2015

CANADIAN YEARBOOK OF HUMAN RIGHTS

ANNUAIRE CANADIEN DES DROITS DE LA PERSONNE

VOL.I

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EDITORS' INTRODUCTION

Kirsten J. Fisher and John Packer

What is the state of human rights in Canada? Is Canada's commitment to human rights and sustainable peace and development as strong as it once was and as strong as Canada's reputation, promoted by the country itself, projects? How can human rights be fully enjoyed at home and abroad? Can Canada maintain its pride and identity as norm entrepreneur in this field? This initial issue of the *Canadian Yearbook of Human Rights* explores issues and events that transpired in or emerged from 2015 that address these questions from a variety of perspectives and approaches. As the world seems to be changing course in the promotion of human rights as we enter the bottom half of the second decade of the 21st century, these questions are perhaps more important than they might otherwise be. We believe that Canada has the opportunity – perhaps the moral imperative – to take up the cause again in light of recent global shifts. Irrespective of developments outside Canada, we believe it is important for Canadians to have a better understanding of contemporary issues, with access to relevant material, in order to try to realise more fully human rights within our country and in our relations with others.

The launch of the *Canadian Yearbook of Human Rights* is an exciting endeavour for the Human Rights Research and Education Centre (HRREC – cdp-hrc.uottawa.ca) at the University of Ottawa in collaboration with Human Rights Internet (HRI – http://hri.ca). Our aim is to fill a gap in the literature and resources available to academics and practitioners working at the intersection of human rights and Canada. Canada's and Canadians' roles in shaping, defending, and promoting human rights are part of our country's identity – both attributed from abroad and broadly felt at home.[1] With the publication of this issue, it seems that Canadian politics and election results may point to the population's re-engaging with its core contemporary values of defending and promoting human rights, while elsewhere in the world human rights may be losing their strength in the minds of some who want to tighten borders and narrow moral concern to the rights of co-citizens (and, in some cases, only for *some* co-citizens). This is the right time, then, to launch this periodical, and with it to promote the need for human rights protection while at the same time aiding those who are working towards this aim.

Our vision for this new publication is of an authoritative, bilingual reference at the intersection of human rights and Canada. We hope it will stand apart as a tool for those interested in key developments in human rights in Canada, global human rights developments relevant to Canada, and Canada's contribution to international human rights discourse and activity.

This first edition includes, as subsequent issues will, three distinct sections: the first two sections comprise articles (one general peer-reviewed, non-thematic section, and a dedicated special section with a number of articles pertaining to a particular, selected human rights issue – in the case of this issue, there are three such special sections addressing unique issues); the third section is a network-based reportage on the calendar year's developments of the main human rights related decisions of Canadian courts and tribunals, legislative enactments regarding human rights in Canada, and developments relating to Canada and its foreign policy and international relations (including international bodies).

In the General Section of peer-reviewed articles are four contributions: David Petrasek of the University of Ottawa explores the recent Conservative Canadian Government's approach to foreign policy and how its commitment to the declared values was undermined by political partisanship and selectivity; Etienne Roy Grégoire of UQAM considers Canada's obligations

1 According to the 2013 General Social Survey conducted by Statistics Canada, over 90% of Canadians hold the *Charter of Rights and Freedoms* as either very or somewhat important to national identity – the highest amongst five symbols measured (higher than the Canadian flag, National anthem, RCMP and even hockey).

and responsibility in relation to the exploitation of natural resources with a focus on Colombia as reflected in reporting under the Canada-Colombia Free Trade Agreement; Rebecca Johnson of the University of Victoria explores the Canadian Truth and Reconciliation Commission's 94 'Calls to Action'; and lawyer Jennifer Moore examines why Canada has taken only modest and diminishing steps in the international fight against impunity in terms of domestic prosecutions of war crimes and crimes against humanity... and is unlikely to prosecute again under the *War Crimes Act*.

In 2015, a particularly significant development was the controversial C-51 anti-terrorism bill becoming law in Canada. Proper attention to this bill and its implications was necessary in this edition. Therefore, we reached out to two experts, Professor Craig Forcese of the University of Ottawa and Professor Kent Roach of the University of Toronto, to co-edit a Special Section that compiles summaries, analyses, and commentaries from some of the top Canadian academics and practitioners working on the intersection of human rights and security. The result is a stimulating exploration of national security, law, and human rights – such as the right to a fair trial and the need to balance civil liberties and security-based concerns. These pieces are important not only for what they say about and to the Canadian context, but can shed important light on similar initiatives that are or may be pursued or considered by other governments around the world.

We include in this issue a second Special Section, one that showcases the discussions and work that emanated from a symposium held in the summer of 2015 at HRREC. The symposium brought together academics, social activists, art curators, and human rights practitioners from a number of countries to discuss and generate ideas regarding the interplay of the Arts and Human Rights (in particular in respect of indigeneity) and how art can be an expression of and a means for promoting and realizing human rights. The Special Section in the *Yearbook* dedicated to this symposium offers a summary of the event and discussions, as well as the introductory addresses delivered by the keynote speakers, Professor Yvonne Donders of the University of Amsterdam and Professor Allan J. Ryan of Carleton University, together with an article written by one of the participants, Omid B. Milani.

A third Special Section, edited by John Packer, presents subsequently written versions of presentations delivered initially as part of a panel discussion held at HRREC on 28 November 2014 grappling with the challenging issues arising in respect of competing perspectives and rights and responsibilities vis-à-vis the health care and survival of an adolescent girl ('JJ') belonging to an Indigenous community in Ontario. The controversial decision of Justice G.B. Edward of the Ontario Court of Justice is included in full text, together with the extraordinary addendum reflecting a subsequent (April 2015) agreement with the parties – resolving the instant case but leaving unsettled the principal issues then in dispute. This case, and the issues raised, are likely to take on increased significance in the future as Indigenous Peoples assert more fully their rights, i.a. as the rights of the child become more fully elaborated and sustained and as Canadian jurisprudence and relevant practices evolve.

2015 was the year that Canadians voted in a new Liberal Government of Canada, after almost a decade of Conservative Party rule under Prime Minister Stephen Harper.[2] Canada has, with the election of Justin Trudeau, at least in theory re-embraced its reputation and self-identity as a country of human rights and social equality, and as a middle power promoting liberal governance and multilateralism. 2015 may be seen as particularly significant, as a turning point for Canada and its promotion and protection of human rights at home and abroad. It remains to be seen what effect this change of leadership will have on the country and its global interactions. The contributions of this issue of the *Canadian Yearbook of Human Rights* are well-suited to help evaluate Canada's place, role and effectiveness with regard to the protection and promotion of human rights in Canada and the world.

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2 Stephen Harper served as Canada's 22nd Prime Minister from February 6, 2006, until November 4, 2015.

