The 22nd Annual McDonald Lecture in Constitutional Studies

Canada's Response to Terrorism

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Introduction[1]

Terrorism is generally defined as an activity undertaken for political, religious or ideological purposes that is intended to intimidate the public or to compel a government to perform or refrain from performing any act. The activity is also intended to cause serious harm. As the events of 9/11 demonstrate, terrorist attacks achieve maximum effect when they undermine our sense of order, or when they target institutions thought to be inviolable in communities where people have, historically, enjoyed a sense of security.

Terrorism has been a threat to the liberal democratic state since this form of government came into existence. Historically, terrorism has been used to further a relatively narrow political objective, for example, Basque separatism or Irish republicanism, and terrorist acts have been directed against a particular state government purportedly standing in the way of the terrorists' objective.

The international terrorism waged by Islamic terrorists represents a paradigm shift in two respects. First, Islamic terrorists are not motivated by a narrow political objective, but by contempt for liberal democratic ideals. Second,

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it is not one single state that is threatened, but rather the entire democratic world.

While terrorists have never obeyed "rules" per se, and depraved indifference to the sanctity of human life has always been the mark of a terrorist, Islamic terrorists have demonstrated a determination to inflict suffering on a scale never seen before.

Furthermore, their organization is amorphous and their activities are coordinated internationally, which makes it difficult to target terrorists and easy for them to permeate our society. To elaborate, instructions for the events of 9/11 were given in Afghanistan, planning took place in Italy and Germany, preparations were made in the south-eastern United States, and the attacks were executed in the north-eastern United States. Associates of those who flew the planes and others trained by al-Qaeda at its camps in Afghanistan have been traced to connections in widely dispersed parts of the world, including Canada. Under these circumstances, while there may be preferred targets, no country is immune from the risk of a terrorist attack.

Indeed, phrasing the ideological struggle we are in as a "war on terror" is problematic because it does not accurately capture either the nature of the threat or the tactics of our adversary. As then Prime Minister Chretien stated in the House of Commons on October 15, 2001:

> [i]t has become clear that the scope of the threat that terror poses to our way of life has no parallel. We in North America have been extraordinarily fortunate to live in peace, untouched by attack, but that has changed. Additional action is required from Canada and all nations, domestically and in concert with each other, for there to be a truly effective and truly global offensive against terrorism.[2]

In my remarks, I will start by first providing a brief overview of the struggle against terrorism. Second, I will make a few comments about the features of a democracy that are implicated in this struggle. Third, I will discuss the roles of the executive, the legislature, and the judiciary in crafting our response to the threat of terrorism. In this discussion, I will comment briefly on the steps required to maintain judicial independence, which is vital to the role that the judiciary plays in our democratic system. Finally, I will conclude with my assessment of what is at stake in the democratic response to terrorism.

2 *House of Commons Debates*, No. 94 (15 October 2001) at 6111 (Right Hon. Jean Chrétien).

Overview of the struggle against terrorism

The attacks of September 11, 2001 were not just attacks on New York and Washington, or on the United States for that matter. Likewise, the 2005 bombings in London did not arise out of a grievance with the British government specifically, nor did the 2004 Madrid bombings result from disagreement with the Spanish government in particular. As I stated earlier, Al-Qaeda and its followers represent a threat against the entire democratic world.

Many nations, including Canada, have adopted a multi-pronged approach to fighting terrorism. This has included shoring up internal security to foil planned attacks; tightening international borders; suppressing financing of international terrorist groups; deterring rogue states from supporting terrorist groups; and attempting to dissuade disaffected populations from turning to terrorism to advance their causes.

Regrettably, the nature of the terrorist threat makes it incredibly difficult to oppose, both internationally and domestically. Before the tide turns in our favour, the unfortunate reality is that there are likely to be more attacks. The challenge is, and will continue to be, to avoid overreacting out of fear—because the terrorists' ends have been realized as soon as our desire for security leads us to compromise our democratic values.

