

Section 7 of the *Charter* and National Security: Rights Protection and Proportionality versus Deference and Status

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This paper examines section 7 jurisprudence in the context of national security cases involving collective security considerations and/or Canada's interactions with other states on security-related matters. National security, like section 7 of the *Canadian Charter of Rights and Freedoms*, spans the traditional divides between administrative, criminal, extradition and international law. The paper identifies two distinct strands in the jurisprudence: one associated with rights protection and a requirement that any limits on rights be justified as proportionate, and another based on an a priori deference to governments, consideration of the status of individuals— notably non-citizens—and respect for the sovereignty of other nations. The paper concludes that despite some post-9/11 attraction to deference and status concerns, rights protection and proportionality concerns may eventually win out, especially when supported by concerns about compliance with international human rights commitments and the reconciliation of rights protection with the fulfillment of various national security goals.

Dans cet article, on examine la jurisprudence relative à l'article 7 dans le contexte des causes en matière de sécurité nationale impliquant des éléments de sécurité collective et/ou les relations du Canada avec d'autres États sur des questions liées à la sécurité. La sécurité nationale, à l'instar de l'article 7 de la *Charte canadienne des droits et libertés*, soulève les divergences habituelles entre les droits administratif, criminel, de l'extradition et international. Dans cet article, on dégage deux courants distincts dans la jurisprudence : le premier est lié à la protection des droits et à la condition que les restrictions à l'encontre de droits soient justifiées par leur caractère proportionné, tandis que l'autre courant se fonde sur une déférence a priori envers les gouvernements, l'examen du statut des individus—notamment les non-citoyens—et le respect pour la souveraineté des autres nations. En conclusion, l'auteur fait observer que, malgré une certaine inclination, dans la foulée des événements du 11 septembre, pour les questions de déférence et de statut, les préoccupations relatives à la protection des droits et à la proportionnalité pourraient l'emporter, en particulier lorsqu'elles sont étayées par un souci de respect envers les obligations internationales en matière de droits de la personne et la conciliation entre la protection des droits et l'atteinte de divers objectifs de sécurité nationale.

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Section 7 of the *Charter* and National Security: Rights Protection and Proportionality versus Deference and Status

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I. INTRODUCTION

Section 7 of the *Charter*¹ is the most difficult section to evaluate because of its sprawling nature. Its protection of the “right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”² ranges over the traditional doctrinal categories of criminal law, administrative law, extradition law, military law and the conduct of foreign affairs. The national security context is a good fit for an evaluation of section 7 because national security law itself encompasses a diversity of similar concerns. The leading Canadian text on national security law moves effortlessly and expertly through various areas of law, with author Professor Craig Forcese concluding that Canada’s national security law may constitute “a patchwork quilt.”³ Although the scattered nature of national security law presents serious scholarly challenges, it also provides an opportunity to observe patterns that may not be apparent when section 7 is examined within more traditional doctrinal categories.

National security in this paper will refer not only to substantial and serious threats to our collective well-being,⁴ but also to cases in which Canada, as a country, interacts with other countries in a way that may affect important security interests of either state. This latter part of the definition affects matters such as extradition, even though not all extradition matters involve terrorism or other national security offences.

The national security context is worth examining because of its inherent importance. The state’s interests are often central when it comes to issues of national security. These interests include the protection of Canadians from acts of terrorism

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

2 *Ibid.*

3 Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008) at 33.

4 See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 85, [2002] 1 SCR 3 [*Suresh*].

and Canada's ability to interact with other nations in an increasingly interdependent world. State objectives in the national security area can also be supplemented by international mandates, including those declared by the United Nations Security Council under its Chapter VII powers with respect to the maintenance of international peace and security.⁵ The national security context is increasingly an internationalized one and Canadian courts must reconcile international mandates with domestic rights protection.⁶

Canada's foreign policy has always been preoccupied with our relations with our southern neighbour and this has certainly had an impact on our national security law. Canada's first section 7 case in the national security context involved its decision to allow the United States to test cruise missiles in Canada's north.⁷ Other more recent decisions involved questions of whether Canada should secure undertakings from the United States not to use the death penalty when it extradites a fugitive,⁸ whether a court could order Canada to ask the United States to repatriate Omar Khadr, a Canadian citizen, from Guantanamo Bay⁹ and whether extradition proceedings of Abdullah Khadr should be stayed because of misconduct by American and Pakistani officials in his initial capture and detention in Pakistan.¹⁰

The stakes in national security cases are high, not only for the state and society, but also for the individual claiming the section 7 right. Although Canadian courts are generally not accustomed to dealing with state threats to the right to life in the domestic context, such threats are more common in the national security context where the courts have considered and refused to rule out the possibility of extradition to face the death penalty or deportation to face torture. Even outside of these potential life or death contexts, section 7 claims may involve prolonged detention under either criminal or immigration law in situations where detainees

5 *Charter of the United Nations*, 26 June 1945, CanTS 1945 No 7, cVII. For arguments that the United Nations Security Council's use of Chapter VII powers in relation to terrorism, especially in the years immediately before and after 9/11, did not pay enough attention to rights and fairness concerns see Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011) at 21-67.

6 In *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, 1 FCR 267 Zinn J found that a Canadian citizen's right under section 6 of the *Charter* to return to Canada had been breached when the government denied him travel documents because he was listed as associated with al Qaeda under UN Security Council Resolution 1267. Zinn J found that the Resolution did not prevent travel by citizens to return to their countries of citizenship (*ibid* at para 129). Zinn J, however, also indicated that the process of listing on the basis of secret intelligence and then requiring listed persons to prove their innocence was contrary to a "fundamental principle of Canadian and international justice ..." (*ibid* at para 53). Mr. Abdelrazik was subsequently delisted at the end of 2011 upon a recommendation of a new Ombudsperson added to the 1267 listing process. For a discussion of this case and the case of another Canadian wrongly listed by the UN Security Council see Kent Roach, "Counter-Terrorism In and Outside Canada and In and Outside the *Anti-Terrorism Act*" (2012) 16:2 Rev Const Stud 243 at 260-61.

7 *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481 [*Operation Dismantle* cited to SCR].

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

9 *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr II*].

10 *United States v Khadr*, 2011 ONCA 358, 106 OR (3d) 449. For a discussion of the Omar and Abdullah Khadr cases in the context of American-Canadian security relations see Kent Roach, "Uneasy Neighbors: Comparative American and Canadian Counter-Terrorism" (2012) 38:5 Wm Mitchell L Rev 1701 [Roach, "Uneasy Neighbors"].

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might not know the full case against them for reasons related to secrecy and/or respect for the decisions and processes of other sovereign states.¹¹ Even in cases not involving detention, the denial of citizenship or a security clearance on the basis of national security concerns may stigmatize an affected individual, especially if, as is often the case, the full reasons for the decision are not made public.

It is a truism that national security cases call for a fine balance between state and collective interests and those of the individual. In *Suresh*, the Court described its task under section 7 as “essentially one of balancing,” and stressed that the importance of context made it “impossible to say in advance . . . that the balance will necessarily be struck the same way in every case.”¹² The Court’s commitment to balancing in that case led it to declare that while the *Charter* would generally prohibit deportation to a substantial risk of torture, exceptions could be justified under either sections 7 or 1 of the *Charter*, even though such a result would place Canada in breach of its absolute international obligations not to be complicit in torture.¹³ The frequent conflation of the process of defining the section 7 right and considering justifications under section 1 presents a risk that judges will avoid the structure and discipline provided by the section 1 proportionality test and in particular its demand that the state demonstrate how a rights-invasive measure is rationally connected to a precise objective and whether there are less rights-invasive means to achieve such goals.

It will be suggested in what follows that some of the Court’s most rights-invasive decisions under section 7 have not emerged from a sustained proportionality test, or even a true balancing process, but rather from a posture of judicial deference to the state on security matters, and explicit or implicit judgments based on the status of the affected parties such as the diminished rights of non-citizens and the need to respect the sovereignty of foreign states. For example, the Court in *Suresh* quoted Lord Hoffmann with approval when he stated that courts should respect decisions of the executive on national security matters, not only because of their “access to special information and expertise” but also because of the “legitimacy which can be conferred only by entrusting [such decisions] to persons responsible to the community through the democratic process.”¹⁴ It will also be suggested below that decisions to not apply the *Charter* abroad, even in situations in which Canadian Forces transfer Afghan detainees to face torture,¹⁵ or to not allow courts to order the executive to request Omar Khadr’s repatriation,¹⁶ are related more to concerns

11 See *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 26, [2007] 1 SCR 350 [*Charkaoui I*] (the Supreme Court recognized that the consequences of prolonged detention under security certificates were as serious for the detainee as criminal convictions).

12 *Supra* note 4 at para 45.

13 *Ibid* at para 78.

14 *Ibid* at para 33, citing *Secretary of State v Rehman*, [2001] UKHL 47 at para 62, [2003] 1 AC 153 [*Rehman*].

15 See *Amnesty International v Canada, (Chief of the Defence Staff)*, 2008 FCA 401, [2009] 4 FCR 149 [*Amnesty International*].

16 *Khadr II*, *supra* note 9.

about the status of the detainees as non-citizens and the status of Canadian and foreign governments as sovereign states than to the results of a full balancing or a sustained proportionality analysis. A full proportionality analysis in these cases could have delineated with greater precision the relevant state interests and the issue of whether there were less rights-invasive means to pursue those interests. Moreover, it could have avoided reliance on the blunt categories of citizenship or deference to the state's prerogative powers.