PRÉSENTATION DES RÉDACTEURS

Kirsten J. Fisher et John Packer

Quel est l'état des droits de la personne au Canada? L'engagement du Canada envers les droits de la personne ainsi qu'envers la paix et le développement durables est-il aussi fort qu'il a déjà été et fait-il honneur à la réputation du Canada, laquelle est promue par le pays lui-même? De quelle manière les droits de la personne peuvent-ils être pleinement exercés au pays et à l'étranger? Le Canada peut-il maintenir sa fierté et son identité en tant qu'incitateur de changement dans ce domaine? Le numéro initial de l'*Annuaire canadien des droits de la personne* explore les enjeux et les événements qui sont ressortis en, ou émergé à partir de, 2015 et qui répondent à ces questions selon divers points de vue et diverses approches. Comme le monde semble changer de direction en ce qui concerne la promotion des droits de la personne alors que nous entrons dans la première moitié de la deuxième décennie du 21e siècle, ces questions sont peut-être plus importantes qu'elles le seraient autrement. Nous croyons que le Canada a la possibilité – peut-être l'obligation morale – de défendre la cause à la lumière des récents changements survenus à l'échelle mondiale. Sans tenir compte des développements à l'extérieur du Canada, nous sommes d'avis qu'il est important que les Canadiens comprennent davantage les enjeux contemporains, grâce à un accès à la documentation pertinente, pour que l'on puisse exercer encore plus pleinement les droits de la personne au sein de notre pays et dans nos relations avec les autres.

Le lancement de l'*Annuaire canadien des droits de la personne* est une initiative très intéressante du Centre de recherche et d'enseignement sur les droits de la personne (http://cdp-hrc.uottawa.ca/fr) de l'Université d'Ottawa, en collaboration avec l'organisation non gouvernementale Human Rights Internet (http://hri.ca, en anglais seulement). Notre objectif est de combler un manque de documentation et de ressources disponibles pour les universitaires et les praticiens qui travaillent au point de rencontre des droits de la personne et du Canada. Les rôles du Canada et des Canadiens dans la définition, la défense et la promotion des droits de la personne font partie de notre identité nationale – tant celle qui nous est attribuée par les pays étrangers que celle que nous vivons ici[1]. Au moment où ce numéro paraît, il semble que la politique canadienne et les résultats de l'élection pourraient indiquer que la population réadopte les valeurs contemporaines fondamentales qui sont de défendre les droits de la personne et d'en faire la promotion, tandis qu'ailleurs dans le monde, les droits de la personne perdent de l'importance pour certaines personnes qui veulent resserrer les frontières et réduire les préoccupations d'ordre moral aux droits des concitoyens (et dans certains cas, aux droits de seulement *certains* concitoyens). Le temps est donc venu de faire le lancement de ce périodique et, en même temps, de promouvoir le besoin de protéger les droits de la personne tout en aidant ceux et celles qui travaillent à l'atteinte de cet objectif.

Notre vision de cette nouvelle publication est d'une référence bilingue faisant autorité au point de rencontre des droits de la personne et du Canada. Nous espérons que cette vision en fera un outil différent pour les personnes qui s'intéressent aux nouveaux faits importants quant aux droits de la personne au Canada, aux faits nouveaux dans ce domaine qui sont pertinents au Canada, et à la contribution du Canada à ce qui se dit et à ce qui se fait en matière de droits de la personne à l'échelle internationale.

Le premier numéro comprend, comme le feront les numéros suivants, trois sections distinctes : les deux premières sections présentent des articles (une section générale non thématique revue par les pairs et une section spéciale avec des articles portant sur un enjeu précis concernant les droits de la personne – le

1 Selon l'Enquête sociale générale menée par Statistique Canada en 2013, plus de 90 % des Canadiens considèrent la Charte canadienne des droits et libertés comme étant assez ou très importante pour l'identité nationale – elle se classe au premier rang parmi cinq symboles mesurés (avant le drapeau canadien, l'hymne national, la Gendarmerie royale et même le hockey).

présent numéro comprend trois sections spéciales traitant d'enjeux uniques); la troisième section est un reportage axé sur les réseaux au sujet des faits nouveaux, survenus durant l'année civile, concernant les décisions liées aux droits de la personne qui ont été prises par les tribunaux canadiens, les mesures législatives liées aux droits de la personne au Canada, et la politique étrangère et les relations internationales (y compris les organismes internationaux) du Canada.

La section générale des articles revus par les pairs comprend quatre contributeurs : David Petrasek, de l'Université d'Ottawa, explore l'approche récente du gouvernement conservateur canadien quant à la politique étrangère et la manière dont la partisanerie politique et la sélectivité ont nui à son engagement envers les valeurs déclarées; Étienne Roy Grégoire, de l'Université du Québec à Montréal, examine les obligations et la responsabilité du Canada concernant l'exploitation des ressources naturelles en mettant l'accent sur la Colombie, plus précisément les rapports aux termes de l'Accord de libre-échange Canada-Colombie; Rebecca Johnson, de l'Université de Victoria, explore les 94 « appels à l'action » de la Commission de vérité et de réconciliation; Jennifer Moore, avocate, examine les raisons pour lesquelles le Canada n'a pris que des mesures modestes et décroissantes dans la lutte internationale contre l'impunité quant aux poursuites nationales liées à des crimes de guerre et à des crimes contre l'humanité, et explique pourquoi le pays n'intentera probablement pas d'autres poursuites en vertu de la *Loi sur les crimes contre l'humanité et les crimes de guerre.*

En 2015, un fait particulièrement important a été le projet de loi antiterroriste C-51, qui a pris force de loi au Canada. Il était nécessaire de porter l'attention requise à ce projet de loi et à ses implications dans ce numéro. Nous avons donc demandé à deux experts, le professeur Craig Forcese de l'Université d'Ottawa et le professeur Kent Roach de l'Université de Toronto, de rédiger ensemble une section spéciale compilant des résumés, des analyses et des commentaires de certains des plus grands universitaires et praticiens canadiens qui travaillent au point de rencontre des droits de la personne et de la sécurité. Le résultat est une exploration stimulante de la sécurité nationale, de la loi et des droits de la personne – comme le droit à un procès équitable et le besoin d'établir un équilibre entre les libertés civiles et les préoccupations liées à la sécurité. Ces articles sont importants compte tenu de ce qu'ils affirment au sujet du contexte canadien, en plus de jeter la lumière sur des initiatives similaires qui sont ou pourraient être prises ou considérées par d'autres gouvernements partout dans le monde.

Nous incluons dans le présent numéro une deuxième section spéciale présentant les discussions et les travaux qui ont découlé d'un symposium qui a eu lieu à l'été 2015, au Centre de recherche et d'enseignement sur les droits de la personne. Ce symposium a permis de réunir des universitaires, des activistes sociaux, des conservateurs d'art et des professionnels des droits de la personne de nombreux pays pour échanger et générer des idées en ce qui concerne l'influence réciproque entre les arts et les droits de la personne (surtout en ce qui a trait à l'appartenance autochtone). La section spéciale de l'*Annuaire* dédiée à ce symposium comprend un résumé de l'événement et des discussions, les discours d'introduction prononcés par les conférenciers, la professeure Yvonne Donders de l'Université d'Amsterdam et le professeur Allan J. Ryan de l'Université Carleton, ainsi qu'un article rédigé par l'un des participants, Omid B. Milani.