The main features of a democracy that are implicated in our response

It is of vital importance that in protecting our security we respect the rights and freedoms that so many have fought to achieve. Unlike a terrorist, who is willing to repudiate rights and freedoms to achieve a particular end, a democracy must choose means to deal with terrorism that uphold democratic features and values. Indeed, many features of a democracy are implicated in the response to terrorism. First and foremost, democratic states have a duty to protect the security and lives of their citizens.

Second, the rule of law and constitutionalism are central features of a democracy from which we cannot derogate. For this reason, a "war on terror" approach that emphasizes the paramountcy of security considerations and creates legal black holes like Guantanamo Bay cannot be sustained over the long term.

Third, the independence of the judiciary must be maintained. As Michael Ignatieff writes in his book, *The Lesser Evil*, "injustice can always be justified if you have to justify it only to yourself."[3] The process of justification before the courts is a vital check and balance on the democratic system's response to terrorism.

Fourth, we must adhere to due process when enforcing the laws of the land. The state, no matter how noble its ends, does not have an inherent right to punish the innocent. Legal norms, including the presumption of innocence, the onus on the prosecution to prove the offence, and open proceedings before an impartial and independent tribunal, must be respected in some way.

Finally, our response must ensure respect for and equality of minorities, which has been enshrined in sections 15 and 27 of the *Canadian Charter of Rights and Freedoms* and which the Supreme Court of Canada has stated to be one of the fundamental animating principles of our Constitution.[4] Make no mistake: striking a balance among these competing considerations is no easy task. However, the mere fact that doing so is difficult is no excuse when such fundamental values are at stake.

The executive response

The executive, legislative and judicial branches of government share responsibility for developing and implementing our response to terrorism. Their roles are complementary, and what is more, democratic values are evident in the way in which all three branches have responded. Of course, in a democracy the executive is often in tension with the legislature and the judiciary, as the legislature and judiciary are charged with holding the executive to account in different, but important, ways. This is not problematic; rather, it is an indication that the proper checks and balances are in place. But we often forget that the executive itself plays a vital role in vindicating democratic values.

As I mentioned above, it is arguably the highest duty of the democratic state to protect its citizens. This will often require quick and decisive state action, which is achievable only through the executive. Unilateral executive action to shore up borders or to conduct counterterrorism operations when a nation is under threat is entirely consistent with democratic values.

3 Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004) at 4.

4 See e.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 32 and 80.

Democratic values are also evident in the Canadian government's willingness to be openly accountable for the actions of the executive. It is noteworthy that on three separate occasions since 9/11, the sitting Canadian prime minister has ordered Commissions of Inquiry to probe the counterterrorism operations of Canadian officials and to make findings and recommendations on how the government can ensure its efforts are consistent with our democratic ideals. This record of accountability is very rare among democratic countries.

The first of these inquiries was the Arar Inquiry. Maher Arar was a telecommunications engineer from Ottawa who was detained by U.S. authorities in 2002 during a stopover en route from a vacation in Tunisia.[5] U.S. officials claimed that Arar had links to Al-Qaeda and even though he was carrying a Canadian passport, they eventually deported him to Syria, where he was tortured and detained for more than a year.[6]

The excellent final report of the Inquiry exonerates Arar and categorically concludes that there is no evidence linking Arar to terrorist activity, stating: "there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada."[7] While the Commission found no evidence that Canadian officials acquiesced in the U.S. decision to detain and remove Mr. Arar to Syria, it found that the U.S. very likely relied on inaccurate and unfair information about Mr. Arar provided by Canadian officials.[8] The report also confirms that Arar was tortured while in Syria[9] and offers numerous recommendations for changes that will improve Canada's response to terrorism.[10]

I chaired the second of these inquiries, which arose out of a recommendation by the Arar Inquiry that the cases of three other individuals, who claimed that the Canadian government was complicit in their torture at the hands of Middle Eastern security services, be reviewed through an "independent and credible process."[11] Regrettably, my report similarly concluded that all three men were detained and suffered mistreatment that amounted to torture as de-