This paper will proceed through six vignettes concerning section 7 jurisprudence in national security cases. The first three will be grouped around the theme of the Court's retreat from its original commitment to rights protection associated with early *Charter* cases such as *Reference re BC Motor Vehicle Act (British Columbia) s 94(2)*,¹⁷ *Operation Dismantle*,¹⁸ and *Singh v Minister of Employment and Immigration*,¹⁹ and its move towards a less reasoned and more reflexive deference to the state and/or concern with the status of individuals or states. The tone of these three vignettes will be critical and pessimistic.

The first three vignettes, however, cannot tell the entire story. In the last three vignettes, I will suggest that a counter-trend has emerged in some national security cases, where the Court has moved from early deference and concerns about status to an approach that is more concerned with both rights protection and proportionality. This trend is most evident in extradition cases where the Court has gone from an early approach marked by deference that stressed the need to respect comity and the sovereignty of requesting states, to a more demanding one that is prepared in appropriate cases to impose conditions on extradition and to evaluate the fundamental fairness of the extradition process. It also includes cases where the Court has gone beyond its 1992 decision upholding security certificates based on secret evidence²⁰ to require both adversarial challenges to the secret evidence and greater preservation of intelligence material to allow affected individuals to more fully understand and challenge the case against them.²¹ The narrative for these three vignettes will be one that suggests that the early days of the *Charter* were not uniformly rights-friendly, and that more recent courts have, at times, risen to the demands of rights protection. At the same time, rights protection in these cases is far from absolute and it is connected with a willingness to accept reasonable and proportionate limits on rights. The critical difference is, however, that the state must justify these limits and demonstrate that they are necessary, rather than simply rely on judicial deference to all of its claims or arguments that are based on the diminished status of non-citizens or the enhanced status of sovereign states.

17 [1985] 2 SCR 486, 24 DLR (4th) 536 [*BC Motor Vehicle Reference* cited to SCR].

18 *Supra* note 7.

19 [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh* cited to SCR].

20 See especially *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711, 90 DLR (4th) 289 [*Chiarelli* cited to SCR].

21 See especially *Charkaoui I*, *supra* note 11; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326, [*Charkaoui II*].

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Ultimately, this paper will suggest that the Court's record in applying section 7 in national security cases has been decidedly mixed. The impulse towards rights protection subject to justified and proportionate limits *and* the impulse towards more reflexive deference and concerns about the status of non-citizens and sovereign nations are both entrenched in our constitutional make-up. In some respects, these two strands in section 7 national security jurisprudence mirror competing values of individual rights and community solidarity and our conflicting desires that state actors should be accountable under the rule of law, while simultaneously possessing the space and respect necessary for them to perform the difficult task of keeping Canada safe in a dangerous and interconnected world.²²

The conclusion of this paper will also address the question of which of the two competing strands in the section 7 national security jurisprudence is currently dominant, and which of them may fare better in the future. History may be on the side of rights protection and proportionality. Canada has already come a long way since 1982 when the Supreme Court unanimously and quickly accepted that it was perfectly constitutional for the state to assert an absolute and unreviewable discretion to prevent the disclosure of information on national security grounds.²³ The most recent examples of deference and concern with status—the *Suresh* exception, which allows non-citizens to be deported to torture in certain circumstances, restrictions on the extraterritorial application of the *Charter* (most notably to Afghan detainees) and restrictions on remedies that require the government to make diplomatic representations—are themselves partial and contested. In both *Suresh* and *R v Hape*,²⁴ the Court recognized that Canada's international human rights obligations have a role to play and the gravitational force of such obligations is considerable. In addition, recent victories for rights protection—the requirements that secret evidence be subject to adversarial challenge; that extradition judges not be rubber stamps; and that intelligence be preserved and subject to adversarial challenge—demonstrate that increased rights protection often goes hand and hand with a willingness to accept reasonable and justified limits on rights.

These factors suggest that history may be on the side of rights protection and proportionality. Nevertheless, the exceptions to these trends cannot be denied nor are they trivial. Context does matter, and another 9/11, especially one that could be attributed to an overly lax Canadian security apparatus or to Canadian nationals, could produce another *Suresh* exception or worse. The high stakes of threats to national security may tempt judges to lean towards deference to the elected branches of government and to placing categorical limits on rights based on the status of those who lack citizenship and the status of other sovereign nations. Twenty-five years after the Court's first ringing endorsement of section 7 of the *Charter*, deference and status concerns have not yet disappeared from the jurisprudence.

22 See generally Roberto Mangabeira Unger, *Knowledge and Politics* (New York: Free Press, 1975).

23 See *Commission des droits de la personne v Canada (AG)*, [1982] 1 SCR 215, 134 DLR (3rd) 17 [*Commission des droits* cited to SCR].

24 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].

II. FROM RIGHTS PROTECTION/ PROPORTIONALITY TO DEFERENCE/STATUS

Enough time has now passed that it is possible to detect some historical trends in the evolving section 7 jurisprudence. In this section, I will trace three different trajectories in the jurisprudence. The starting point of all three is a trilogy of landmark section 7 decisions made by the Supreme Court in 1985.²⁵ These cases embraced a broad reading of the *Charter* in their rejection of the idea that review within section 7 was limited to matters of procedural fairness. In these three cases, the Court found that section 7 could address substantive matters, prerogative powers and protect the rights of non-citizens. Although these 1985 decisions remain good law, it will be seen that a number of post-9/11 decisions have retreated from them and raised the possibility that section 7 may not protect non-citizens from deportation or transfer to torture and that courts may not be able to provide *Charter* remedies that affect the foreign affairs and diplomatic prerogatives of governments.

A. From *BC Motor Vehicle Reference* to *Suresh*

The Court's rejection, in *BC Motor Vehicle Reference*, of the idea that section 7 was limited to the protection of procedural fairness came as a surprise to many. In the decision, Justice Lamer dismissed concerns that the court would become an unrepresentative super legislature, and stressed that a democratic decision had been made with the enactment of the *Charter*, to give the courts more power.²⁶ This power, he wrote, would not be used indiscriminately but rather would be tailored to the protection of basic rights informed by the protections of the other legal rights. Some of these other legal rights were not simply concerned with procedural matters such as the presumption of innocence, but embraced substantive concerns about unreasonable searches, arbitrary detention and cruel and unusual punishment or treatment. Torture would be recognized in later cases as a paradigmatic form of cruel and unusual treatment.²⁷

The Court's enthusiasm to make something meaningful of the *Charter* was also demonstrated by its warning that many other section 7 rights might emerge over time. At the same time, the Court, arguably prematurely, suggested that violations of section 7 would only be justified under section 1 in "exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."²⁸ This decision was part of a series of early *Charter* decisions in which the Supreme Court distanced itself from its oft-criticized restrictive interpretation of the *Canadian Bill of Rights*.²⁹

25 *Operation Dismantle*, *supra* note 7; *BC Motor Vehicle Reference*, *supra* note 17; *Singh*, *supra* note 19.

26 *Supra* note 17 at 497.

27 See *Canada v Schmidt*, [1987] 1 SCR 500 at 522, 39 DLR (4th) 18 [*Schmidt* cited to SCR]; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438 [*Kindler* cited to SCR].

28 *BC Motor Vehicle Reference*, *supra* note 17 at 518.

29 *Canadian Bill of Rights*, SC 1960, c 44, reprinted in RSC 1985, App III.

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Those caught up in the excitement of the *BC Motor Vehicle Reference* and related early *Charter* cases would have had difficulty imagining a time 17 years hence, when, in the immediate aftermath of the terrorist attacks of 9/11, the Supreme Court would assert the need to defer to the executive because of its access to information and expertise and its democratic legitimacy.³⁰ Even more troubling would be the Court's finding that deportation to torture—a shameful and brutal practice that constitutes cruel and unusual treatment and violates Canadian and international law—could be justified in:

[E]xceptional circumstances ... either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1 We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.³¹

It is tempting to say that too much may have been made of the *Suresh* exception. It constitutes only one paragraph of a long judgment that recognized a general rule that deportation to torture violates both international law and the Canadian *Charter*. Although the government has argued for the *Suresh* exception in security certificate cases and an alleged Sikh terrorist associated with the Babbar Khalsa has been deported to India³² in circumstances that were determined to have posed a real risk of torture,³³ no Canadian court has yet applied *Suresh* to knowingly and explicitly deport someone to torture. In *Jaballah (Re)*,³⁴ the Federal Court explicitly rejected any idea that exceptional circumstances justified deportation

30 *Suresh*, *supra* note 4 at para 33.

31 *Ibid* at para 78.

32 In interim reasons for decision, Simpson J stated, "it is my conclusion that, in an exceptional/extraordinary case, it is open to the Minister to balance the Risk and the Threat and order a deportation to torture," *Sogi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 853 at para 15, [2005] 3 FCR 517. She later delayed her decision as to whether deportation to torture was justified in the particular case (*ibid* at para 23). Mr. Sogi was eventually deported to India, but after the Minister's delegate ruled that he would not be tortured given the changing circumstances in the Punjab. This decision was made despite having made two previous decisions that Mr. Sogi would be tortured if returned to India, but that deportation was justified under the *Suresh* exception, see *Sogi v Canada (Minister of Citizenship and Immigration)* 2007 FC 108 (available on QL) at paras 10-11.