Une troisième section, rédigée par John Packer, présente les versions écrites des présentations faites au départ dans le cadre de la discussion en groupe qui a eu lieu au Centre de recherche et d'enseignement sur les droits de la personne le 28 novembre 2014, durant laquelle on a abordé les défis concernant les différents points de vue, droits et responsabilités en matière de soins de santé et de survie d'une adolescente (appelée JJ) faisant partie d'une collectivité autochtone en Ontario. Le texte intégral de la décision controversée du juge G.B. Edward de la Cour de justice de l'Ontario est inclus, avec un addenda extraordinaire reflétant un accord subséquent (avril 2015) avec les parties – résolvant l'affaire en question, mais laissant non réglées les principales questions en litige. Ce dossier et les questions qui ont été soulevées auront probablement une plus grande importance dans l'avenir alors que les peuples autochtones affirment davantage leurs droits, c'est-à-dire alors que les droits de l'enfant sont de plus en plus élaborés et soutenus, et alors que la jurisprudence canadienne et les pratiques pertinentes évoluent.

C'est en 2015 que les Canadiens ont élu le nouveau gouvernement libéral du Canada, après près d'une décennie de règne du Parti conservateur sous la direction du premier ministre Stephen Harper[2]. Le Canada a, depuis l'élection de Justin Trudeau, du moins en théorie, repris en main sa réputation et son identité comme pays favorisant les droits de la personne et l'égalité sociale, et comme pays de puissance moyenne faisant la promotion d'une gouvernance libérale et du multilatéralisme. L'année 2015 peut être considérée comme étant particulièrement importante puisqu'elle s'est avérée

2 Stephen Harper a été 22e premier ministre du Canada du 6 février 2006 au 4 novembre 2015.

être un tournant pour le Canada ainsi que pour sa promotion et sa protection des droits de la personne à domicile et à l'étranger. Il reste à voir quel sera l'effet que ce changement de leadership aura sur le pays et ses interactions mondiales. Les contributions au présent numéro de l'*Annuaire canadien des droits de la personne* conviennent parfaitement pour aider à évaluer la place, le rôle et l'efficacité du Canada en ce qui concerne la protection et la promotion des droits de la personne au Canada et dans le monde.

GENERAL SECTION

HUMAN RIGHTS IN CONSERVATIVE PARTY FOREIGN POLICY, 2006-2015

David Petrasek

Abstract: The Conservative government led by Stephen Harper from 2006-15 proclaimed its commitment to promoting human rights and freedom in the world, and took a number of steps towards that end. The effort seemed genuine, but it was critically undermined by the government's overly partisan and selective approach to raising rights concerns abroad, and by its wariness of multilateral processes. The policy was also compromised by the fact that the Conservatives sought to ignore or opt-out of international monitoring of Canada's record, calling into question Canada's commitment to a universal human rights regime. The result is that the Conservative legacy in this area is largely inconsequential.

Le gouvernement conservateur dirigé par Stephen Harper de 2006 à 2015 affirma son engagement à promouvoir les droits et libertés de la personne dans le monde et prit un certain nombre de mesures à cette fin. Les efforts semblaient réels, mais ils furent grandement minés par l'approche trop partisane et sélective du gouvernement lorsque venait le temps de soulever la question de ces droits à l'étranger, ainsi que par sa méfiance à l'égard des processus multilatéraux. La politique des conservateurs fut aussi compromise par leurs tentatives d'ignorer les mécanismes internationaux de surveillance ou d'y soustraire le Canada, qui remirent en question l'engagement de ce dernier envers le système international des droits de la personne. En conséquence, l'héritage conservateur dans ce domaine est très mince.

INTRODUCTION

The defeat of Stephen Harper's Conservative government in October 2015 was widely welcomed by many observers of Canadian foreign policy. In their near decade in power, the Conservatives put a distinct mark on foreign policy, turning aside from the even-handedness and preference for multilateralism characteristic of previous Canadian governments. Although in some areas, for example pursuing free trade agreements, there was continuity, in other areas the Conservatives took a decidedly different approach. This was especially evident in the Conservatives' approach to the promotion of human rights abroad. Prime Minister Stephen Harper and his various foreign ministers from 2006-2015 spoke publicly, and often, about promoting freedom and human rights in the world. Yet, their policies to do so were overly partisan, wary of multilateralism and undermined Canada's commitment to a universal human rights regime. The result is that the Conservative legacy in this area is largely inconsequential. Indeed, it is safe to conclude that – taking into account their near decade in power – no recent Canadian government has less to show for its efforts on this file.

While a full and final assessment of Conservative policy in this area will require access to diplomatic notes and cabinet memos, this article is a first attempt to take stock of the Conservative record[1]. It argues that the Harper government's claim to take a principled stand in favour of human rights was at odds with its practice, which was highly partisan. The government claimed to embrace human rights but did so in the absence of a commitment to their universal application, both at home and abroad. Thus, although the Prime Minister and his foreign ministers spoke passionately about promoting freedom and human rights in the world, their evident selectivity about which countries were criticized, and their distrust of multilateral approaches, undermined their ability to do so effectively.

There are different explanations for an approach that trumpeted a values-driven foreign policy, yet that was so clearly compromised. Some see a hidden motive;

1 The article provides a *general* overview of the issue, and, although numerous examples are referred to, it does not deal in detail with Conservative policy as regards the human rights situation in particular countries.

that is, the use of human rights rhetoric was intended not to promote these rights, but to serve some other purpose. The argument advanced here is different. It starts from the assumption that Prime Minister Harper and his foreign ministers were genuine in their belief that Canada should be promoting freedom and human rights in the world. But their ideological bent blinded them to the realization that the universal nature of human rights requires a more honest attempt to apply these rights to friend and foe alike, and to accept unequivocally scrutiny at home if Canada is to insist on it abroad.

MORE THAN MERE RHETORIC

Some will dispute it, but Stephen Harper's Conservative government was committed to promoting freedom and human rights as a key feature of its foreign policy. Freedom, human rights, democracy, and the rule of law –these themes were ever-present in the Prime Minister's speeches and interviews that touched on global events,[2] and those too of his foreign ministers, especially Foreign Minister John Baird.[3] The Harper government did not, as some have charged,[4] abandon Canada's traditional commitment to human rights. Indeed, from the beginning of their tenure, the Conservatives insisted that their response to authoritarian regimes would be *more principled* than their predecessors. For example, in opposition, prominent Conservatives including Stephen Harper and Jason Kenney had been vocal critics of the Chinese government's human rights record.[5] When he became Prime Minister, Harper was initially cool to the Chinese, and did not attend the Beijing Olympics in 2008. When the Chinese president, Hu Jintao, refused to meet Harper at an Asia Pacific Economic Co-operation (APEC) summit in Vietnam in November 2006, Harper said, "I think Canadians want us to promote our trade relations worldwide, and we do that, but I don't think Canadians want us to sell out important Canadian values ...[t]hey don't want us to sell that out to the almighty dollar."[6] Indeed, the Harper government's apparent prioritization of human rights issues in its relations with China, at least in its first years in office, was widely criticized.[7]

Prime Minister Harper also met twice with the Dalai Lama, the first Prime Minister to do so in his Parliamentary offices, and encouraged a similar meeting between the Governor-General and the Dalai Lama.[8] Harper also boycotted a Commonwealth summit in Sri Lanka because of that country's refusal to investigate credible allegations of war crimes. Further, Prime Minister Harper committed Canadian forces to humanitarian interventions abroad to protect civilians, first in Libya in 2011 and later against the Islamic State in Iraq and Syria. His government also, at least initially, partially justified the major Canadian military commitment in Afghanistan by the need to protect democracy and human rights in that country, which were under threat from a resurgent Taliban.