5 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendation* (Ottawa: Public Works and Government Services Canada, 2006) at 9.
6 *Ibid* at 9.
7 *Ibid* at 59.
8 *Ibid* at 24.
9 *Ibid* at 187–90.
10 *Ibid* at 311–69.
11 *Ibid.* at 278.

fined in the United Nations Convention banning torture.[12] While the inquiry did not find that the Canadian government was complicit in their torture, it did find that the actions of certain Canadian officials likely contributed to their detention and mistreatment.[13]

The comprehensive final report for the third of these inquiries was released recently and relates to the bombing of Air India Flight 182 en route from Toronto to New Delhi on June 23, 1985.[14] The bombing was the work of Sikh extremists seeking revenge against the Government of India. The overwhelming majority of the men, women and children killed were Canadian citizens and permanent residents. The bombing was the subject of both criminal and civil litigation, although both courses of action ended rather inconclusively: the civil litigation resulted in a confidential settlement and the criminal litigation resulted in one plea arrangement[15] and two acquittals.[16] The Terms of Reference of the Air India Inquiry ask, and the voluminous final report deals with, and makes numberous recommendations on, the issue of whether, in light of the experience of the Air India bombing and its aftermath, changes are needed with regard to assessing terrorist threats, the co-operation between police and intelligence agencies, criminal procedure for terrorism prosecutions, the protection of witnesses from intimidation, the regulation of aviation security, and the tools used to combat terrorist financing and related matters.[17]

The legislative response

Whereas the executive's primary role is to ensure that our response is timely and that the state remains vigilant and prepared in the face of terrorist threats, Parliament's chief concern is that Canada's legislative framework and provisions strike the right balance in dealing with the terrorist threats. Following the attacks of September 11, Canadians felt vulnerable and looked to Parliament for systemic measures that would address their sense of insecurity. Accordingly, Parliament enacted omnibus anti-terrorism legislation,

12 Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin: Final Report* (Ottawa: Public Works and Government Services Canada, 2008).

13 *Ibid* at 35–39.

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

15 See *R v Reyat*, [1993] 20 CR (4th) 149 (B.C.C.A.) and *R v Malik*, 2003 BCSC 254.

16 *R v Malik*, 2005 BCSC 350.

17 Major Commission, *supra* note 14 at 5–9.

known as the *Anti-Terrorism Act*,[18] as did the U.S. Congress, the U.K., and legislatures of other countries.

Several existing laws were affected by the omnibus legislation, principally the *Criminal Code*, but also the *Official Secrets Act*, the *Canada Evidence Act*, and the *National Defence Act*, among others. There are three features of the legislation that I will mention briefly. First, the *Anti-Terrorism Act* defined terrorism and criminalized terrorism-related activities. Second, the Act expanded police powers, authorizing preventative arrests for up to 72 hours in order to disrupt terrorist activities and thus establishing a framework for secret investigative hearings. Third, the Act contained secrecy provisions, enhancing the government's capacity to keep information related to national security, international relations or national defence secret.

How do we recognize democratic values in this response? Let me quote what the Supreme Court of Canada said in a 2004 case that focused on the new provision of the Criminal Code providing for what are known as judicial investigative hearings.[19] Through Justice Arbour and me, the Court said:

> The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law. So, while Cicero long ago wrote "*inter arma silent leges*" (the laws are silent in battle): Cicero, *Pro Milone 14*, we, like others, must strongly disagree: see A. Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 16, at pp. 150–51.
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> Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Yet, at the same time, while respect for the rule of law must be maintained in the response to terrorism, the Constitution is not a suicide pact, to paraphrase Jackson J.: *Terminiello v. City of Chicago,* 337 U.S. 1(U.S. S.C., 1949), at p. 37 (in dissent).
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> Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law . . . [20]

The Court continued:

18 *Anti-terrorism Act*, SC 2001, c 41.
19 *Application Under s 83.28 of the Criminal Code, Re*, 2004 SCC 42 [*Re s 83.28*].
20 *Supra* note 15 at paras 5–7.