33 United Nations Committee Against Torture, 39th Sess, Dec, UN Doc CAT/C/39/D/297/2006 (2007) at para 10.10, online: <http://www.worldcourts.com/cat/eng/decisions/2007.11.16_Bachan_Singh_Sogi_v_Canada.htm>. The United Nations Committee Against Torture decided that Canada had violated the Convention Against Torture by deporting Mr. Sogi in July 2006. The Committee concluded: [T]aking account in particular of the fact that the complainant is allegedly a member of what is regarded as a terrorist organization, and that he was wanted in his country for attacks on several public figures in Punjab, the Committee considers that, by the time he was returned, the complainant had provided sufficient evidence to show that he personally ran a real and foreseeable risk of being subjected to torture were he to be returned to his country of origin. The Committee therefore concludes that, under the circumstances, the complainant's removal to India constituted a violation of article 3 of the Convention.

34 *Jaballah (Re)*, 2006 FC 1230, [2007] 148 CRR (2d) 1.

to Egypt. The European Court of Human Rights has declined to follow the *Suresh* exception, and various international bodies have reminded Canada of the absolute nature of its obligations not to be complicit in torture.³⁵ The government has also affirmed its rejection of torture, both through the creation of commissions of inquiry into the conduct of Canadian officials in relation to Canadians who were tortured abroad, and through new amendments to the *Immigration and Refugee Protection Act* that exclude the use of evidence obtained through torture or cruel and degrading treatment.³⁶ If Canada is not prepared to use evidence derived from torture, then surely it would not deliberately and knowingly deport someone to a substantial risk of torture. All of these developments suggest that Canada rejects torture, even if the Supreme Court in the immediate aftermath of 9/11 was not prepared to exclude it absolutely.³⁷ In some ways, the *Suresh* exception, like the Court's upholding of capital punishment³⁸ under the *Canadian Bill of Rights*, may turn out to be a bump in the road towards greater awareness and condemnation of the practice.

At the same time, the *Suresh* exception cannot be ignored. As Justice Jackson argued in his dissent in *Korematsu v United States*, the constitutional approval of a practice by the Court means that the principle henceforth "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes ..." and has "a generative power of its own."³⁹ The fact that the *Suresh* exception exists has allowed the government to make plausible claims that there is still a connection with immigration law and its ultimate remedy of deportation in the remaining security certificate cases. Without such a claim, the deportation of suspected terrorists to states that are suspected of using torture is an impossibility, which would strongly suggest that security certificates are being abused as an administrative detention and control order regime that has not been explicitly authorized by Parliament.

Even if courts are unlikely to find that the *Suresh* exception actually applies in any of the remaining security certificate cases, it remains as a type of threat. The idea that courts would contemplate risking and condoning the torture of a security certificate detainee ultimately tells us something about the status (or, more accurately, the lack of status) of the non-citizens who are the only persons subject to the *Suresh* certificates. The *Suresh* exception goes beyond the calls by Professor Alan Dershowitz⁴⁰ and others for judicial torture warrants in so-called ticking

35 *Saadi v Italy*, [2008] ECHR 179 (BAILII), (2009) 49 EHRR 30.

36 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 83(1.1).

37 For an approach that examines the degree of acceptance and shared understanding of the norm against torture, see Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) ch 5.

38 See *Miller v The Queen*, [1977] 2 SCR 680, 70 DLR (3d) 324.

39 323 US 214 (1944) at para 246.

40 *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) ch 4.

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bomb cases or the strained reasoning of Judge Jay Bybee and Professor Yoo in the torture memos;⁴¹ the *Suresh* exception contemplates a deliberate judicial decision to deport someone to the substantial risk of torture. Ultimately, it suggests that those who may be subject to the *Suresh* exception are less than human—it suggests that they can be expelled to torture so that Canada need not assume the risk that they may commit acts of terrorism on Canadian soil. In this sense, *Suresh* is about status and it is consistent with the Court's subsequent blind spot concerning the equality claims of non-citizens detained under security certificates in *Charkaoui I*.⁴² The fact that non-citizens have no right to remain in Canada becomes an excuse for the use of secret evidence that would never be tolerated for Canadian citizens. An extreme possibility of the *Suresh* exception is that non-citizenship status becomes an excuse for deporting people to torture. The *Suresh* exception is ultimately and regrettably about the possibility that non-citizens subject to it may have a less than human status.

Suresh is not only about status; it is also about deference. The *Suresh* exception has not been, and hopefully will never be, employed by the courts in a final decision. What has been used, however, is a highly deferential form of review of the executive's determination of whether a non-citizen will face a substantial risk of torture if deported. As mentioned previously, the Supreme Court of Canada invoked Lord Hoffmann's argument that courts should defer to the executive, both because of its expertise and access to secret information and its democratic legitimacy.⁴³ The Court in *Suresh* held that the Minister's decision should only be set aside if it were found to be patently unreasonable. This standard was applied in the companion case of *Ahani v Canada (Minister of Citizenship and Immigration)* to allow the deportation of a person to Iran.⁴⁴ It is not known what happened to Mr. Ahani when he was returned to Iran and it may be that the Minister was correct in finding that he would not be tortured, but it is also clear that others have been tortured in Iran. The *Suresh* standard of review has enjoyed an international legitimacy that the *Suresh* exception has not enjoyed; the House of Lords recently cited *Suresh* as a reason for deferring to the executive's finding that a person could be deported to Algeria on the basis of assurances that he or she would not be tortured.⁴⁵

The next use of *Suresh* may well come in evaluating executive determination of whether Mohamed Harkat and perhaps other security certificate detainees can be deported without a substantial risk of torture. Although this exercise would not carry the explicit warnings that would accompany any use of the *Suresh* exception, it would involve an implicit judgment about the level of risk of torture if a detainee were deported. This risk would be determined not by a full proportionality analysis

41 Karen J Greenberg & Joshua L Dratel, eds, *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005).

42 *Supra* note 11.

43 *Supra* note 4 at para 33.

44 2002 SCC 2, [2002] 1 SCR 72.

45 *RB (Algeria) v Secretary of State for the Home Department*, [2009] UKHL 10 (BAILII) at paras 116-17, [2009] 2 WLR 512.

that would examine whether there are less rights-invasive means of protecting national security, or a merits-based balancing of the cases for and against deportation, but rather by an *a priori* judicial deference to the executive because of its claim to expertise, access to secret information and democratic legitimacy. Both the *Suresh* exception and the deferential *Suresh* standard of review are miles away from the animating sense in *BC Motor Vehicle Reference* that the courts possess a mandate to protect the most basic rights, and that any limits on those rights will require a high standard of justification.

B. From *Operation Dismantle* to *Khadr II*

In terms of the role of section 7 in the national security context, the Court's decision in *Operation Dismantle* was even more important than its decision later the same year in *BC Motor Vehicle Reference*. *Operation Dismantle* involved a peace group's challenge of the government's decision to allow the United States to test its then new cruise missiles in Canada's north. The government argued that the decision was non-justiciable under the *Charter* because it involved prerogative powers related to foreign and military affairs. The Supreme Court rejected this position, with Chief Justice Dickson stating that he had "no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts"⁴⁶ while concluding that the statement of claim should be struck out because of the impossibility of demonstrating a connection between the Canadian government's actions in allowing the testing and an increased threat of nuclear war. Justice Wilson held that the agreement between Canada and the United States to allow the testing was reviewable under the *Charter* because it could be subject to legislation by Parliament. She stressed issues of rights protection in concluding that it was the obligation of courts to decide whether impugned governmental actions violated rights and that this was distinct from second-guessing the wisdom of its actions.⁴⁷

Justice Wilson also stressed issues of proportionality when she suggested that legislative authorization for mandatory conscription and overseas service might well constitute a reasonable limit on the conscriptee's section 7 rights, but unauthorized "press gang" tactics or forcing people to participate in the testing of deadly nerve gas would not survive *Charter* review.⁴⁸ In her view:

Section 1 ... is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and

46 *Supra* note 7 at 459.

47 *Ibid* at 472.

48 *Ibid* at 472-73.

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the rule of law. It obviates the need for a “political questions” doctrine and permits the Court to deal with what might be termed “prudential” considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.⁴⁹

The Court has not retreated from its rejection of a political question doctrine in *Operation Dismantle* and has considered many matters such as the treatment of Afghan detainees that might have been held not to be justiciable in the United States on grounds of political questions and separation of powers.⁵⁰ The Court’s decision in *Khadr II*,⁵¹ however, suggests that separation of powers concerns may limit the remedies it is prepared to order. In that case, the Court reversed a trial judge’s order that Canada request Khadr’s repatriation from the United States on the basis that the remedy “gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada’s broader national interests.”⁵² Although deference to the executive’s prerogative powers over foreign affairs and balancing of competing interests will not preclude the Court from deciding whether the result violates the *Charter*, it may nevertheless restrain the ability of the Court to devise *Charter* remedies.

