, the political proclivity of the decision-maker is confronted and made to account for the absurdity of its own propositions. The resulting discourse reflects an exaggerated state response that magnifies fissures and inherent contradictions in the edifice of Canadian national security. The project of deconstructing these contradictions and revelations of the absurd is significant in terms of creating a space for and enlarging the vantage from which abuses of discretion can be seen within a broader pattern of systemic violations of basic rights and administrative fairness. The proliferation of such abuse within national security decisions is not incidental or coincidental, but it is intrinsic to the hegemonic and elastic nature of the state's power. By explicitly considering the state's political construction of security in discretionary decision-making, it is possible to unravel the hegemonic veneer of public interest that protects national security decisions. What is revealed, at its core, is an offensive political "cutting-out" device that severs rights protections and fairness from those who are targets of moral and political persecution by the state. The disruption of this process of cutting-out remains a vital project for resisting the often-masked abuses committed in the name of Canadian national security.