> Although the constitutionality of a legislative approach to terrorism will ultimately be determined by the judiciary in its role as the arbiter of constitutional disputes for the country, we must not forget that the legislative and executive branches also desire, as democratic agents of the highest rank, to seek solutions and approaches that conform to fundamental rights and freedoms.[21]

This is evident from the recital in the legislation:

> WHEREAS the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms*.[22]

The judicial response

This brings me to the third branch of governance in a democracy—the judiciary. The role of the judiciary in the struggle against terrorism is to operate as a check on the other branches: to ensure that fear, expediency, or the so-called "tyranny of the majority" does not lead us to abrogate basic human rights and values. Since the attacks of 9/11, Canadian courts, including the Supreme Court, have been called upon on many occasions to rule on the counterterrorism response of the executive and legislature. In this section, I will review some important questions that have arisen: the definition of terrorism and the constituent elements of terrorism-related offences; deportation in circumstances where the deportee faces a substantial risk of torture; the use of investigative hearings to compel testimony; the indefinite detention of non-citizens on national security grounds; and the application of the *Charter* to Canadian government officials conducting anti-terrorism operations abroad.

While the discussion that follows focuses primarily on the Canadian experience, it is important to note that courts in the U.K. and U.S. have contended with similar issues and that the jurisprudence in Canada has very much been informed by the decisions of courts in these countries and, to some extent, vice versa.

21 *Ibid* at para 8.

22 *Anti-terrorism Act*, *supra* note 18, Preamble.

Definition of terrorism

Turning first to the definition of terrorism, the constitutionality of the definition in the *Anti-Terrorism Act* was considered in *R v Khawaja*.[23] Khawaja, who was the first person charged under the criminal provisions in the Act, was accused of financing and facilitating terrorism by providing cash to a group of British extremists.[24] In his defence, he argued that the definition of "terrorist activity" under the Act was vague and too broad, and that it infringed ss 2(a) (freedom of conscience and religion) and (b) (freedom of thought belief, opinion, and expression) of the *Charter*.[25] Mr. Justice Rutherford of the Ontario Superior Court rejected his argument that the definition was vague and too broad.[26] However, he found that the definition of terrorist activity as "an act or omission . . . committed in whole or in part for a political, religious or ideological purpose, objective or cause" offended s 2 of the *Charter* because its effect was to focus investigative and prosecutorial scrutiny on groups with the same religious, political or ideological leanings as those implicated in terrorist acts.[27] Two years later, the Ontario Court of Appeal overturned the trial court's holding that the provisions would have a "chilling effect" on others who shared political, ideological and especially religious beliefs mainly because the approach of the trial judge was based on speculation since no evidence (even anecdotal) was led to support the finding.[28]

When the constitutional arguments were settled and Khawaja's case finally went to trial, the central issue in the case was whether Khawaja was a knowing participant in terrorist activity. The position of the defence was that Khawaja's stated intention was to participate in the war in Afghanistan and that his actions fell outside the definition of terrorism because of a carve-out for acts and omissions committed during an armed conflict in accordance with the laws of war.[29] The court ultimately rejected this contention, taking judicial notice of the means by which the war in Afghanistan was being waged by insurgents and finding that Khawaja was aware that the British cell's objects included suicide plots in Israel and economic terrorism against the West.[30] On appeal, the Court of Appeal rejected the appellant's arguments regarding judicial notice and agreed with the trial court's treatment of the

23 *R v Khawaja* [2006], 147 CRR (2d) 281 (Ont. SCJ).
24 *Ibid* at para 1.
25 *Ibid* at para 3.
26 *Ibid* at para 6.
27 *Ibid* at para 58.
28 *R v Khawaja*, 2010 ONCA 862 at paras 118–135 [*Khawaja 2010*].
29 *R v Khawaja* [2008], 238 CCC (3d) 114 (Ont. SCJ).
30 *Ibid* at paras 126–132.