When he won a majority government in 2011, Prime Minister Harper reaffirmed his commitment to a principled foreign policy. He said Canada would no longer go along with the consensus in multilateral forums simply to get along; Canada would "take pretty clear stands."[9] In a speech at the Conservatives' annual conference in June 2011, Harper stated emphatically that Canada will "no longer [try to] please every dictator with a vote at the United Nations. And I

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2 Prime Minister Harper's first speech to the United Nations, in September 2006, stressed "... the higher ideals to which we all should aspire –tfreedom, democracy, human rights, and the rule of law."re

3 Address by the Honourable John Baird, Minister of Foreign Affairs, to the UN General Assembly, September 26, 2011.http://www.international.gc.ca/media/aff/speeches-discours/2011/2011-030.aspx?lang=eng&view=d.

4 Errol Mendes, "Defending Canada's human rights and rule of law legacy" *CIPS Blog*, January 21, 2013, http://cips.uottawa.ca/defending-canadas-human-rights-and-rule-of-law-legacy/

5 Robert Fife, "MP Blasts PM's Idea of Human Rights" *The Province*: A29. 21 January 2005. See also: Lawrence Martin, *Harperland: The Politics of Control* (Toronto: Penguin Canada, 2011), 83.

6 "Won't sell out on rights despite China snub: PM," *cbc.ca*, 15 November 2006, http://www.cbc.ca/news/world/won-t-sell-out-on-rights-despite-china-snub-pm-1.570708.

7 A useful summary of this criticism is found in Lui, Andrew, "Sleeping with the Dragon: The Harper Government, China and How Not to Do Human Rights." In *Canada in the World: Perspectives on Canadian Foreign Policy*, Claire Turenne-Sjolander and Heather A. Smith, eds, Toronto: Oxford University Press, 2012.

8 Derek Abma, "Dalai Lama commends Stephen Harper for 'courage' meeting in face of pressure from China," *The National Post*, April 28, 2012, http://news.nationalpost.com/news/canada/dalai-lama-commends-stephen-harper-for-courage-meeting-in-face-of-pressure-from-china. The meeting led to a strong rebuke from the Chinese embassy, which calledit "blatant interference in China's internal affairs". See http://ca.china-embassy.org/eng/mtfw/press2/t376373.htm

9 Kenneth Whyte, "In conversation-Stephen Harper"*Macleans*, 5 July 2011, http://www.macleans.ca/general/how-he-sees-canadas-role-in-the-world-and-where-he-wants-to-take-the-country-2/.

10 Paul Wells, "Why Harper wants to take on the world"*Macleans*, 15 July 2011, http://www.macleans.ca/authors/paul-wells/why-harper-wants-to-take-on-the-world/.

confess that I don't know why past attempts to do so were ever thought to be in Canada's national interest."[10] In short, the Conservative government was very forthright in insisting on a values-based foreign policy that included the vigorous promotion of human rights abroad.[11]

On the other hand, and as set out in more detail below, this same government consistently refused to criticize human rights abuse in *some* countries, notably in the Middle East. It also criticized or ignored United Nation's scrutiny of Canada's human rights record, lost interest in supporting the International Criminal Court, and stepped back from fully defending women's rights. It also reduced Canadian support to the UN human rights program.

How to explain this apparently contradictory approach? For some, the explanation lies in the Harper government's instrumentalization of human rights concerns abroad for political purposes at home. Thus, the strong stance taken by the Harper government vis-à-vis the human rights situation in Sri Lanka is explainable as a matter of domestic politics. By refusing to attend the Commonwealth Heads of Government Meeting in Sri Lanka in November 2013, the Prime Minister was appealing to Tamil voters, concentrated in a few eastern Toronto ridings.[12] Similarly, some argue the Harper government's refusal to criticize credible allegations of human rights abuse by Israel in the Occupied Territories, or during its several military attacks in Gaza, was designed to win Jewish votes in Montreal and Toronto.[13] To be sure, the Conservative's stated goal to increase their popularity with specific ethnic groups lends some credibility to these claims.

Another explanation might be the 'bait and switch' theory advanced by Julie Mertus in relation to human rights in US foreign policy. Mertus suggests the human rights rhetoric so evident in US foreign policy is largely a ruse, designed to attract people to support a supposed principled policy that in fact is grounded solely in the national interest. It further masks a double standard whereby the US seeks to hold other nations to a body of international norms that the US itself only partially accepts.[14] On the latter point, the Conservatives did at times claim a similar exceptionalism– suggesting we were immune from the scrutiny we demanded be applied to others.[15]

However, on closer reflection, neither of these arguments is convincing as an explanation for the apparent inconsistencies in the Harper government's approach to human rights. The instrumentalization argument rests on the unproven assumption that diaspora communities will vote *en bloc* for the party that takes their side vis-à-vis events in their home (or kinship) country. Evidence for this is mixed at best.[16] Certainly, the 2015 federal election results showed no significant gains for the Conservatives in Montreal and Toronto among the Tamil and Jewish voters they were allegedly pursuing with their policies to criticize Sri Lanka and not to criticize Israel.[17] It also fails to account for the fact that overt partisanship in favour of one national, ethnic or religious group may well annoy another group of voters–especially in a country as diverse as Canada. There are, for example, significantly more Canadians claiming Arab ancestry than Jewish ancestry.

As regards the claim that human rights rhetoric is an elaborate ruse, this assumes some clever planning on the Prime Minister's part, to seize the values-laden discourse of human rights to give a principled sheen to a self-interested foreign policy. Yet, the Prime Minister did not discover human rights on taking office, nor did those of his ministers, like John Baird and Jason Kenney, who spoke out most vociferously

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11 Chapnick, Adam. "A Diplomatic Counter-revolution: Conservative Foreign Policy, 2006-11. International Journal 67.1 (2011): 137-54.

12 David Carment and YiagadeesanSamy, "The dangerous game of diaspora politics,"*Globe and Mail*, February 10, 2012, http://www.theglobeandmail.com/globe-debate/the-dangerous-game-of-diaspora-politics/article544912/ Jeffrey Simpson, "This Commonwealth 'principle'is naked self-interest,"*Globe and Mail*, October 9, 2013, http://www.theglobeandmail.com/globe-debate/this-commonwealth-principle-is-naked-self-interest/article14746307/.

13 Jeffrey Simpson, "For two years, Conservatives will be all about the 10 percent,"*Globe and Mail*, December 21, 2013, http://www.theglobeandmail.com/globe-debate/for-two-years-conservatives-are-all-about-the-10-per-cent/article16059597/.

