How Canada's highest court has given security certificates a red light

BY PAUL COPELAND

Paul Copeland is a Toronto-based lawyer and one of Canada's leading experts on security certificates. He has acted on behalf of some of those who are held in prison.

CANADA'S TOUGH RESPONSE TO 9/11

After the horrors of September 11, 2001 both Canada and the United States, with very little legislative debate and almost no public discussion, passed draconian new security measures, the *Anti-terrorism Act* in Canada and the *Patriot Act* in the United States. In June 2002, with the passage of the *Immigration and Refugee Protection Act* (IRPA), security certificate cases for both permanent residents and foreign nationals were dealt with before a single judge in the Federal Court of Canada. Canada has used security certificates—first under the *Immigration Act* and more recently under the IRPA—to deport permanent residents or foreign nationals from Canada who the government claims are inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality. The deportation process commences and the person is arrested once the immigration minister and the minister of public safety sign a security certificate.

Prior to the passage of the IRPA, security certificates involving permanent residents had been dealt with before the Security Intelligence Review Committee (SIRC), and the cases involving foreign nationals were dealt with before a single judge of the Federal Court of Canada. The lawyers involved in these cases have long argued, without success, that the security certificate process was unfair and that it violated the provisions of the *Canadian Charter of Rights and Freedoms*. The subject of the certificate, and his or her counsel, would only receive a summary of the case, cleansed entirely of any matters that the government claimed would endanger national security.

In 1996, an application for leave to appeal from the Federal Court of Appeal was brought before the Supreme Court of Canada in the *Ahani* case. Mr. Ahani had been ordered deported from Canada pursuant to a security certificate. Justice McGillis of the Federal Court had found that the certificate issued against Mr. Ahani was reasonable. In a very poorly reasoned decision, she rejected the argument that the security certificate procedure violated the fundamental justice requirements of s. 7 of the Charter. The Federal Court of Appeal agreed with her reasoning. The Supreme Court of Canada refused Ahani's application for leave to appeal. As is the custom in applications for leave to appeal before the Supreme Court of Canada, the Court gave no reasons for refusing the application.

Canada has used security certificates—first under the *Immigration Act* and more recently under the IRPA—to deport permanent residents or foreign nationals from Canada who the government claims are inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality.

SECURITY CERTIFICATE CASES RELATED TO AL-QAEDA

With the McGillis decision in *Ahani* providing judicial cover, between 1999 and 2003 the government of Canada began efforts to remove from Canada five men of Arabic background who the government claimed were connected to al-Qaeda or similar terrorist organizations. Mahmoud Jaballah, Hassan Almrei, Mohammad Majoub, Mohamed Harkat, and Adil Charkaoui were all made subjects of security certificates. Mr. Almrei has now been in jail for more than seven years while the government tries to remove him from Canada (on January 2, 2009, Federal Court Justice Mosley released a decision holding that Mr. Almrei would soon be released). The other four men spent various long periods of time in custody and are now out on very restrictive terms of bail awaiting the resolution of their cases.

It is very doubtful that the federal national security agencies or the Department of Justice were aware of the impact of undertaking five security certificate cases at the same time. Very effective organizing and community work was done by the Committee to End Secret Trials, by Amnesty International, and by a number of NGOs from the Arab community. Counsel for Adil Charkaoui challenged the constitutionality of the legislation before Justice Noel of the Federal Court.

When the challenge was unsuccessful on that application they appealed to the Federal Court of Appeal. A more narrowly focused constitutional chal-

lenge to the security certificate procedure under the fundamental justice provisions in s. 7 of the Charter was brought before Justice Dawson in the *Harkat* case. Justice Dawson relied on the decision of the Federal Court of Appeal in *Charkaoui* and dismissed the constitutional challenge. In what I regard as a display of legal arrogance, counsel for the government made no attempt to justify the denial of fundamental justice in the security certificate procedure by calling evidence under s. 1 of the Charter.

SECURITY CERTIFICATE PROCEDURES REVIEWED BY THE SUPREME COURT OF CANADA

Counsel for Mr. Almrei brought a constitutional challenge against the bail provisions of the security certificate procedure. Mr. Almrei was unsuccessful on that challenge before Justice Blanchard and before the Federal Court of Appeal. However, much to the surprise of the lawyers involved, the Supreme Court of Canada granted leave to appeal on the constitutional issue, first in the *Charkaoui* case and later in the *Harkat* and *Almrei* cases. All three cases were scheduled to be argued together in June 2006.

By the time leave to appeal was granted by the Supreme Court of Canada, many legal groups had spoken out against the security certificate procedures, including the Canadian Bar Association, the Canadian Civil Liberties Association, the Federation of Law Societies, the Criminal Lawyers' Association, Human Rights Watch, the British Columbia Civil Liberties Association, and the International Human Rights Clinic at the University of Toronto Law Faculty. All of these groups were granted intervenor status at the Supreme Court of Canada. Other intervenors supporting the appeals were the Canadian Counsel for Refugees, the African Canadian Legal Clinic, the National Anti-Racism Council of Canada, the Canadian Arab Federation, the Canadian Council on American-Islamic Relations, and the Canadian Muslim Civil Liberties Association. The only intervenor on the government side was the attorney general of Ontario.

By the time leave to appeal was granted by the Supreme Court of Canada, many legal groups had spoken out against the security certificate procedures.

