

Racial profiling and national security

WORDS AND DEEDS

The intent behind the adoption of the federal policy of multiculturalism in 1971 included assisting cultural groups to retain and foster their own identities while encouraging their full participation in Canadian society. Over the years the concept was refocused to overtly include the promotion of the principles of equality and non-discrimination, particularly the elimination of racial discrimination. The preservation and enhancement of the multicultural heritage of Canadians were entrenched in the Canadian Constitution when it was repatriated in 1982, at the same time that human rights were constitutionally entrenched, including the right to equality.

There undoubtedly have been advances in public awareness of the need for tolerance and respect for the diversity of Canadian society, as well as advances in the struggle against racism and other forms of discrimination, since Canada began to officially promote multiculturalism. However, in respect of the protection of Canada's national security, where discrimination and intolerance have always been particularly acute, little has changed.

DISCRIMINATION, INTOLERANCE, AND NATIONAL SECURITY

The Canadian Security Intelligence Service (the Service) is charged with the responsibility for identifying threats to Canada's national security. The concept is broad, not even requiring that Canada be directly threatened. In early 2002, the Supreme Court of Canada, in *Suresh v. Minister of Citizenship & Immigration* ([2002] S.C.J. No. 3), stated that "Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. . . . The threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security."

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In identifying security threats, the Service collects information, but unlike police forces, who collect evidence to present in court in support of a criminal prosecution, the kind of information which the Service relies upon may include that which is speculative and gives rise to no more than suspicions about a person. In identifying individuals who it believes should be investigated, the Service relies partly on information that includes "profiles."

An example of this is the profile underlying the advice that the Service provided to the government in June, 2005 about the threat from Islamic extremists. The memo was prepared ostensibly to provide the federal government with information about the threat presented by detained Islamic extremists, but actually shored up the state's case in several of the security certificate cases, which were then before the Federal Court on applications for release from detention.

The memo, dated June 24, 2005, is entitled "Islamic Extremists and Detention: How Long Does the Threat Last?"

It opens with the statement that "thousands of extremists passed through Al Qaeda or Al Qaeda-affiliated training camps in Afghanistan during the 1990's." It notes that "all attendees were indoctrinated into an extremist form of Islam that called upon adherents to kill those perceived as the enemy. This ideology was drummed into these individuals and is likely to remain with them for years." The report creates an impression that all who participated in the Afghan conflict are adherents of an Islamic extremism rooted in a religious belief which is lacking in human morality, and that these individuals will never change.

THE CASE OF HASSAN ALMREI

One example of a case where the Service applied its profile is that of Hassan Almrei. In the early 1990s he went to Afghanistan as a teenager to participate in the conflict caused by the Soviet occupation of the country. The Service officer who testified at the hearing into whether the security certificate issued against Mr. Almrei should be upheld, concluded that he "had a profile" comparable with the profile of al Qaeda members and that there were "sufficient elements of a profile" for the Service to conclude that there were reasonable grounds to believe that he posed a threat to national security (*Almrei v. M.C.I.*, [2004] F.C.J. No. 509).

It is the same profile that resulted in the identification by the Service, and later by the RCMP, of a number of Canadians—Abdullah Almalki, Ahmad El Maati, Muayyed Nureddin, and Maher Arar—as Islamic extremists. Mr. El Maati was in Afghanistan, and while the others were not, it was thought that Mr. Arar was there, that Mr. Almalki was on the border in Pakistan, and that Mr. Nureddin knew others perceived to be Islamic extremists. These Canadians were detained and tortured in Syria, as was Mr. El Maati in Egypt, because the suspicions about

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their being Islamic extremists were shared with other states.

PROFILING AND STEREOTYPING

The profile applied by the Service is a stereotype and one which, like all stereotypes, is inaccurate. The essential premise of the profile is that all who went to Afghanistan pledged allegiance to Osama Bin Laden after being indoctrinated into an extremist form of Islam; and that, having adopted extremism, they would never reject it. The reality is not so simplistic. The Service profile conflates the history of jihad against Soviet control in Afghanistan with involvement in al Qaeda as though the two were one and the same thing. The Afghani jihad was an international armed conflict, within the meaning of the *Geneva Conventions* (1949) and the two *Protocols*. It was in this sense legitimate in the context of international law norms of the *Geneva Conventions Act* (RSC 1985, c. G-3).

The Service profile assumes all camps were controlled by Bin Laden, ignoring the many different leaders vying then for supremacy in the struggle for control of Afghanistan. And it assumes that all who travelled there shared a belief in a jihad directed against Western interests, without regard to principles of morality and the rule of law, when the struggle in Afghanistan was originally directed against Soviet interests, not Western ones.

The presumption that all who went to Afghanistan were extremists is not grounded in fact. Experts who testified before the Federal Court in Mr. Almrei's case, including a Yale law professor, Dr. El Fadl, explained that the struggle against the Soviets was supported by the United States and most Middle Eastern countries. Muslim youth from many different countries responded to calls from states and mosques to help the Afghans. Some states, like Saudi Arabia, offered financial assistance for youth to participate. Most who went did not receive rigorous training, but only the elementary

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basic training necessary for their own safety. Dr. El Fadl indicated that many went because of the Muslim belief that one must come to the aid of a Muslim brother or sister. The prevailing mood then was that a communist state had invaded a Muslim state: Muslims equated communism with atheism, and governments such as Saudi Arabia's pressed this view. Most youth who went worked in non-combat positions, in humanitarian and educational activities. Very few became extremists—15 percent at most. Most were average, decent, moral Muslims who had strong religious beliefs. They were being fed a one-sided account, that the “bad guys” were the Soviets and the “good guys” were the Afghani people who were being dominated by the bad guys.