14 Julie A. Mertus, *Bait and Switch: Human rights and US foreign policy* (New York: Routledge, 2nd ed., 2008).

15 BrookeJeffrey, *Dismantling Canada: Stephen Harper's New Conservative Agenda*(Montreal: McGill-Queen's University Press, 2015), 258. Thomas Walkom, "Harper Government's dismissal of UN torture report absurd," The Toronto Star, June 5, 2012, http://www.thestar.com/news/canada/2012/06/05/walkom_harper_governments_dismissal_of_un_torture_report_absurd.html

16 Natalie Bender, "Harper government 'pandering to diasporas'? Not so fast, pundits,"CIPS Blog, May 8 2013, http://cips.uottawa.ca/harper-government-pandering-to-diasporas-not-so-fast-pundits/

17 The Liberals won all the seats in the Toronto suburb of Scarborough where Canada's Tamil community is concentrated. Paul Weinberg, "Canada's Israel Lobby and the Elections" *LobeLog*, 11 November 2015, https://lobelog.com/canadas-israel-lobby-and-the-elections/.And the Liberals won the seats in Montreal and Toronto with sizeable population of Canadian Jews. See also: Patrick Martin, "Canada's Jewish community divided over which party should be elected", *The Globe and Mail*, 19 October 2015, http://www.theglobeandmail.com/news/politics/canadas-jewish-community-divided-over-which-party-should-be-elected/article26854943/.

on human rights issues abroad.Neither did they introduce human rights into Canadian foreign policy, nor did they elevate its importance. Moreover, if the purpose were to disguise the national interest in the cloak of universal values, one would expect that the rhetoric (if not the policy) would be more even-handed, rather than overtly and explicitly partisan. That is, the manner of their defense of human rights abroad hardly provided attractive 'bait' to those who might not otherwise support them.

Rather, the position taken here is that we should accept as genuine the Harper government's insistence that it would take a principled stand in defense of human rights abroad. There is nothing necessarily inconsistent between such a view and a policy of implementation that was highly selective and hostile to multilateral efforts. How so? Because the policy arises not from a commitment to uphold the UN's international human rights regime that is grounded in universality, but more narrowly it is seen as an expression of Canadian "values" which include the belief that Canada must promote human rights in the world. To understand why this might be problematic requires some further explanation.

There are distinct components to the idea of the universality of human rights. The first is the most commonly cited, that these are rights that are universally valid. That is, when the UN adopts a human rights treaty or other human rights document, it is proclaiming that the rights protected therein are not conditional on a political or economic system, or culture or religion, but inherent in individuals on the basis of their humanity. But universality additionally includes the idea that all governments are bound by the same standards, and all should be subject to equal scrutiny as regards their adherence to those standards. To apply selectively a demand grounded in human rights –vis-à-vis some countries, or some groups, and not others –is to undermine the idea of universality.

Yet, repeatedly, when the Conservatives spoke of promoting human rights in the world, they anchored this policy not in obligations on states that arise from membership in a universal human rights regime, but rather in abstract appeals to Canadian values and history. In a major speech on human rights in 2012 (the most detailed he gave on the topic), Foreign Minister Baird laid out a comprehensive approach to promoting human dignity in the world. In particular, he committed Canada to defending women's rights, opposing child marriage, and speaking up in defense of the rights of gays and lesbians worldwide. Oddly, however, he made no mention of how human dignity and the rights of the most vulnerable might be grounded in the Universal Declaration of Human Rights or other UN standards. One would think that on the human rights issues he prioritized – so controversial in some areas of the world – the foreign minister would want to base his argument on the universal validity of international law. Rather, he suggested in a troubled world,

> "...Canada stands as a beacon of light, built around our fundamental values of freedom, democracy, human rights and the rule of law. *We* have a clear vision of what it takes to build the conditions in which people live with the dignity *others* crave....[18] (emphasis added)

And Canada's obligation to promote human rights, its "...principled, values-based foreign policy"was based not in membership in the UN human rights regime but was rather,

> "...steeped in the conviction that, as a free nation, we must promote and protect the fundamental liberties of people around the world. It's a foreign policy I'm aggressively pursuing, one in which we promote Canadian interests and Canadian values."[19]

It is striking in reading through Baird's statements, and those of other members of the government dealing with human rights, how infrequently international human rights treaties are invoked.[20]

All of this points to the particular ideological approach the Conservatives brought to the issue of promoting human rights abroad. There were three key components: first, they delinked the promotion of human rights from the international legal regime (or de-emphasizing the importance of that regime); second, and related, they eschewed multilateral efforts and often pursued human rights promotion in a determinedly unilateral fashion; and third, they anchored the policy in an appeal to Canadian values. Such an

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18 Address by Minister Baird at Montreal Council on Foreign Relations Luncheon, September 14, 2012, http://www.international.gc.ca/media/aff/speeches-discours/2012/09/14a.aspx?lang=eng

19 Address by Minister Baird at Montreal Council on Foreign Relations Luncheon.

20 For example, in September 2013, at the United Nations, Foreign Minister Baird gave a speech dedicated to the issue of child, early and forced marriage without any reference to any UN treaty or standard that addresses the issue. Address by Minister Baird on Child, Early and Forced Marriage, September 25, 2013, http://www.international.gc.ca/media/aff/speeches-discours/2013/09/25a.aspx?lang=eng

approach, whether intentionally or not, has some clear implications. One can, for example, promote human rights abroad without fretting about doing so in a consistent manner as measured against universal standards. If the call to respect rights is based in Canada's own values, it might not be inconsistent to temper it when other things we value are at stake. Further, delinking the policy from the international legal regime means the necessity of multilateral approaches (grounded in that regime) is less clear, and also that there is no pressing need when demanding scrutiny abroad to show one is similarly subject to international scrutiny at home. These features bear a striking resemblance to the neo-conservative approach to rights and democracy promotion favoured by President George W. Bush. Indeed, the leader of the largest human rights group in the US noted in 2010 that "Harper's foreign policy team is still acting as if 9/11 happened yesterday and George Bush is still in the White House."[21]

A SELECTIVE APPROACH

As noted, the Harper government was highly selective in its defense of human rights abroad. Some countries were routinely criticized, others rarely, or not at all –even when serious human rights concerns were present. This was particularly evident in the government's unwillingness to criticize in any way Israeli actions that might be in breach of international human rights or international humanitarian law. Soon after being elected, Prime Minister Harper described the Israeli attack on and invasion of Lebanon in the summer of 2006 as a "measured response" to Hezbollah's action in seizing Israeli soldiers as hostages. He did so in the face of evidence of disproportionate attacks by Israel on Lebanon that led to an internal displacement crisis in Lebanon, and prompted thousands of Lebanese-Canadians who were in Lebanon to seek Canadian government help to leave. Credible reports pointed to clear evidence of indiscriminate attacks by both Israel and Hezbollah.[23] The Harper government similarly refused to condemn Israeli attacks in Gaza from December 2008 to January 2009 that led to many civilian casualties, again with credible reports of these arising from unlawful attacks.[24] There were further Israeli attacks on Gaza in 2012 and in 2014 that led to civilian deaths,[25] and in which the Harper government made no statement even mildly critical or questioning of Israeli policy. The US State Department, on the other hand, labeled as "disgraceful" and "totally unacceptable and totally indefensible" Israeli shelling in two separate incidents in the 2014 attacks, on or near schools, which killed many civilians.[26]

Throughout the period of the Harper government, Israeli settlement activity in the Occupied Territories continued unabated. Although Canada's official position remained that Israeli settlement activity in the West Bank was in breach of its duties as the Occupying Power under the 4th Geneva Convention, such activity was never forcefully condemned and did not receive even a mild rebuke after 2011.[27] Both the US and Canada's European allies did continue to condemn Israel's illegal settlement activity throughout this period.[28]

Canada's partisan approach to human rights issues in Israel and Palestine was so strong that it produced some odd results. When the Palestinian Authority sought to accede to numerous UN human rights treaties, Foreign Minister Baird objected.[29] Even though these treaties would better protect Palestinians from abuse at the hands *of their own*

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21 Ken Roth, "Canada no longer leads on human rights,"*Ottawa Citizen*, 15 October 2010, http://www.hrw.org/news/2010/10/15/canada-no-longer-leads-human-rights.