The case was argued over two days in the middle of June 2006. Judgment was reserved, and on February 23, 2007 the unanimous judgment of the Supreme Court of Canada was released. The Court ruled that the procedure followed to determine whether or not the security certificate was reasonable violated section 7 of the Charter. The Court held that the persons named in the certificates were denied fundamental justice in that they did not know the case they had to meet. The Court also struck down the bail provisions of the security certificate procedure as they related to foreign nationals who were not permanent residents of Canada. With regard to the fundamental justice aspect of the decision, the Court suspended its ruling for one year and, in effect, ordered the government to draft new legislation that complied with the fundamental justice provisions of the *Canadian Charter of Rights and Freedoms*.

LEGISLATIVE AMENDMENTS

By the time the Supreme Court of Canada decided the case, Stephen Harper was the prime minister of Canada and Stockwell Day was the minister of public safety. They were very slow in introducing new legislation in the House of Commons to amend the security certificate provisions of the IRPA. It was not until October 2007 that the legislation was introduced, and not until February 2008 that the amended legislation got to the Senate.

The Senate committee heard from government witnesses with respect to the new legislation passed by the House of Commons. Another day, at the end of eight hours of hearings, the members of that Senate committee in effect held their noses and passed the legislation. The amended legislation came into effect at the end of February 2008, and on that same day five new security certificates were issued, in effect continuing the deportation attempts against the five men of Arab origin.

DEPORTATION TO TORTURE OR DEATH

It is beyond the scope of this article to deal extensively with the issue of possible deportation to torture or death. Section 115 of the IRPA, somewhat in line with the Supreme Court of Canada decision in the *Suresh* case, allows for the possibility of deporting someone from Canada to a country where it is possible that he will be tortured or killed. The IRPA provides that a decision about possible return to torture will be made by a delegate of the immigration minister. In the cases of the five men, a number of decisions have been made to return them to their homeland.

The decisions made by the minister's delegate have so far amounted to a rubber-stamp approval of the position taken by Immigration Canada. No minister's delegate has said that it is inappropriate to send the men back to their home country. Almost all of those decisions have been overturned by the Federal Court and sent back to the government for amendment and redrafting in conformity with the Federal Court ruling.

SPECIAL ADVOCATES

Prior to the time that the amendments to the security certificate provisions of the IRPA were passed in February 2008, the government of Canada commenced the process of receiving applications from people who wanted to be approved as special advocates in the security certificate hearings. Generally speaking, to be

Security certificates, page 35

and Mexico could have an important position because of its cost advantages and the level of production it has achieved. Second, technology will have to improve, even in the segments of inexpensive compacts, to be able to compete in terms of efficiency. Finally, technology and quality policies will have to improve in distribution and administration to make both production processes and sales more efficient, thus reducing costs. North America faces a great challenge in the auto industry, and we will see how it meets it—it will either recover or disappear altogether.

North American Vehicle Total Production, January to November 2008

	January 2008	November 2008	Change
United States	10,072,186	8,192,433	–18.7%
Canada	2,443,381	1,971,978	–19.3%
Mexico	1,963,316	2,051,231	4.5%

Source: Ward's Automotive Reports: Key Automotive Data; North American Production Summary, November 2008.

UNCERTAIN FUTURE

The loss of the Big Three in Mexico could give rise to a new situation in which foreign investors—Asian or European—already operating in Mexico could fill the vacuum left by the United States. Mexico has signed trade agreements with practically the entire world, and this could also be an advantage for producing in Mexico. Mexican production has already begun to internationalize and depend less on the US market.

However, in the short run, a worsening of the Big Three's crisis could be catastrophic for the Mexican economy if it means plant closings. A collapse of any of these companies, like GM or Chrysler, would have very negative effects. The sector requires time to adapt to the new conditions and to search for and consolidate new markets. On the other hand, any restructuring centred on the US market and workforce would also have a severe impact. It is probable that in either case, Mexico's government would be forced to promote its own bailout package and put in place a more active policy to reconfigure the industry without the Big Three or with companies more limited in their market power. Clearly, we are on the verge of great changes and unprecedented situations for North America.

It is important to remember that the auto industry, worldwide, has suffered from overcapacity. Sharp competition has forced many companies to merge in recent years and seek new ways to survive. Under NAFTA, Canada and Mexico remained very dependent on the policies of the Big Three in the United States, and today they pay a very high price for that dependency.

* The information for this article comes mainly from the Mexican Auto Industry Association (AMIA) and from *Ward's Automotive Reports*.

Security certificates

continued from page 31

approved as a special advocate one needed to be granted top-secret national security clearance and be experienced in immigration law matters, criminal law matters, national security law matters, or a combination of all three. Twenty-six people were approved by the government as special advocates. The security certificate legislation requires the judge in the case to appoint as special advocate the lawyer chosen by the person concerned, unless there is a conflict of interest that prevents that lawyer from acting as a special advocate.

It was the view of the special advocates that two special advocates should be chosen for each case, and the government and the court agreed with that view. There are now a total of seven lawyers acting as special advocates in the five cases. Three of the special advocates are each doing two cases; the other four special advocates are just dealing with one case.

I am a special advocate in the *Harkat* and in the *Almrei* cases. Because of the non-communication provisions set out in the security certificate legislation, without the consent of the judge in those cases I am unable to comment on how those cases are proceeding and whether the special advocate process set out in the legislation will ultimately be found to meet the fundamental justice requirements under s. 7 of the Charter.

FIVE FEDERAL COURT JUDGES WILL DECIDE THE FATE OF THE SECURITY CERTIFICATE MEN

It is expected that over the course of 2009 the five Federal Court judges dealing with these cases will reach their decisions on whether the security certificates filed in these cases are reasonable. Their decisions will likely include rulings on whether the new security certificate procedures, with the use of special advocates, comply with the requirements of fundamental justice under s. 7 of the Charter.

And then the appeals will start.