The precise meaning of the Court’s remedial approach in *Khadr II* is unclear. Justice Zinn’s interpretation of the Court’s decision in subsequent litigation suggests that the Court in *Khadr II* was not imposing hard restraints on judicial remedial powers but was only giving the government time to select among adequate remedies. He indicated that courts could indeed order the government to make a diplomatic request for repatriation if that was the only effective remedy available.⁵³ Another reading, favoured by Federal Court of Appeal Chief Justice Blais, in the course of staying the decision of Justice Zinn, found that courts lack the power “to ‘supervise’ the exercise of the Crown’s prerogative” especially if the effect of such supervision would be to require the government to make a diplomatic representation.⁵⁴ Even if the interpretation of Justice Zinn is accepted, the Supreme Court’s reluctance to fashion the remedy is a far cry from Justice Wilson’s finding that the judiciary would be required to intervene in the face of arbitrary “press gang” tactics, which could not be saved under section 1 of the *Charter*.

Chief Justice Blais’s reading of *Khadr II*, which precluded judicial remedies that require the government to make diplomatic representations, suggests that

49 *Ibid* at 491.

50 See e.g. *Munaf v Geren*, 553 US 674 (2008) (allegations by American citizens in Iraq that their transfer to Iraqi authorities would result in torture are matters to be addressed by the political branches and not second-guessed by the judiciary).

51 *Supra* note 9.

52 *Ibid* at para 39.

53 *Khadr v Canada (Prime Minister)*, 2010 FC 715 at para 91, [2010] 4 FCR 36.

54 *Khadr v Canada*, 2010 FCA 199 at paras 14, 32, 321 DLR (4th) 448.

the Court has reintroduced a reflexive deference to the state. Such a deferential approach might also be supplemented by a concern about Canada's status as a sovereign nation. One concern might be that the courts should not tie or force the government's hands in its complex negotiations with the United States on security matters. There may be much political wisdom in this approach, but it conflicts with the Court's refusal in *Operation Dismantle* to abstain from reviewing the government's agreement to allow the United States to test cruise missiles over Canadian territory. Both matters involved delicate, secret and polycentric foreign policy decisions in which it could be argued that the government should be free from judicial interference in deciding what was in the national interest. In *Operation Dismantle*, however, the Court refused to sacrifice *Charter* claims made by a peace group, whereas in *Khadr II*, it effectively sacrificed a remedy that might have assisted a vulnerable person.

Judicial refusal, reluctance or hesitation to require the government to make diplomatic representations on behalf of Guantanamo Bay detainees would not necessarily be out of line with the reluctance of other courts to require diplomatic representations to be made.⁵⁵ Nevertheless, it does compromise traditional visions of rights protection that stress that courts have a duty to fashion effective remedies for proven rights violations. The remedial issue in the *Khadr II* case has been declared moot because, having not received an effective remedy for the *Charter* violations established in his Canadian litigation, and undoubtedly for other reasons, Omar Khadr decided to plead guilty before an American military commission.⁵⁶

C. From *Singh* to the Afghan Detainee Case

By any measure, 1985 was a good year for section 7 of the *Charter*. As discussed previously, the Supreme Court made momentous decisions in both *BC Motor Vehicle Reference* and *Operation Dismantle*. A third decision involving section 7 was that of Justice Wilson, joined by Chief Justice Dickson and Justice Lamer, in *Singh*.⁵⁷ The case involved non-citizens who wished to challenge initial denials of refugee status by an advisory committee and the Minister. At the very start of her judgment, Justice Wilson recognized that the applicants were non-citizens who did not have a right to remain in Canada,⁵⁸ but this did not determine the issue of whether they had

55 The British courts have held that the issue of diplomatic representations with respect to Guantanamo detainees are justiciable, but have stopped short of ordering governments to make diplomatic representations: see *Abbasi v Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598 (BAILII), 2002 WL 31452052; *Al Rawi v Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWHC 972 (Admin) (BAILII), [2006] HRLR 30 (WL UK). The South African Constitutional Court reached a similar decision in *Kaunda v President of South Africa* (2004) 10 BCLR 1009, 2004 SACLR LEXIS 19.

56 *Khadr v Canada (Prime Minister)*, 2011 FCA 92, 333 DLR (4th) 303.

57 *Supra* note 19.

58 *Ibid* at 189.

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been treated fairly in accordance with the principles of fundamental justice under section 7. Justice Wilson rejected the approach taken under the *Canadian Bill of Rights*, which had stressed that immigration was a privilege rather than a right, concluding:

I do not think this kind of analysis is acceptable in relation to the *Charter*. It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re examined.⁵⁹

The focus under the *Charter* would be on rights and not the status of an individual as a privileged guest in the country.

In applying section 7 of the *Charter*, Justice Wilson noted that its text referred to every individual and that this stood in contrast to other *Charter* rights that were explicitly limited to Canadian citizens. She also rejected the American distinction between applying the bill of rights to those within the United States and not applying it to those outside the United States, as tied to the American political question doctrine and the rewarding of those who entered the country illegally over those who presented their cases openly at the first opportunity.⁶⁰ In this way, she contemplated that section 7 of the *Charter* would apply beyond the physical borders of Canada.

Justice Wilson continued to interpret the right broadly by holding that the threat or risk that a person would be returned to face persecution infringed the applicant's right to security of the person under section 7. The focus in *Singh* was on any threat to the person's well being, as opposed to the focus in *Suresh* on whether there was a substantial risk of torture. Justice Wilson then went on to hold that the principles of fundamental justice were breached by the denial of an oral hearing in circumstances where credibility could be critical and where the refugee applicant would not have access to all the material that might be considered by the advisory board.

Under section 1, Justice Wilson stressed the importance of the government justifying the necessity of the rights infringement and warned that:

[T]he guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1.⁶¹

59 *Ibid* at 209.

60 *Ibid* at 210.

61 *Ibid* at 218-19.

Although she did not conduct a full proportionality analysis, it was clear from the decision that the violation had not been justified under section 1 and that the government would bear a heavy burden in justifying the need to violate rights to obtain important objectives. As with the other 1985 decisions, *Singh* revolved around issues of rights protection and proportionality. It demonstrated little interest in the status of non-citizens or claims that courts should defer to government on matters such as immigration and foreign affairs.

The path from *Singh* to the Federal Court of Appeal's finding in *Amnesty International*⁶² that section 7 of the *Charter* would not apply to Canada's Afghan detainees even if they were transferred to torture is a complex one that involves not only section 7 but also changing approaches to the extra-territorial application of the *Charter*. As seen above, Justice Wilson was prepared to contemplate the idea that those outside Canada could benefit from section 7 and she also stressed that section 7 applied to everyone, not just citizens. In subsequent cases, culminating in *R v Cook*,⁶³ the Court developed a more formal test for extra-territorial application of the *Charter*, one that was guided by concerns about whether extra-territorial application of the *Charter* would adversely affect the sovereignty of another country. In many cases, including the extra-territorial application of the *Charter* contemplated in *Singh*, this would not be a problem, especially if compliance with the *Charter* simply increased the duty of fairness on Canadian officials when they operated outside of Canada, and did not produce any functional conflict with foreign laws and practices.

In *Hape*, however, a majority of the Supreme Court took a more categorical approach based on more abstract concerns about respecting the equality and sovereignty of all states, and comity between states.⁶⁴ The majority of the Court enunciated a new rule: the *Charter* would not apply outside of Canada, even in situations where, as under *Cook*, observance of the *Charter* by Canadian officials would not interfere with the sovereignty of another country. The new rule required the consent of the other country to the application of the *Charter*, and this new rule was defended as necessary to respect the sovereignty of all states.⁶⁵ The demands of protecting rights and ensuring that, where possible, Canadian officials respected the *Charter*, were subordinated to the formal principle of recognizing the self-governing status of all sovereign states.

The majority in *Hape* did, however, contemplate that the demands of comity "may give way where the participation of Canadian officials in investigative activities sanctioned by foreign law would place Canada in violation of its international

62 *Supra* note 15.

63 [1998] 2 SCR 597, 164 DLR (4th) 1.

64 *Supra* note 24 at paras 40-52.

65 LeBel J articulated the new rule in quite abstract and categorical terms when he stated: "As the supreme law of Canada, the *Charter* is subject to the same jurisdictional limits as the country's other laws or rules. Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent," *ibid* at para 69.

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obligations in respect of human rights.⁶⁶ This is an important albeit unclear exception to the general rule of no extra-territorial application of the *Charter*. On the one hand, it could indirectly constitutionalize all of Canada's international human rights obligations as principles of fundamental justice under section 7 of the *Charter*. This could have the effect of moving Canada from a dualist legal structure to a more monist one in which international law is incorporated into domestic law, at least for matters involving the extra-territorial application of the *Charter*. Such a reading would suggest that courts could intervene if Canadian troops in Afghanistan transferred detainees to torture by Afghan officials, given the clear international human rights obligations on Canada to not be complicit with torture in any circumstances.

On the other hand, there is also a possibility that the *Hape* exception is much more limited and will only be applied in cases where Canadian courts could enforce such international human rights obligations because of the impact of such conduct "on *Charter* rights in Canada."⁶⁷ Under such a restrictive reading, Canadian courts would be powerless to prevent the transfer of Afghan detainees to torture because such conduct would have no effect on *Charter* rights in Canada, even though it was in breach of Canada's international obligations not to be complicit in torture.