22 Michael Byers, "Harpers unmeasured support for Israel," *The Tyee*, 19 July 2006, http://thetyee.ca/Views/2006/07/19/Israel/.

23 See Human Rights Watch, "Why they died – civilian casualties in Lebanon during the 2006 war," September 5, 2007, http://www.hrw.org/reports/2007/09/05/why-they-died.

24 Peter Kent, then a junior foreign minister, blamed the deaths of children at a school attacked by the Israeli Defense Forces entirely on Hamas, without any clear evidence that they were at or near the school when it was attacked. Aaron Wherry "Apparently Peter Kent has the conch," *Macleans.ca*, 7 January 2009, http://www.macleans.ca/politics/ottawa/apparently-peter-kent-has-the-conch.

25 See Human Rights Watch, "Israel/Gaza: Unlawful Israeli Attacks on Palestinian Media", December 20, 2012, and see Human Rights Watch, *World Report 2015 –oIsrael/Palestine*, https://www.hrw.org/world-report/2015/country-chapters/israel/palestine.

26 "US 'appalled' by 'disgraceful'Israeli shelling of school", *The Guardian*, 3 August 2014, http://www.theguardian.com/world/2014/aug/03/us-appalled-disgraceful-israeli-shelling-gaza-un-school

27 The Canadian Press, "Canada Plays down Israeli Settlement Criticism",*CBC News*, CBC/Radio Canada, 3 December 2012, http://www.cbc.ca/news/politics/canada-plays-down-israeli-settlement-criticism-1.1136546

28 A full account can be found in Adam Chapnick, "Stephen Harper's Israel policy, 2006-2015", Adam Chapnick and Christopher Kukucha, eds.,*Canadian International Policy 2006-2015: Continuity and Change Under Conservative Minority and Majority Government*, (UBC Press, 2016 forthcoming).

29 Foreign Affairs, Trade and Development Canada, "Baird calls on Palestinians, Israelis to re-commit themselves to Kerry peace initiative,"3 April 2014, http://www.international.gc.ca/media/aff/news-communiques/2014/04/03a.aspx?lang=eng.

government (and create no new obligations on the Israeli occupying authorities), Baird feared that allowing Palestine to join the treaties would further cement its claims to statehood. [30]

A second situation where the Harper government chose to apply a highly selective concern for human rights was as regards Iran and neighbouring Persian Gulf countries. The government routinely denounced human rights abuses in Iran, and was very vocal and active in international forums drawing attention to the Iranian regime's poor human rights record. Previous Canadian governments had also been outspoken regarding human rights in Iran. Canada first led the process of condemning Iran in the UN General Assembly (UNGA) in 2003 and continued to take the lead in securing a UNGA vote each year condemning Iran's human rights record. However, under the Harper Government, especially in its latter period, Canadian criticism of Iran's human rights record intensified, even after the election of a more reform-minded government in Iran in 2013. In the 2011 - 2015 period, Foreign Minister Baird or his department issued 49 press statements critical of the Iranian government's human rights record, more than as regards the human rights situation in almost any other country.[31] By way of contrast, in the same period, 27 press statements were issued regarding human rights in Egypt, in a period when it went through unprecedented violence and political turmoil, culminating in the military coup in 2013. The latter resulted in the deaths of hundreds of unarmed civilians, thousands of political detainees and widespread torture; yet the 6 press statements from 2014-15 dealing with human rights in Egypt were positive in tone, simply encouraging reform.[32,33]

Certainly, the human rights situation in Iran deserved attention; it remains characterized by arbitrary detention and use of the death penalty, political imprisonment and unfair trials, widespread torture of detainees and restriction on freedoms of expression, assembly and religion, and discrimination against women and minorities.[34] Yet, although there may be differences in scale, these are all human right abuses found to varying degrees in other Gulf countries – Qatar, United Arab Emirates, Bahrain, and especially Saudi Arabia. The Harper government, however, was noticeably silent on the human rights record of Iran's neighbours in the Gulf. For example, in the face of widespread protests and instability in Bahrain from 2011 onwards, with credible evidence of arbitrary arrests, unfair trials, torture, ill-treatment, and undue restrictions of free expression and assembly, Baird was publicly silent, even in the official statements concluding his two visits to the country.[35] In a March 2013 visit to Qatar and the United Arab Emirates (UAE), during which each of these states was maintaining or even tightening repressive rule, Baird did not publicly raise the issues of democracy or freedom, and he barely mentioned human rights.[36] Similarly, while criticizing the Iranian record on religious freedom and women's rights, he made almost no criticism of the human rights record of the Saudi government.[37] Indeed, in the period 2011-15, of the 20 some press statements issued on these four countries only 5 made any mention of human rights even in general terms (and three of these concerned the unrest in Bahrain in 2011). This despite the foreign minister's several trips to the region. In 2012, Foreign Minister Baird announced his intention to champion the rights of lesbian and gay persons and in particular to oppose

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30 David Petrasek, "Canada makes Palestinian human rights a pawn in Mid-east peace talks", CIPS Blog, 10 April, 2014, http://cips.uottawa.ca/canada-makes-palestinian-human-rights-a-pawn-in-mideast-peace-talks/.

31 Only the ongoing violence and killings in Syria received more attention. Foreign Affairs, Trade and Development Canada, "News Releases" 2011-2015, http://www.international.gc.ca/media/minpub-index/news-communiques/.

32 The 27 statements do not include the several statements issued concerning the specific case of the detained Canadian journalist, Mohamed Fahmy.

33 Amnesty International, *Annual report 2014/15- Egypt*, https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/,

34 Amnesty International, *Annual report- Iran 2014/15*, https://www.amnesty.org/en/countries/middle-east-and-north-africa/iran/report-iran/

35 Admittedly, Foreign Minister Lawrence Cannon did initially demand respect for human rights when protests erupted in Bahrain in early 2011, and issued several statements calling on the government to investigate alleged human rights abuse, respect due process rights, etc. See "Statement by Minister Cannon on Situation in Bahrain,"t18 February 2011, http://www.international.gc.ca/media/aff/news-communiques/2011/069.aspx?lang=eng. See also "Statement by Minister Cannon on Situation in Bahrain,"t16 March 2011, http://www.international.gc.ca/media/aff/news-communiques/2011/108.aspx?lang=eng ; and "Minister Cannon Condemns Ongoing Violence in Yemen, Bahrain and Syria,"i21 March 2011, http://www.international.gc.ca/media/aff/news-communiques/2011/113.aspx?lang=eng.

36 David Petrasek, "Going along to get along –John Baird's Mideast tour", *CIPS Blog*, 5 April 2013, http://cips.uottawa.ca/going-along-to-get-along-john-bairds-mideast-tour/.