armed conflict exception provided in the definition of "terrorist activity" in the legislation.[31] Khawaja was convicted and sentenced to 10½ years in prison by the trial judge.[32] With its different perspective on the constitutionality of the provisions, the Ontario Court of Appeal allowed the cross-appeal on one of the counts of the underlying offence and after finding errors in the trial judge's reasons for sentence and the failure of the trial judge to address special aspects of terrorist offences which must be considered in sentencing for terrorist offences, imposed the maximum sentence of life imprisonment.[33]

Deportation where there is a risk of torture

The second issue courts have addressed which I would like to briefly discuss is whether a non-citizen can be deported in circumstances where he faces a substantial risk of torture in his home country. This issue was considered by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*.[34] The Court, through the pen of Mr Justice Binnie, found that s 7 of the *Charter* will generally preclude deportation in circumstances where the deportee faces a substantial risk of torture in his home country, because deportation to a country where there is a risk of torture will *prima facie* deprive the deportee of his right to liberty and security of the person.[35] The Court said that deportation will only be permissible where it is in accordance with the principles of fundamental justice—an issue which must be decided on a case-by-case basis, and which involves balancing the government's interest in preventing terrorism with the refugee's interest in protection from torture.[36]

It is interesting to note that the U.K. House of Lords also adopted a case-by-case approach in the 2009 case *RB (Algeria) v Secretary of State for the Home Department*.[37] The British government wished to deport three men on the ground that they were a threat to national security. Two of the men were Algerian nationals, the third was Jordanian. The Home Office had sought assurances from Algeria and Jordan that the three men would not be tortured upon their repatriation. The men contended that these assurances could not be relied upon. The House of Lords held that whether such assurances suf-

31 *Khawaja 2010*, *supra* note 28 at paras 152–175.
32 *R v Khawaja* [2009], 248 CCC (3d) 233 at para 54 (Ont. SCJ).
33 *Khawaja 2010*, *supra* note 28 at para 253.
34 *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1.
35 *Ibid* at para 129.
36 *Ibid* at para 49. As part of this balancing process, the Court held at paras 85–89 that deportation to torture requires evidence of a serious threat to national security.
37 *RB (Algeria) v Secretary of State for the Home Department* [2009], UKHL 10.

ficiently mitigate the risk of torture is a question of fact to be decided on a case-by-case basis.[38]

Investigative hearings

Next I will turn to the issue of investigative hearings. As noted above, the *Anti-Terrorism Act* created a new investigative power that enabled authorities, through court intervention, to compel a person to answer questions relating to terrorist activities.[39] The first attempt to use these hearings came during the Air India trial, in a proceeding known as *Re Section 83.28*.[40] The individual compelled to give testimony challenged the constitutionality of the procedure, but the Supreme Court found that it was consistent with s 7 of the *Charter* given the protections against self-incrimination embedded in the hearing process.[41]

In a companion case to *Re Section 83.28*, *Re Vancouver Sun*, the Supreme Court further considered the manner in which judicial investigative hearings are to be conducted.[42] The application judge who granted the order compelling the subject to attend the investigative hearing also set a number of terms and conditions to govern the conduct of the hearing, including that the hearing was to be conducted *in camera* and that notice of the hearing was not to be given to the accused in the Air India trial, to the press or to the public.[43] A newspaper, the *Vancouver Sun*, sought an order that the proceedings be open to the public and that its counsel and a member of its editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials from the proceedings to date.[44] The Supreme Court held that the presumption in favour of open courts applied to investigative hearings under s 83.28, and that in this case the sweeping publication ban over the proceedings was unjustified.[45]

Security certificates

An issue which has attracted significant public attention in Canada is the use of security certificates. Security certificates used to detain non-citizens