While the Supreme Court had found in *Hape* that "[d]eference to foreign law ends where clear violations of international law and human rights begin,"⁶⁸ the Federal Court of Appeal in *Amnesty International* concluded that, this did not mean that the *Charter* would apply, even if Afghan detainees were being transferred to torture.⁶⁹ Instead, the Court of Appeal emphasized the need to consider all the circumstances, and it concluded that the *Hape* exception, as applied in *Canada (Justice) v Khadr*,⁷⁰ could be distinguished on the basis that Omar Khadr is a Canadian citizen while the Afghan detainees are foreigners, "with no attachment whatsoever to Canada or its laws . . ."⁷¹ The approach of the Court of Appeal in refusing to apply the *Charter* even if Canadian Forces were clearly violating Canada's international human rights obligations by transferring Afghan detainees to torture represents a problematic reliance on status—an individual's lack of citizenship and connection to Canada—to limit *Charter* obligations. It is regrettable that status would be used in this way, particularly in the face of the clear language of section 7 that extends rights to security of the person to "[e]veryone,"⁷² and in light of an agreed statement

66 *Ibid* at para 101.

67 *Ibid*.

68 *Supra* note 24 at para 52.

69 *Supra* note 15 at para 14.

70 2008 SCC 28, [2008] 2 SCR 125.

71 *Supra* note 15 at para 14.

72 *Charter*, *supra* note 1, s 7. For similar arguments concerning the relevance that the Federal Court of Appeal ascribes to a lack of Canadian citizenship, and its interpretation of the Supreme Court's decision in *Khadr* as limited to cases involving Canadian citizens, see Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 53.

of facts that assumed that the Afghan detainees would be transferred to a substantial risk of torture. As with the *Suresh* exception of deportation to torture, the status-based reasoning of the court in the Afghan detainee case comes dangerously close to ignoring the status of those who would be tortured as human beings.

The Federal Court of Appeal, in a case involving Guantanamo detainees seeking disclosure of intelligence obtained from Canadian officials who interrogated them at Guantanamo, has similarly restricted the extra-territorial application of section 7 of the *Charter* and distinguished the Supreme Court's decision in *Khadr* on the basis that the applicants did not have status as Canadian citizens.⁷³ It is regrettable that the Supreme Court did not grant leave in either this or the Afghan detainee case, as these cases provided an opportunity to clarify whether the extra-territorial application of section 7 of the *Charter* is categorically limited to Canadian citizens.⁷⁴ Such a holding would be in contrast to both the plain language of section 7, which protects the most basic rights of "everyone," and to the rationale of the *Hape* exception that would allow extra-territorial application of the *Charter* to enforce Canada's international human rights obligations to all people.

III. FROM DEFERENCE/STATUS TO RIGHTS PROTECTION/ PROPORTIONALITY

The previous section suggested that Canadian courts have strayed far from the original vision of rights protection and proportionality that animated early *Charter* cases such as *BC Motor Vehicle Reference*. This is consistent with a narrative that suggests that the Dickson Court was particularly strong and understood the deep structure of the *Charter* while subsequent Courts have struck a more cautious and pragmatic tone.⁷⁵ Although there may be some truth to this, it will be suggested in the next section that, in the national security context at least, it obscures some pockets of deference in the early *Charter* jurisprudence. One particular outlier in the early *Charter* jurisprudence was the Court's initial approach to extradition, where it stressed the need to defer to the domestic executive and to foreign governments. As will be seen, it is only in the last decade that the Court has more aggressively asserted principles of rights protection and proportionality in the extradition context.

The Court's post-9/11 record is also more complex than the narrative of the previous section suggests. Although the *Suresh* exception and the Afghan detainee case are low points that reveal a judicial willingness to condone torture, there are other post-9/11 cases that have challenged the government's use of secret evidence

73 *Slahi v Canada (Minister of Justice)*, 2009 FCA 259 at para 4, 394 NR 352.

74 For additional arguments about why the Supreme Court should have granted leave to hear the Afghan detainee case, see Kent Roach "The Supreme Court at the Bar of Politics': The Afghan Detainee and Omar Khadr Cases" (2010) 28:1 NJCL 115 at 132-41.

75 See e.g. David M Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990).

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and its claims to be able to destroy raw intelligence that may be relevant in legal proceedings. The Supreme Court did not confront such issues in the early years of the *Charter*. Given its cheerful pre-*Charter* acceptance of the idea that governments could make absolute and unreviewable claims of secrecy,⁷⁶ it is doubtful that even the Dickson Court would have been prepared to challenge secrecy claims, even though such claims can make much national security activities virtually unreviewable and immune from the rule of law.

A. From *Mellino* and *Kindler* to *Burns* and *Ferras*

One exception to the Dickson Court's early enthusiasm for applying principles of rights protection and proportionality were early *Charter* cases involving extradition. Although not all extradition cases involve national security, they do involve interactions on security issues with other nations. The Court's early decisions were dominated by concerns about respecting and deferring to other sovereign states and maintaining comity with them, and by the task of ensuring that Canada would not become a safe haven for fugitives.

In *Argentina v Mellino*, the Supreme Court, over a dissent by Justice Lamer, rejected a delay challenge to a second extradition hearing and stressed the dangers of supervising "the conduct of the diplomatic and prosecutorial officials of a foreign state ..." under section 7.⁷⁷ In *Schmidt*, Justice La Forest, for the Court, refused to say that an extradition would never violate section 7 of the *Charter*, but stressed the need to defer to executive action and the dangers of imposing Canadian standards on other sovereign countries.⁷⁸ Justice Wilson took a more robust approach and emphasized the need to apply the *Charter* to the extradition decision, arguing that this would not involve extra-territorial application of the *Charter*.⁷⁹

The deferential line of authority reached its highpoint in the 1991 decisions in *Kindler*⁸⁰ and *Reference Re Ng Extradition (Can.)*,⁸¹ both of which held that extradition to face the death penalty in the United States would not violate section 7 of the *Charter*. Justice La Forest, for the majority of the Court in *Kindler*, stressed both the need to defer to the government and the danger of Canada becoming a safe haven for criminals. He distinguished extradition to face the death penalty from other practices, such as extradition to torture, that would shock the conscience. The dissenting judges, however, concluded that the death penalty would violate the *Charter* and that the government had not even asked the United States for assurances that the death penalty would not be applied. They concluded that the

76 *Commission des droits*, *supra* note 23.

77 [1987] 1 SCR 536 at 551, 40 DLR (4th) 74.

78 *Supra* note 27 at 527.

79 *Ibid* at 531-35.

80 *Supra* note 27.

81 [1991] 2 SCR 858, 84 DLR (4th) 498.

death penalty was cruel and unusual punishment, and emphasized the availability of less rights-invasive means to achieve international crime co-operation, such as extradition with assurances that the death penalty would not be applied.

The Supreme Court's 2001 decision in *United States v Burns*⁸² represents perhaps the Court's most well known change in interpreting section 7 of the *Charter*. The Court in this case downplayed the importance of the shock the conscience test, stressing that the real issue was compliance with the principles of fundamental justice. It took note of the growing awareness of wrongful convictions and changing attitudes towards the death penalty in holding that extradition to face the death penalty would generally violate section 7 of the *Charter*. The Court then concluded that comity, international crime control and the preventing of Canada becoming a safe haven for criminals could be achieved in a less rights-invasive manner, through extradition with assurances that the death penalty would not be applied. This case fits into a pattern of greater rights protection not standing alone but being coupled with proportionality analysis. The end result, as in *Suresh*, was the creation of a less than absolute rule. Nevertheless, the *Burns* exception has emerged as less relevant than the *Suresh* exception. It at least contemplates a legal decision to execute a person as opposed to the extra-legal conduct of torture.⁸³

Burns was not the only change to the Court's approach to extradition. In the companion case of *United States of America v Cobb*,⁸⁴ the Court stressed the important role played by section 7 throughout the extradition process; the Court held that extradition proceedings should be stayed under section 7 for an abuse of process in situations involving judges threatening maximum penalties for accused individuals who fought extradition, and prosecutors threatening that a fugitive could be raped in prison. This line of cases also stressed the importance of the extradition judge being able to provide remedies for *Charter* violations, thus affirming the important remedial aspect of rights protection that seems to be missing from cases such as *Khadr II*.

In the 2006 case of *United States of America v Ferras*,⁸⁵ the Court modified pre-*Charter* approaches and stressed the need for a meaningful judicial hearing in Canada before extradition, which would stand distinct from the usual judicial deference to the Minister of Justice's actual surrender decision. The Court warned about the dangers of extraditing on evidence that does not satisfy a threshold of reliability

82 *Supra* note 8.

83 One possible way to erode *Burns* is in cases where the Minister of Justice might conclude that there is no realistic prospect of the death penalty being applied, even though there is some legal possibility of such a penalty. In the non-death penalty case of *Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761, the Court stressed that it would defer to the Minister's balancing of various factors in determining whether extradition would shock the conscience and violate section 7. But see *Németh v Canada (Minister of Justice)*, 2010 SCC 56, [2010] 3 SCR 281 for a more recent decision reversing the Minister's decision to surrender Roma refugees to face fraud charges in Hungary.

84 2001 SCC 19, [2001] 1 SCR 587.

85 2006 SCC 33, [2006] 2 SCR 77.