37 The only exceptions were mildly worded expressions of concern at one point over protests in Bahrain and over the case of the Saudi blogger, RaufBadawi, sentenced to 1,000 lashes. See David Petrasek, "As nuclear talks progress, Baird's concern for human rights in Iran rings hollow"*CIPS Blog*, 10 November 2013, http://cips.uottawa.ca/as-nuclear-talks-progress-bairds-concern-for-human-rights-in-iran-rings-hollow/; and David Petrasek, "On human rights, Baird leaves a troubled legacy"*CIPS Blog*, 3 February 2015, http://cips.uottawa.ca/on-human-rights-baird-leaves-a-troubled-legacy/.

the criminalization of same-sex relations.[38] In public statements he drew attention to persecution of homosexuals in Russia, Nigeria[39] and Uganda, but never in the Gulf countries, although there is serious and active repression of homosexuals in Saudi Arabia and elsewhere in the Gulf.[40]

NO GOING ALONG TO GET ALONG

In addition to this hyper-partisanship in deciding which regimes to criticize, the Harper government's approach to human rights was also marked by a deep ambivalence towards advancing its agenda through UN human rights bodies. This was evident, especially from 2011 onwards, both as a general orientation for the government, but also in its specific treatment of certain multilateral initiatives.

The preference for going it alone was made explicit by the Prime Minister and Foreign Minister in August and September 2011. In a speech to the UN General Assembly, Baird said that Canada will no longer "go along" just to "get along. "Freedom, democracy, human rights and the rule of law" will be the principles guiding Canada's foreign policy. He further stated that multilateral institutions like the UN –and Canada's engagement with them –would be measured on the degree to which they stand up for these principles against tyrants and terrorists. In this view, defending human rights in the word would be done with an inherent suspicion of multilateralism.

The application of this policy was clear in the Harper government's positions as regards the two follow-up meetings, in 2009 and 2011, to the World Conference against Racism in 2001 held in Durban, South Africa.[41] As regards the Durban II Review Conference in 2009, there were legitimate concerns that President Ahmadinejad of Iran, and others, would use the preparatory meetings and conference itself to single out and denounce alleged Israeli racism, and that Ahmadinejad would continue to cast doubt on the Holocaust. A number of western countries were doubtful about participating. Canada, however, was the first to announce, in January 2008, that it would not attend. The United States, Germany, Australia, the Netherlands and a few other European countries eventually joined in boycotting the meeting. The UK, France and other countries that did attend simply boycotted Ahmadinejad's inflammatory speech to the conference. Importantly though, the declaration that emerged denounced all forms of racism, specifically mentioning anti-Semitism, and did not in any way single out Israel for criticism. Although Canadian non-participation was hardly unique, the Harper government did go out of its way to boast of the stand it took. Speaking in 2009, as Minister of Citizenship and Immigration, Jason Kenney described the announcement of Canada's withdrawal from Durban II as his "proudest moment as Minister".[42] He also publicly derided the UN High Commissioner for Human Rights who had announced her dismay at the Canadian decision not to participate.[43] Canada was also the first country to boycott a third, follow-up meeting to the Durban conference, in 2011. Again, it was not alone, but the vehemence with which it shunned the gathering and broadcast this loudly was notable.[44]

A further example of the Harper government's retreat from multilateral approaches was evident in its growing wariness concerning the International Criminal Court (ICC). Canada had been instrumental in the negotiation of the Rome Statute leading to the establishment of the ICC and Canada's advocacy for international justice enjoyed cross party support. In 2013 after a UN commission of inquiry –and many NGO reports –had documented ongoing crimes

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38 Address by Foreign Minister Baird at Montreal Council on Foreign Relations, September 14, 2012 http://www.international.gc.ca/media/aff/speeches-discours/2012/09/14a.aspx?lang=eng

39 http://ipolitics.ca/2014/01/13/baird-canada-deeply-concerned-by-new-nigeria-anti-gay-law/

40 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), "Saudi Arabia", *State-sponsored Homophobia : A world survey of laws criminalising same-sex sexual acts between consenting adults*, May 2012, 47, http://www.refworld.org/docid/50ae380e2.html.

41 The original Durban conference was mired in controversy, with strongly opposing views on complex issues like reparations for the slave trade. There was also an attempt by some states and NGOs to single out for particular condemnation Israeli discrimination against Palestinians. An NGO declaration submitted to the conference had equated Zionism with racism. Although in the end the final Durban Declaration did not draw any such inference or single out Israel for criticism, several countries, including Canada withdrew from the conference.

42 Speaking notes for the Honourable Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, at the Inaugural Conference of the Inter-Parliamentary Commission for Combatting Anti-Semitism, February 17, 2009, http://www.cic.gc.ca/english/department/media/speeches/2009/2009-02-17.asp

43 Jason Kenney, speech at "The Perils of Global Intolerance"Conference, September 22, 2011, New York. http://www.frumforum.com/defying-durban/

44 "Speaking Notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism",*Government of Canada, Citizenship and Immigration Canada, Communications Branch*.September 22, 2011, http://www.cic.gc.ca/english/department/media/speeches/2011/2011-09-22.asp.

against humanity and war crimes in Syria, the Swiss government led an initiative to petition the UN Security Council to refer the situation to the ICC. Over 60 countries signed on, including virtually all of Canada's European allies, but the Harper government refused to do so.[45] In 2014, there was a renewed effort to push the Security Council to refer the situation in Syria to the ICC. When the French presented a draft resolution to this effect to the Security Council, Canada did in the end lend its support (although when it did so it had become clear that the resolution would almost certainly be vetoed by the Russians and Chinese). But that resolution, controversially for many, made clear that nationals of states not party to the ICC would be exempt from the investigation.[46] At the November 2013 Assembly of State Parties to the ICC, the Harper government threatened to break an established consensus by demanding a "zero growth" budget for the organization, and only backed down after considerable pressure was brought to bear by other states.[47]

The Conservatives' waning support for the court was likely influenced by the increasing interest on the part of the Palestinian Authority (PA) in acceding to the Rome Statute, a possibility denied to it before the PA was recognized by the UN General Assembly as a non-member observer "state" in November 2012. When the Palestinians did finally formally seek accession to the Rome Statute in January 2015, Baird strongly criticized the move.[48] Indeed, he threatened repercussions and did not distance himself from comments made by the Israeli foreign minister who threatened to ask Israel's allies, including Canada, to stop funding the ICC.[49]

The lack of enthusiasm for multilateral efforts was manifest too in funding decisions. Canada had traditionally contributed substantially to the work of the UN Office of the High Commissioner for Human Rights (OHCHR), usually being one of the top donor countries to OHCHR. However, funds were substantially cut, from over USD $5 million in 2011, to USD $2 million in 2014, moving Canada from 6th to 16th on the OHCHR donor list (just above Russia).[50] There were persistent rumours too that even this substantial decrease was not enough and that the government was considering cancelling all voluntary contributions to OHCHR.