38 *Ibid* at paras 114, 184–187, and 236.
39 *Criminal Code*, 1985 RSC, c C-46, s 83.28.
40 *Re s 83.28*, *supra* note 19.
41 *Ibid* at para 60.
42 *Re Vancouver Sun*, 2004 SCC 43.
43 *Ibid* at para 9.
44 *Ibid* at para 12.
45 *Ibid* at paras 53–56.

suspected of being a risk to national security have been included in immigration law for some time, but they have received increased attention since 9/11 because they have been used to detain Islamic fundamentalists suspected of involvement in international terrorism.

Until recently, the *Immigration and Refugee Protection Act* allowed the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident was inadmissible to Canada on grounds of security, among others, leading to the detention of the person named in the certificate.[46] The reasonableness of the certificate was subject to review by a judge of the Federal Court, although the review could be conducted *in camera* and *ex parte* at the request of the state.[47] The person named in the certificate had no right to see the material on the basis of which the certificate was issued.[48]

The consequences of the issuance of a certificate of inadmissibility varied depending on whether the person named was a permanent resident of Canada. If the ministers wished to detain a permanent resident, they had to issue a warrant stating that the person was a threat to national security, or would be unlikely to appear at a proceeding or for removal.[49] Foreign nationals, however, were required to be detained and could not apply for a review of their detention until 120 days after the certificate had been issued.[50]

The Supreme Court concluded in *Charkaoui v Canada* that the s 7 rights of the detainee were infringed because of the provisions which deprived the detainee of the right to be fully informed of the case against him or her.[51] While the Court found that the protection of secrecy was important given that disclosure could harm national security or risk intelligence sources, it said that there were less intrusive alternatives available, specifically the use of security-cleared special counsel to act on behalf of named persons.[52] On this point, the Court looked to the experience of the United Kingdom, where special advocates have been used since the 1996 European Court of Human Rights decision in *Chahal v United Kingdom*,[53] noting that U.K. special

46 *Immigration and Refugee Protection Act*, 2001 SC, c 27, ss 77(1) and 82(1), as they read prior to the amendments enacted by SC 2008, c 3, s 4.
47 *Ibid* at s 80.
48 *Ibid* at s 78.
49 *Ibid* at s 82(1).
50 *Ibid* at s 82(2).
51 *Charkaoui v Canada* (Citizenship and Immigration), 2007 SCC 9 at para 65 [*Charkaoui*].
52 *Ibid*, *supra* note 46 at paras 85–87.
53 *Chahal v United Kingdom*, no. 22414/93 [1997], 23 EHRR 413.

counsel have demonstrated a willingness to cross-examine the government's evidence rigorously where required.[54]

The Supreme Court found furthermore that the *automatic* detention of *foreign nationals* violated ss 9 and 10(c) of the *Charter* and could not be justified in view of the alternative procedure afforded to *permanent residents*.[55]

Conduct of investigations and disclosure of evidence

Having discussed the interpretation and constitutionality of anti-terrorism legislation, the final issue I will be discussing in this section is how Canadian officials engaged in counterterrorism operations abroad must conduct themselves. This issue came to the fore in the recent case *Khadr v Canada (Minister of Justice)*.[56]

Omar Khadr was a fifteen-year-old Canadian citizen captured in Afghanistan by U.S. forces after a firefight in July 2002.[57] He was subsequently transferred to Guantanamo Bay, Cuba, and was charged under the 2006 *Military Commissions Act* with murdering a U.S. soldier.[58] In 2003, Khadr was interrogated by Canadian officials at Guantanamo Bay and the results of this interrogation were shared with U.S. authorities.[59] At issue was whether all documents produced by Canadian officials relevant to these charges need be disclosed to Khadr, as would be required by the *Charter* in a Canadian criminal proceeding.[60]

The Supreme Court upheld a previous ruling that the principles of international law and comity of nations, which normally required that Canadian officials operating abroad comply with local law and which might otherwise preclude the application of the *Charter* to Canadian officials operating abroad, did not extend to participation in activities which were in violation of

54 *Charkaoui*, *supra* note 51 at paras 81–84.