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or provide sufficient evidence for a properly instructed jury to convict. The *Ferras* standard—ensuring that committals are justified and that Canadian judges do not “rubber stamp” extradition requests—may be of particular relevance in terrorism and other security cases.⁸⁶ For example, the Canadian government withdrew unsourced and potentially unreliable intelligence in the Hassan Diab extradition case.⁸⁷ The Ontario Court of Appeal upheld a stay of proceedings in the Abdullah Khadr extradition case on the basis of misconduct and mistreatment by the United States and Pakistan in his capture and detention without judicial review in Pakistan.⁸⁸ In cases where the requesting state has broader security laws than Canada or as in this case in a number of states including now the United States, the potential for military detention and trial in terrorism cases, there may also be concerns about abuse of process or other rights violations that would shock the conscience. In all extradition cases, there will have to be double criminality and sufficient evidence for a properly instructed Canadian jury to convict. *Ferras* is not blind to the need for comity or international co-operation, but it establishes a structured process that allows challenges to the requesting country’s case, even while that case enjoys a presumption of reliability. *Ferras* is also consistent with *Burns* because it makes reliability concerns, which are often associated with miscarriages of justice, relevant to the extradition process.

B. From *Chiarelli* to *Charkaoui I*

In the 1992 *Chiarelli* decision, the Supreme Court unanimously upheld a predecessor to the current security certificate regime under section 7 of the *Charter*. The Court stressed that, “in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying

86 *Ibid* at paras 34, 41. The Court went on to conclude:

[T]hat to deny an extradition judge’s discretion to refuse committal for reasons of insufficient evidence would violate a person’s right to a judicial hearing by an independent and impartial magistrate—a right implicit in s. 7 of the *Charter* where liberty is at stake. It would deprive the judge of the power to conduct an independent and impartial judicial review of the facts in relation to the law, destroy the judicial nature of the hearing, and turn the extradition judge into an administrative arm of the executive. The process of assessing whether all the boxes are ticked and then ordering committal is not an adjudication, but merely a formal validation. In so far as the majority view in the pre-*Charter* case of *Shephard* suggests a contrary view, it should be modified to conform to the requirements of the *Charter*,” *ibid* at para 49.

87 *France v Diab*, 2011 ONSC 337 (available on QL) at paras 146-48. I disclose that I provided expert witness testimony on the potential unreliability of unsourced intelligence for Dr. Diab. Dr. Diab was committed for extradition on the basis of handwriting analysis despite the extradition judge having concerns about the reliability of that evidence also submitted by the requesting state.

88 *United States of America v Khadr*, 2011 ONCA 358, 106 OR (3d) 449. For an examination of this case and the possibility that other extraditions to the United States may be challenged because of the option of military detention and trial for non-American citizens suspected of involvement with al-Qaeda, see Roach, “Uneasy Neighbors,” *supra* note 10.

immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.⁸⁹ In this way, the focus was placed on the status of the section 7 applicant as a non-citizen with no rights to enter or remain in Canada. The Court also deferred to the “legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country.”⁹⁰ The decision thus stressed both the status of non-citizens and deference to the government’s policy choices in deciding whom to exclude from Canada.

On the issue of the use of secret evidence not disclosed to the non-citizen, the Supreme Court reversed the Federal Court of Appeal, which had unanimously ruled that the use of secret evidence violated section 7, with two judges holding that the violation could not be upheld under section 1 of the *Charter*. The Supreme Court held on the facts of *Chiarelli* that the non-citizen had received sufficient disclosure to accord with the principles of fundamental justice and did not need to be given access to the “details”⁹¹ of the police investigation. More generally, however, the Court stressed the importance of secrecy, quoting with approval Lord Denning’s overheated Cold War rhetoric that information should not be disclosed “if there is any risk that it would lead to the sources being discovered. The reason is because, in this very secretive field, our enemies might try to eliminate the source of information.”⁹² This approach, like the Court’s reliance in *Suresh* on Lord Hoffmann’s warnings in *Rehman* about the special information and expertise of the executive, stressed the need for courts to defer to what Clive Walker has called the “securitocracy”⁹³ over issues of both rights protection and proportionality. It is also consistent with the Court’s unanimous 1982 pre-*Charter* decision that held it was within the constitutional powers of both federal and provincial governments to make secrecy claims absolute and unreviewable by the courts.⁹⁴

Given *Chiarelli*, the security certificate regime seemed safe from facial constitutional challenge even as it was used more frequently from 2001 to 2003 as Canada’s main form of anti-terrorism law. Nevertheless, in the 2007 *Charkaoui I* case, the Court ruled that the use of secret evidence in the security certificate regime without adequate substitutes for knowing and challenging the case was an unjustified violation of section 7 of the *Charter*. This case, like *Burns* and *Ferras*, accepts the possibility of executive error, and as a safeguard against such error allows adversarial challenge. The *Charkaoui I* decision, at least as it relates to section 7 of the *Charter*, places less emphasis on the status of the applicants as non-citizens with

89 *Supra* note 20 at 733.

90 *Ibid* at 734.

91 *Ibid* at 746.

92 *Ibid* at 745, citing *R v Secretary of State for the Home Department, ex parte Hosenball*, [1977] 3 All ER 452 at 460 (CA), [1977] 1 WLR 766.

93 Clive Walker & Jim Broderick, *The Civil Contingencies Act 2004: Risk, Resilience, and the Law in the United Kingdom* (New York: Oxford University Press, 2006) at 94.

94 *See Commission des droits, supra* note 23.

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no right to remain in Canada, and more emphasis on the severe effects of prolonged detention and deportation.⁹⁵

The Court in *Charkaoui I* stressed that, while security concerns were an important contextual factor, they “cannot be permitted to erode the essence of section 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*.”⁹⁶ The Court held that section 7 was violated because the use of secret evidence violated the detainees’ right to know and meet the case against them. It then held that even though the use of secret evidence was rationally connected to the important objective of protecting national security and intelligence sources, the limit on the section 7 rights was not justified because there were many other alternatives that allowed adversarial challenge to secret evidence. As such, the decision follows the more traditional division between the rights definition and the limitation phases of *Charter* adjudication: stages that have at times been collapsed, following the Court’s indication in *BC Motor Vehicle Reference* that section 7 violations would rarely be saved under section 1.

An important implication of proportionality analysis is that it generally contemplates that legislatures can respond to judicial decisions by finding less rights-invasive means to pursue the same legislative objectives. The Court facilitated dialogue between the Court and Parliament in *Charkaoui I* by suspending the declaration of invalidity for a year. Parliament responded by enacting a special advocate scheme that has subsequently been upheld as an adequate substitute for full disclosure.⁹⁷ Under this scheme, special advocates have assisted in subsequent decisions that have revealed flaws in the secret evidence, including those relating to the reliability of human sources and the use of evidence obtained through torture.

Charkaoui I also represented something of a return to the *BC Motor Vehicle Reference* approach of allowing the other legal rights in the *Charter* to inform the content of section 7 rights. The Court found that some restrictions on timely judicial review of the detention of foreign nationals violated section 9 of the *Charter*. It also devoted extensive analysis to the question of whether continued detention and restrictions on liberty under security certificates would result in cruel or unusual treatment or punishment. It concluded that violations of sections 7 and 12 could occur if the detainee did not have regular opportunities to review the detention and restrictions on liberty. The Court would not rule out the possibility

95 Unfortunately, the Court’s summary conclusion in *Charkaoui I*, that the scheme did not violate section 15 of the *Charter*, relied on the same status concerns that animated *Chiarelli*; the Court rejected the equality claim and avoided full equality analysis simply by asserting that “s. 6 of the *Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*” *Charkaoui I*, *supra* note 11 at para 129.

96 *Ibid* at para 27.

97 *Harkat v Canada* 2012 FCA 122.

“of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*.”⁹⁸ The incorporation of substantive section 12 concerns about cruel and unusual treatment in *Charkaoui II*⁹⁹ can be contrasted with the Court’s refusal in *Suresh* to resolve the consequences created by the concurrent determinations that, while torture in Canada would violate section 12,¹⁰⁰ deportation to torture may be constitutional. Although the reading of section 7 in light of the other legal rights by Justice Lamer has been criticized in the social policy context as unduly restrictive,¹⁰¹ it has the potential to provide some important backbone and substantive context in the national security context.¹⁰²

Charkaoui I demonstrates the ability of rights protection that is subject to proportionality analysis to provide a disciplined way to reconcile the state’s security claims with the fairness and liberty claims of those affected by the state’s national security activities. The case followed the traditional pattern of *Charter* analysis in its attempt to keep the rights definition stage distinct from issues of whether the government had justified the limit on the right. Although the decision may have had the effect of rehabilitating an inherently flawed process that relies on the *Suresh* exception of allowing deportation to torture,¹⁰³ it is a vast improvement over the reflexive deference to the state and reliance on the non-citizen status of the applicant in *Chiarelli*, or to less structured evocations of the metaphor of balancing seen in *Suresh*.

C. From the Air India era to *Charkaoui II* and *Ahmad*

Although 1985 was a good year for section 7 of the *Charter*, it was not a good year for national security in Canada. In June of 1985, two bombs planted by a terrorist group exploded, killing 331 people. As a recent commission of inquiry has documented, the failure of Canadian authorities to prevent the bombing or effectively to investigate and prosecute the case afterwards was related to various turf wars—most notably those between the Royal Canadian Mounted Police and the newly created Canadian Security Intelligence Service (CSIS).¹⁰⁴ CSIS’s destruction of wiretaps and witness

98 *Charkaoui I*, *supra* note 11 at para 123.

99 *Supra* note 21.