THE ONTARIO COURT OF APPEAL'S RULING AGAINST RACIAL PROFILING

The distinction between the profiling engaged in by Canadian security agencies searching for threats to Canada's security and that engaged in by police forces searching for criminals, is that racial profiling by the police is not acceptable, while security agency profiling is. Several years ago, the Court of Appeal for Ontario in *R v. Brown* ((2003), 173 C.C.C. 3d 23) clearly stated that police stops based on racialized characteristics were not acceptable, even if evidence of a crime was discovered after the stop. The court took issue with police officers' basing their suspicions of wrongdoing on the basis that the person was black, coupled with other

factors such as sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle.

THE FEDERAL COURT'S HANDLING OF PROFILING

On the other hand, the profiling applied by the Service—which focuses on the person's being Arab and Muslim and having been involved in Afghanistan—has not been criticized by the Federal Court; rather, the profile underlies the conclusion that the non-citizen Arab/Muslims who were made subject to security certificates presented a threat to Canada's security. The court saw nothing wrong with the use of the profile, only that it might not always be accurate.

Even with the Canadians subject to torture abroad, only Mr. Arar has been officially “cleared” and, in his case, it was acknowledged that he was not in Afghanistan or close to it.

The dangers of profiling in the context of national security investigations are stark. The profile is sufficient to give rise to suspicion, which, in combination with other factors which may in and of themselves be neutral, gives Security officials sufficient basis to act. The result of acting on suspicion can be torture, as in the cases of Canadians Mr. Arar, Mr. El Maati, Mr. Almalki, and Mr. Nureddin, or lengthy detentions without trial, as in the cases of non-citizens like Mr. Almrei, Mr. Jaballah, Mr. Mahjoub, Mr. Charkoui, and Mr. Harkat. All these men are Arab and Muslim.

It is already apparent in some of these cases, and will likely be in others as time passes, that the profile of the “Islamic extremist” functioned as a substitute for actual fact and masked a failure on the part of security officials to fully investigate before acting on their suspicions. There have been two commissions of inquiry into why the Canadians were tortured abroad. Both have recognized that the labelling of the men as Islamic extremists was not grounded in anything other than suspicions. The reports of

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communities during the Second World War, when their only sin was to have origins in an enemy country. Another instance is the denial of sanctuary to European Jewish refugees, before and during the Second World War, due to rampant anti-Semitism.

Has this tragic record of racism and xenophobia, compiled from the earliest beginnings of the Canadian state, undermined its diversity gene and thereby opened it up to the battalions of sorrows today? There is no definitive answer, but it is safe to say that the non-discriminatory immigration policy of our more recent history has reinforced the diversity gene in Canada.

THE ETHNIC PENALTY OF NON-EUROPEAN IMMIGRATION

The ethnic composition of the Canadian populace has also changed rapidly, reinforcing the diversity gene of the country. In 1957, European countries accounted for the top ten sources of immigrants, with the United Kingdom providing one-third of all immigrants. Forty years later, in 1997, non-European countries accounted for the top ten sources of immigration.

With such a dramatic increase in the diversity of immigration, the issue of the labour market's discrimination against the new immigrants would inevitably arise. To avoid the worst of these problems, immigration policy favoured the skilled workers among prospective immigrants. This class was sought after to provide the technical and other skills needed in the professions and to fill labour gaps.

The early warning sign of the deconstruction of the diversity gene in Canada is the emergence of the ethnic penalty in the labour force in Canada. Several studies of ethnic and racial discrimination in labour markets have been conducted in Canada. These studies seem to indicate that existing wage gaps between white and non-white workers cannot be accounted for by differences in education, occupation, or other demographic factors. Some ethnic communities have fared better than others. The


The genius of the founding architects of Canadian nationhood was to entrench asymmetry up to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions.

evidence, not necessarily foolproof, may suggest that these wage gaps are the result of racial discrimination in all aspects of the labour market. These ethnic and racial penalties may be producing isolated communities that turn out to be the wellspring of the battalions of sorrows that will assail Canadian diversity in the near and distant future.

EYES WIDE OPEN

We cannot afford to be blind to the possibility and even the probability that our immigration and settlement policies, our citizenship and cultural policies, our discriminatory labour markets, our Aboriginal policies, and our criminal justice laws and policies could well turn our diverse society into a multicultural

and racial rooming house. In this house, each stays within his or her own room, some faring better than others. Some are descending into a spiraling crisis of gangs, guns, youth murders, and vicious criminal activity. There is always the possibility that some of these will morph into highly dangerous organized criminals with the capacity to disrupt vital public transportation and other systems and ultimately even participate in terrorist activities. We need to pay much more attention to the common living spaces of shared and engaged citizenship.


The promise of substantial multiculturalism and the protection and promotion of our diversity gene should become the core of a radical national project for the 21st century. 

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these commissioners, Justice Dennis O'Connor and retired Justice Frank Iacobucci, are having an impact in the security certificate cases. There is a new process in place, with security-cleared lawyers appearing in the secret hearings to protect the interests of the Arab men. It is clear from the conduct of these cases, presently underway, that greater scrutiny is being given to the kinds of information the government relies on.

SEPTEMBER 11 CANADA'S LITMUS TEST

September 11, 2001 was a litmus test for Canada. While the excesses of the Second World War, which saw the mass internment of the Japanese and the confiscation of their homes and properties, did not occur, what has been hap-

pening is just as egregious, although on a smaller scale. This has happened in spite of an official policy of multiculturalism and in spite of the entrenchment of equality principles and respect for other cultures into Canada's constitution. One can only hope that the work now being done, to call officials to account for stereotyping, results in mechanisms being put into place to ensure that it does not happen again. 

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