55 *Ibid*, at paras 91–94. As a point of comparison, it is interesting to note that the U.K. House of Lords struck down similar automatic detention provisions for foreign nationals on a different basis in *A v Secretary of State for the Home Department* [2004], UKHL 56. In the leading judgment, Lord Bingham found at para 33 that these provisions did not rationally address the threat to the security of the United Kingdom posed by terrorists because they applied only to foreign nationals and not to U.K. nationals, and because they allowed those who were detained to depart the U.K. and plot abroad.

56 *Khadr v Canada (Minister of Justice)*, 2008 SCC 28.

57 *Ibid*, at para 5.

58 *Ibid*.

59 *Ibid* at para 7.

60 *Ibid* at para 1.

Canada's binding international human rights obligations.[61] The Court found that where, as in this case, an individual's s 7 right to liberty is engaged by Canada's participation in a foreign process that is contrary to Canada's international human rights obligations, the *Charter* imposes a duty on Canada to provide reasonable disclosure to the individual.[62]

There has been a sequel to the *Khadr* case. Recently, the Supreme Court of Canada unanimously held that Khadr's rights under s 7 of the Canadian *Charter* were being violated by his continued detention in Guantanamo Bay and that Canada actively participated in a process contrary to its international human rights obligations.[63] Following the first *Khadr* case, the Court held that the *Charter* does apply to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law.[64] In this case, there was a sufficient connection between the government's participation in the illegal process and the deprivation of Khadr's liberty and security of the person.[65] Although the U.S. is the primary source of the deprivation, it was reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials were contributing to Khadr's continued detention.[66] The deprivation of Khadr's right to liberty and security of the person was therefore in accordance with the principles of fundamental justice.[67] The interrogation of a youth detained without access to counsel, and the elicitation of statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors offended the most basic Canadian standards on the treatment of detained youth suspects.[68]

The Court stated that Khadr was entitled to a remedy under s 24(1) of the *Charter*. The remedy sought by Khadr—an order that Canada request his repatriation—is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on Khadr's ultimate trial.[69] The Court reasoned that while the government must have flexibility in deciding how its duties under

61 *Ibid* at para 2.
62 *Ibid* at para 3.
63 *Canada (Prime Minister) v Khadr*, 2010 SCC 3, at para 2.
64 *Ibid* at para 18.
65 *Ibid* at para 21.
66 *Ibid.*
67 *Ibid* at para 24.
68 *Ibid* at paras 24–25.
69 *Ibid* at para 30.

the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny.[70] Courts have not only the jurisdiction but also the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government.[71] Here, the trial judge misdirected himself in ordering the government to request Khadr's repatriation in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record.[72] The Court concluded that the appropriate remedy in this case was to declare that Khadr's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information.[73]

As a follow-up to the Supreme Court of Canada decision, the Federal Court Trial Division allowed an application for judicial review, ordered disclosure of the procedures that were under consideration as a remedy for the government's breach of the applicant's rights, and allowed Khadr to provide written submissions of potential remedies.[74] The Federal Court of Appeal stayed this decision pending its appeal[75] and dismissed a motion to expedite the appeal of this decision.[76] Subsequent to all these proceedings, Mr. Khadr has been convicted and sentenced by the U.S. tribunal.[77]

The issue of judicial independence

I now come to the concept of judicial independence which has been correctly described as the "lifeblood of constitutionalism in democratic societies."[78] We are fortunate in Canada because we adhere to the rule of law, and judgments by our courts are followed by governments, which is not the case in many other countries.