100 *Suresh*, *supra* note 4 at para 51.

101 See *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 222, 122 DLR (4th) 1; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 77, [2002] 4 SCR 429.

102 For arguments that section 12 could be used in other section 7 contexts, see Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the *Charter*” in Jamie Cameron & James Stribopoulos, eds, *The Charter and Criminal Justice: Twenty-Five Years Later* (Markham: LexisNexis, 2008) 553.

103 See Kent Roach, “*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures” (2008) 42 Sup Ct L Rev (2d) 281; Craig Forcesc & Lorne Waldman, “A Bismarckian Moment: *Charkaoui* and Bill C-3” (2008) 42 Sup Ct L Rev (2d) 355.

104 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy*, vol 2 (Ottawa: Public Works and Government Services Canada, 2010).

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interviews was subsequently held to constitute an abuse of process and the courts only avoided having to provide a remedy for the abuse because of the acquittals in the case in 2005.¹⁰⁵ The 2005 prosecution was completed in part because the lawyers in the case were able to agree on a solution that allowed the defence lawyers access to CSIS material on an undertaking that they would not share the confidential material with their clients. This undertaking, along with cooperation between the prosecutor and defence lawyers, allowed the parties to avoid having to litigate the issue of access to these materials in the Federal Court as required by section 38 of the *Canada Evidence Act*.¹⁰⁶ The idea that only specially designated judges of the Federal Court and not trial judges should have access to secret information is a residue of the Air India era of Cold War priorities, regarding secrecy, and reflects Canada's status as a small country that is a net importer of intelligence that cannot afford to take chances on the disclosure of secrets. Indeed, as late as 2002, the Court upheld *ex parte* provisions that allowed the government to make secrecy claims without adversarial challenge in large part because of concerns that Canada was a net importer of intelligence.¹⁰⁷ This approach combined deference to Parliament with concerns about Canada's status as a net importer of intelligence. The Court did not, as it would in *Charkaoui I*, examine whether the important objective of protecting secrecy could be achieved in a less rights-invasive manner.

CSIS's destruction of most of the wiretaps and witness interviews reflected an institutional culture that placed a high priority on secrecy. As discussed previously, as late as 1992 the Supreme Court quoted with approval Lord Denning's statements about the vital importance of protecting sources.¹⁰⁸ In 1982, the Supreme Court was even more committed to secrecy, and ruled in a unanimous judgment that then section 41(2) of the *Federal Courts Act*,¹⁰⁹ which provided ministers with an absolute and unreviewable right to prevent the disclosure of material on national security grounds, was constitutional.¹¹⁰ The Court concluded in this pre-*Charter* case that:

Once it is admitted that Parliament and the provincial legislatures have the power to legislate, it necessarily follows that they can make the privilege absolute. In my view, saying that Parliament and the legislatures cannot make the privilege absolute amounts to a denial

105 *R v Malik*, 2005 BCSC 350 (available on QL).

106 RSC 1985, c C-5. Such an undertaking could no longer be used to avoid using the two court approach to national security confidentiality under section 38 in light of more recent Supreme Court decisions stating that such undertakings by defence counsel would disrupt the solicitor-client relationship, see *R v Basi*, 2009 SCC 52 at paras 45-46, [2009] 3 SCR 389; *R v Ahmad*, 2011 SCC 6 at para 49, [2011] 1 SCR 110 [*Ahmad*].

107 See *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 44, [2002] 4 SCR 3.

108 *Chiarelli*, *supra* note 20 at 744.

109 RSC 1985, c F-7.

110 *Commission des droits*, *supra* note 23.

of parliamentary supremacy, and to denying Parliament and the legislatures their sovereign power to legislate in their respective fields of jurisdiction.¹¹¹

The absolute nature of the national security privilege was changed in anticipation of the *Charter*, but habits of absolute secrecy died hard. In the 1980s, the Federal Court was often reluctant to exercise its new powers to examine material that was subject to national security confidentiality claims, let alone order it disclosed.¹¹² A terrorism prosecution in the 1980s was allowed to proceed to conviction even though neither the trial judge nor the Federal Court, in the exercise of its exclusive jurisdiction over matters of national security confidentiality, examined CSIS surveillance records to determine if they should be disclosed to the accused.¹¹³ A reluctance by the courts to challenge secrecy claims presented obvious threats to rights protection, but it also meant that governmental agencies did not have to justify the necessity and the proportionality of their secrecy claims.

In *Charkaoui II*, the Supreme Court interpreted section 12 of the *Canadian Security Intelligence Service Act*¹¹⁴ in light of concerns about fundamental fairness under section 7 of the *Charter*. The Court rejected long standing CSIS policies that had interpreted section 12 as authorizing the destruction of raw intelligence such as the wiretap and interview notes in the Air India investigation by reference to the idea that CSIS should only collect, and subsequently retain and analyze, intelligence when "strictly necessary" to discharge their duties to investigate reasonably suspected security threats.¹¹⁵ The Court emphasized that the original raw intelligence would be a better source of information and evidence than analytical summaries.¹¹⁶ The Court rejected the traditional argument that CSIS was not a police force that collected and retained evidence, noting that even in the security certificate context, the serious consequences for the individual "bring interests protected by s. 7 of the *Charter* into play. A form of disclosure of all the information that goes beyond the mere summaries which are currently provided by CSIS to the ministers and the designated judge is required to protect the fundamental rights affected by the security certificate procedure."¹¹⁷ *Charkaoui II* is a very important decision that implicitly responds to some of the failures of the Air India investigation and Cold War approaches that prioritize secrecy over potential evidential and disclosure uses

111 *Ibid* at 228.

112 See e.g. *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229, 53 DLR (4th) 568, aff'd (1992), 88 DLR (4th) 575 (available on QL) (FCA).

113 *R v Kevork*, [1984] 2 FC 753 (available on QL). See Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Research Studies*, vol 4 (Ottawa: Public Works and Government Services Canada, 2010) at 210-21[Commission of Inquiry].

114 RSC 1985 c C-23.

115 *Charkaoui II*, *supra* note 21 at para 38.

116 *Ibid* at para 39.

117 *Ibid* at para 50.

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of intelligence. It stresses the importance of retention of raw intelligence to the fair treatment of individuals and the need for the state to justify its secrecy claims on a case-by-case basis as opposed to allowing for the destruction of evidence that may be relevant in legal proceedings.

In *Ahmad*,¹¹⁸ the Supreme Court overturned a decision by a judge in the Toronto terrorism prosecutions in which it was held that the exclusive jurisdiction of the Federal Court to make national security confidentiality determinations under section 38 of the *Canada Evidence Act* infringed section 7 of the *Charter* and the inherent jurisdiction of the superior courts. Although the decision does not address the policy objective of section 38, the provision seems to be based on the idea that only specially designated judges of the Federal Court should have access to the secret information. The Court in *Ahmad* interpreted section 38 in light of *Charter* concerns about protecting the accused's right to a fair trial, and required that the Federal Court give notice of relevant section 38 proceedings to the trial judge. The Court also encouraged the Federal Court and the Attorney General of Canada to authorize disclosure to trial judges of the secret information that the Federal Court had ordered not disclosed.¹¹⁹ It also stressed that trial judges had a statutory right under section 38.14 of the *Canada Evidence Act* to stay proceedings in order to protect the accused's right to a fair trial.¹²⁰

The Court's approach in this case may encourage the Federal Court and the Attorney General of Canada to disclose secret information to the trial judge and to special advocates, if appointed. Nevertheless, under the bifurcated process, there is still a risk of trial judges making uninformed decisions because the Federal Court and the Attorney General of Canada have decided not to disclose the secret information to the trial judge. One danger is that the trial judge might err on the side of the accused and stay proceedings under section 38.14, even though the information that has not been disclosed by the Federal Court does not threaten the fairness of the trial. The Court seems to accept that there is some risk of such a result, but that this is a policy matter that should be left to Parliament to resolve.¹²¹ There is, however, also a danger that the trial judge may not order a stay or another adequate remedy because the notice provided by the Federal Court does not provide sufficient detail about the information that is subject to the non-disclosure order. The Federal Court, which will generally make section 38 determinations before trial, may not be in a

118 *Supra* note 106. For fuller discussion of this case, see Kent Roach, "‘Constitutional Chicken’: National Security Confidentiality and Terrorism Prosecutions after *Ahmad*" (2011) 54 Sup Ct L Rev (2d) 357.

119 *Supra* note 106 at para 39. The Court nevertheless recognizes that "the content of that notice remains at the discretion of the designated judge" (*ibid*), [emphasis in original]. The Court went on to state that the "[d]isclosure of the information to the trial judge alone, as is the norm in other jurisdictions, and for the sole purpose of determining the impact of non-disclosure on the fairness of the trial, will often be the most appropriate option. This is particularly true in light of the minimal risk of providing such access to a trial judge, who is entrusted with the powers and responsibilities of high public office" (*ibid* at para 45).

120 *Ibid* at para 2.

121 *Ibid* at paras 69-80.

position to appreciate the potential importance of the non-disclosed information to the accused and the trial judge remains powerless to alter the Federal Court's non-disclosure order. The Court in *Ahmad* did not seem to recognize this danger, possibly because it encouraged trial judges to use a stay of proceedings, a remedy that, it emphasized, is specifically authorized for the trial judge in section 38.14 and can be exercised even if other constitutional and abuse of process requirements for the use of the drastic remedy are not present.¹²²

The Court rejected the accused's claims that the bifurcated approach violated the inherent powers of the trial judge through a historical analysis that recognized that, until 1982, executive claims of secrecy were considered absolute and unreviewable by the courts.¹²³ The Court then rejected the accused's section 7 claims on the basis that, while trial judges are deprived "of the ability to order the disclosure or even their own inspection of material that is withheld pursuant to s. 38," they can and should stay proceedings if they conclude that in light of non-disclosure a fair trial is not possible.¹²⁴ This essentially contemplates what was described to the Court as a game of "constitutional chicken" over whether even trial judges can see secret information that may be relevant to ongoing criminal cases over which they preside.¹²⁵ The section 7 rights of the accused may ultimately be vindicated, but at the expense of the blunt remedy of a stay of proceedings, which the Court has stressed is a statutory remedy under section 38.14 and is not restrained by constitutional or abuse of process considerations.¹²⁶ The section 7 rights of the accused may, however, not be vindicated if the trial judge is unable, due to discretionary decisions made by the Federal Court and the Attorney General, to appreciate that the Federal Court's non-disclosure order may infringe the accused's right to a fair trial.

The Court in *Ahmad* was careful to distinguish the constitutional claims it rejected from the policy debate and it noted many criticisms of Canada's bifurcated system and the lack of any similar international systems. In doing so, the Court did not note even one policy objective achieved by Canada's unique system. Other democracies allow trial judges to see secret information and determine whether it must be disclosed to the accused in order to ensure a fair trial.¹²⁷ In *Operation Dismantle*, the division between constitutionality and policy wisdom was an important component of the Court's initial decision to reject a political questions doctrine. The Court repeatedly stressed that its obligation extended only to deciding whether testing cruise missiles violated the *Charter*, and not to questioning the wisdom of

122 *Ibid* at paras 51-52. The Court stated: "the legislative compromise made in s. 38 will require a stay in such circumstances if the trial judge is simply unable to conclude affirmatively that the right to a fair trial, including the right of the accused to a full and fair defence, has not been compromised" (*ibid* at para 35).

123 *Ibid* at paras 55-65.

124 *Ibid* at para 68.

125 *Ibid* at para 34.

126 *Charkaoui II*, *supra* note 21 at para 38.

127 Commission of Inquiry, *supra* note 104 at 254ff.

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such a policy.¹²⁸ This raises a larger question of how *Charter* compliance can become a surrogate for policy analysis. It is unlikely that the government will reform the bifurcated process in light of the policy issues discussed in *Ahmad* and elsewhere.¹²⁹ Canada retains its bifurcated approach even though its only justification seems to be a problematic assumption that only the Federal Court has the facilities and expertise to make decisions about the disclosure of secret information.

A bolder reading of section 7 rights in *Ahmad* would have arguably advanced both protection of fair trials and the state's interests in seeing terrorism and other national security prosecutions through to a decision on the merits. It would have allowed the trial judge to make, and, if necessary, revise, a decision about whether disclosure of secret information (and not just the blunt remedy of a stay) was warranted in the case. This approach would have better protected the accused's rights to a fair trial by ensuring that the trial judge always saw the information that was not disclosed because of national security concerns while also proportionately reconciling the accused's rights with the state's legitimate interests in secrecy. This would be achieved by allowing the trial judge to, if necessary, amend initial non-disclosure to allow disclosure or partial disclosure with redactions in a way that respected both the state's genuine need for secrecy and the accused's need to know about relevant information. Indeed, this process seems to have worked reasonably well in the Toronto terrorism prosecutions, which, like the preceding *Air India* trial, avoided and worked around the bifurcated system. The state would not be powerless under the one-court approach used in the Toronto prosecutions and in other democracies, while the accused's right to a fair trial would arguably be better protected—especially if certain issues emerge later in the trial process and cause the trial judge to re-evaluate an initial non-disclosure decision. If a trial judge were to have ordered too much disclosure of secret information (for example, information obtained from other countries that do not consent to its disclosure or that threaten informers or ongoing investigations), the Attorney General of Canada would have retained the ability to stop disclosure by issuing a non-disclosure certificate and/or taking over the prosecutions and staying proceedings.

Charkaoui II helped take Canada beyond the *Air India* era by requiring the retention and, when justified, disclosure of intelligence relevant to individuals facing immigration, criminal or other proceedings. It recognized that intelligence may have evidential value, especially as we move from the Cold War era to one in

128 *Supra* note 7 at para 472.

129 In its *Air India* action plan, the government said it would consider the decision in *Ahmad* while noting “the procedure whereby a judge reviews and balances the competing public interests in disclosing or not disclosing relevant intelligence information can be time consuming and subject to change if new evidence is presented during the trial. The current procedure relies on the Federal Court to appropriately protect sensitive information.” Public Safety Canada, *Action Plan: The Government of Canada Response to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, (Ottawa: Public Works and Government Services Canada, 2010) at 8, online: <http://www.publicsafety.gc.ca/prg/ns/ai182/_fl/res-rep-eng.pdf>.

which terrorism is seen as the most serious threat to national security. *Ahmad* is a step back to that era with its emphasis on the constitutionality of Parliament's decision to give the Federal Court exclusive jurisdiction over decisions to disclose secret information—decisions that are routinely made by trial judges in other democracies and that allow trial judges to better reconcile the accused's right to a fair trial with the state's genuine interest in secrecy.

IV. CONCLUSION

Section 7 jurisprudence in matters of national security is complex. As suggested in this article, there are two distinct strands in the jurisprudence. The first, derived from early cases such as *BC Motor Vehicle Reference*, stresses rights protection and the requirement that the state justify the necessity and proportionality of limits on rights. Later cases such as *Charkaoui I* combine rights protection and a willingness to accept reasonable, proportionate, and justified limits on rights. Given the structured and disciplined balances of conflicting rights and security imperatives achieved in these cases, as well as the status and purpose of the *Charter* and the Court's early rejection of a political question doctrine for sensitive matters of national security, one might expect to find that this strand in the jurisprudence was unchallenged or at least highly dominant.

Such a conclusion, however, would be in error. Even in the early years of the *Charter*, the Court sometimes stressed the need to defer to governments in some national security contexts such as extradition. In a pre-*Charter* 1982 case, the Court accepted unreviewable and absolute claims of secrecy to protect national security, and in 1992 it upheld the use of secret evidence in security certificate proceedings on somewhat similar grounds. Although the rights in section 7 apply to everyone and not just Canadian citizens, the courts have re-introduced concerns about the status of citizens in cases such as *Suresh*, which contemplated the idea that deportation to torture may be constitutional in undefined exceptional circumstances, and *Amnesty International*, which held that the *Charter* would not protect Afghan detainees even if they were being transferred to torture. These decisions are most regrettable because they re-introduce status concerns and ultimately deny the most basic status to possible torture victims. The Court has also clouded its initial rejection of a political questions doctrine with the possible re-introduction of a partial political questions doctrine in *Khadr II*, which may render courts powerless to order remedies that affect the prerogative powers of government to make diplomatic representations.

The record in national security cases remains decidedly mixed. The Court recognized the need for adversarial challenge to intelligence in *Charkaoui I*, and the need to retain intelligence that may have evidential value in *Charkaoui II*, but took a more deferential approach in cases such as *Ruby*, where it accepted *ex parte* processes, and *Ahmad*, where it accepted the Federal Court's exclusive jurisdiction over national security confidentiality matters.

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The resurgence of deference and status is surprising and disturbing, but it may not prevail. Although the *Suresh* exception has helped keep some security certificate cases alive, it is not likely ever to be employed, given the rejection of torture by Canadian courts, legislatures and the executive. The *Suresh* exception has been rejected by the European Court of Human Rights and may be destined to become a historical footnote that reveals the unsettling effects of 9/11. The idea that the *Charter* will only be applied extra-territorially to benefit Canadian citizens is a more dangerous concept, and the Supreme Court needs to clarify the relevance of citizenship in this context. The idea that citizenship is required sits very uneasily with both the language of section 7 and the idea that comity and deference should stop where violations of international human rights begin. One does not have to be a Canadian citizen to enjoy international human rights protections.

The best argument for rights protection and proportionality to prevail over deference and status concerns may be in those cases where the rights claim is supported by Canada's international human rights commitments. In other words, the courts may be reluctant to ever give effect to the *Suresh* exception because of its recognition that such an exception would violate international human rights law. Although the Supreme Court refused to hear the Afghan detainee case, it is also possible that it would be reluctant to limit the extra-territorial application of the *Charter* in such circumstances because of a recognition that transfer to torture violates Canada's international human rights obligations with respect to all persons and not simply with respect to Canadian citizens. It is also possible that the Court might interpret *Khadr II* as not placing political questions limits on remedial powers to order the government to make diplomatic representations. The Court might ultimately recognize that, as in *Burns*, Canada's constitutional commitments should shape its diplomatic dealings with other countries, even in the context of national security, and that rights without effective remedies for violations are not meaningful.

Rights protection and proportionality may also eventually win out because this strand in the jurisprudence does not require the absolute protection of rights, but rather gives the state ample opportunity to justify limits on rights as proportionate and necessary for national security. Avoidance of full section 7 analysis based on rights protection and proportionality through judicial deference to states or concerns about the status of non-citizens is not necessary or desirable.