Why do Canadians, especially Canadian governments and officials, accept the role of courts and their decisions? I believe they do so because of what I call the four badges of legitimacy. First, judges are, as a general proposition,

70 *Ibid* at paras 35–36.
71 *Ibid* at para 36.
72 *Ibid* at para 38–47.
73 *Ibid* at para 47.
74 *Khadr v Canada (Prime Minister)*, 2010 FC 715.
75 *Khadr v Canada (Prime Minister)*, 2010 FCA 199.
76 *Khadr v Canada (Prime Minister)*, 2010 FCA 245.
77 As of the date of preparation of this commentary, the sentencing decision was not released.
78 *Beauregard v Canada* [1986], 2 SCR 56 at para 24.

highly qualified to be on the bench. Second, judges are independent from the executive and legislature and are therefore impartial. Third, cases are argued in a fair process before judges in courts that are open to the public, allowing the public to assess the fairness of the process. And fourth, judges render decisions based on the facts in the case and on reasoning reflecting precedent, principle and policy for everyone to see and indeed criticize.

Dealing with terrorism cases puts these badges of legitimacy at risk. I say that because if judges appear to be co-opted or sacrifice these badges in terrorism cases, we will have corrupted our judicial system most seriously and thereby will have undermined our democracy and increased the chances of public rejection not only of our courts' decisions but also of the respect for the role of the courts in our country. This would be devastating for our democracy. Consequently, all the branches of governance—legislature, executive and judiciary—share an interest in ensuring that this result does not happen. This means that the law, its implementation and execution, as well as its interpretation, must be carefully drawn, effected, or interpreted to avoid the deliberate or unintended corruption of the judicial qualities that have led to wide respect for the Canadian judiciary here and abroad.

Conclusion

To conclude, the stakes are extremely high in our effort to prevent and prosecute terrorists and terrorist activity. The struggle against terrorism presents the classic challenge of end versus means. No one can deny the legitimacy and importance of the goal to respond to the plague of terrorism. But the means of our response is every bit as important as the goal of eradication of terrorism. If we sacrifice our principles through adoption of improper means, the terrorists will have succeeded because we will have damaged our freedom, our values, our principles and, ultimately, our democracy, and consequently we will have become like the terrorists.

History is replete with examples of monumental failures in this respect. One notable example in Canada being the internment of Japanese Canadians and others in World War II. A personal example of the latter is that of my brother's father-in-law, who was interned for over two years in rural Ontario. He owned a bakery in Vancouver and joined a Fascisiti club to sell more bread rolls for Italo-Canadian weddings. He lost his business, his wife had a nervous breakdown, and the two children suffered from not seeing their father for 2½ years. These examples are disgraceful stains on our national memory and serve

as reminders for us today to deal with terrorists without repeating the same mistakes.

Terrorism is a threat to the very existence of the democratic state. It is a cancer, and we must respond effectively and thoroughly. But our response cannot be worse than the disease.

In a wonderful address some twenty years ago on the quest to develop civil liberties in times of security crises, the late Justice Brennan of the U.S. Supreme Court (while at the law school of Hebrew University in Jerusalem) stated that human rights and civil liberties are easier to develop in peace time than in war or in times of crisis. He concluded by saying this:

> Nor would I be surprised if in the future the protections generally afforded civil liberties during times of world danger owed much to the lessons Israel learns in its struggle to preserve simultaneously the liberties of its citizens and the security of its nation. For in this crucible of danger lies the opportunity to forge a world-wide jurisprudence of civil liberties that can withstand the turbulences of war and crisis. In this way, adversity may yet be the handmaiden of liberty.[79]

Indeed, I profoundly hope that in our struggle against the adversity of terrorism, this adversity, if it is not the handmaiden of liberty, can at least be the instrument to strengthen our freedoms and our democracy. I am confident that democracy will prevail. We have fought hard to achieve our freedoms and liberty and we cannot and will not let nihilists like terrorists take these values from us.

79 Justice William J. Brennan, Jr, "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises," (Speech delivered at the Faculty of Law, Hebrew University of Jerusalem, 22–24 December 1987).