At the UN Human Rights Council, though Canada remained an active participant in the Council meetings, it did not seek to be re-elected when its first stint as a voting member of the Council ended in 2009, or to seek re-election as it was entitled to do in 2011. This is in contrast to countries like France, the UK, Switzerland and Germany which all served two terms on the Council in this period. Standing on principle meant its diplomats were often precluded from key roles in negotiating important compromises. For example, though the government stated that freedom of religion was a top priority, Canada was sidelined in the negotiations leading to the historic, unanimous Human Rights Council decision in 2011, Resolution 16/18.[51] This resolution, condemning discrimination against persons based on their religion or belief, ended a decade of bitter dispute within the UN where states of the Organisation of the Islamic Conference (OIC) had supported resolutions condemning "defamation of religion" in broad terms that western states (including Canada) argued infringed freedom of expression. The US and other states were able to secure a unanimous vote on Resolution 16/18 by switching the concern from criticism of religions to protecting individuals faced by religious discrimination. Canada played little role in crafting this important compromise – a result that upheld both religious freedom and free speech.

For the Harper government, however, compromise was too often a dirty word. In his 2011 speech to the UN General Assembly, Foreign Minister Baird

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45 David Petrasek, "Why has Canada given up on justice in Syria?"*Globe and Mail*, 23 January 2013, http://www.theglobeandmail.com/globe-debate/why-has-canada-given-up-on-justice-in-syria/article7656847/.

46 Washington insisted that this exemption be included, not only in the event that American forces might become involved in Syria, but also because Israel forces are present in Syrian territory through their occupation of the Golan Heights. See Mark Kersten, "The ICC in Syria-Three red lines,"*Justice in Conflict*, 9 May 2014, http://justiceinconflict.org/2014/05/09/the-icc-in-syria-three-red-lines/.

47 Coalition for the ICC, *Report of the 12th Session of the Assembly of States Parties*, 20-28 November 2013, http://www.iccnow.org/documents/asp12_report.pdf, 23-24.

48 Foreign Affairs, Trade and Development Canada, "Canada concerned by dangerous action by the Palestinian authority"January 1, 2015, http://www.international.gc.ca/media/aff/news-communiques/2015/01/01a.aspx?lang=eng.

49 Thomas Escritt and Dan Williams, "Israel Lobbies Foreign Powers to Cut ICC Funding",*Reuters*, Ed. Jeffrey Heller, Ralph Boulton, and Giles Elgood, Thomson Reuters, 18 January 2015, http://www.reuters.com/article/2015/01/18/us-icc-palestinians-israel-idUSKBN0KR06720150118.

50 Report of the Office of the UN High Commissioner for Human Rights, 2014, at p.63, http://www2.ohchr.org/english/OHCHRReport2014/WEB_version/allegati/5_Funding_2014.pdf

51 UN Human Rights Council, *Combatting intolerance, negative stereotyping and stigmatization of, and discrimination, and incitement to violence, and violence against persons based on religion or belief*, April 12, 2011, A/HRC/RES/16/18, http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf

quoted approvingly Margaret Thatcher's dictum that "consensus [is] the process of abandoning all beliefs, and principles[.]" This disdain for multilateral approaches has been noted by a number of commentators as a distinguishing feature generally of Prime Minister Harper's foreign policy.[52] But it was particularly pronounced in the human rights field.

Of course, a principled stand on human rights is needed; but so too is co-operation and compromise. Only through such co-operation were states, including Canada, able to negotiate the UN human rights treaties at the height of the Cold War in the 1950s and 1960s - treaties that still serve us well today. It is true that consensus in international decision-making may often be unfavourable to human rights, but so too will be a policy where a middle size country frowns on co-operating with other states to achieve good–if not always the best–solutions.

NOT FOR THE VIRTUOUS

When countries ratify international human rights treaties the primary (at least hoped for) impact should be at home; that is, ratifying countries should bring their domestic law and policy into line with the provisions of the treaty. Further, ratifying countries also agree to allow international scrutiny of whether they meet their obligations. But although the domestic impact is key, there is also a hoped for international impact. Ratifying human rights treaties and accepting UN scrutiny sends a signal to other UN Member States –that the ratifying state treats seriously its commitments as a UN Member State to improve its human rights record. It is, therefore, on solid ground when it raises concerns about human rights in other countries. Of course, an authoritarian state may join a human rights treaty with no such intention in mind. But because such a state is unlikely to seek to promote human rights in the world, its cynicism –though harmful to its own citizens –is unlikely to undermine any further its international diplomacy. For a country like Canada, however, inconsistency between what it commits to at home and what it promotes abroad can be especially harmful. The Harper government failed to understand or showed little concern for this dynamic.

Since 2002, the UN has adopted two new human rights treaties (on the rights of the disabled, and to prevent forced disappearances), and four protocols to existing treaties to strengthen the powers of their supervisory bodies. Of these six new, binding international agreements, Canada has ratified only one –the Convention on the Rights of the Disabled. Moreover, whereas ratification problems in the past (including the difficulties that arise from a division of powers with the provinces) have led Canadian governments to report that ratification is delayed, the Harper Government stated flatly it had no intention of ratifying the new agreements. In its first years, there was some ambiguity concerning ratification. For example, in 2009, during the UN Human Rights Council's Universal Periodic Review (UPR) process, the Canadian delegation said Canada was considering signing and ratifying the Optional Protocol to the UN Convention against Torture (OP-CAT).[53] In 2013, at the next review, the position had changed, and the Harper government indicated that it had no plans to sign or ratify any of the outstanding human rights treaties.[54]

It is important to point out that, with the notable exception of the United States (which has difficulty ratifying any human rights treaties, given that a two-thirds vote of the Senate in favour is necessary), most of Canada's allies have moved to ratify these new agreements. All European states have signed or ratified the OP-CAT, as have Australia and New Zealand. Numerous others have signed or ratified the Convention on Enforced Disappearances and the protocol to the Convention on the Rights of the Child (that strengthens the role of the UN body supervising the treaty).

The Harper government also refused to sign the Arms Trade Treaty, which was adopted by the UN General Assembly in 2013. This treaty sets restrictions on the export of weapons when they might contribute to serious human rights abuses or international crimes. Signing the treaty would have signalled an intention to ratify, and the interim period could have been used to ensure Canadian law was in full conformity with the treaty. All of Canada's NATO allies including the US signed the treaty.

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52 See Gerald J. Schmitz, "The Harper Government and the De-democratization of Canadian Foreign Policy", Canadian Foreign Policy Journal 20.2 (2014): 224-28. Roland Paris, "Are Canadians Still Liberal Internationalists? Foreign Policy and Public Opinion in the Harper Era", *International Journal* 69.3 (2014): 274-307. Jordan Michael Smith, "Reinventing Canada: Stephen Harper's Conservative Revolution", *World Affairs* 174.6(2012):21.

53 Report of the Working Group on the Universal Periodic Review, Canada, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review A/HRC/11/17/Add.1 June 8, 2009, http://www.upr-info.org/sites/default/files/document/canada/session_4_-_february_2009/ahrc1117add.1canadae.pdf.

54 Report of the Working Group on the Universal Periodic Review, Canada, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review A/HRC/24/11/Add.1, General September 17, 2013.http://www.ohchr.org/EN/HRBodies/UPR/Pages/CASession16.aspx.

This determination by Canada to opt out of international human rights standards extends beyond the UN. Although Canada joined the Organization of American States (OAS) in 1990, Canada is one of very few countries in the hemisphere that has not yet ratified the Inter-American Convention on Human Rights (IACHR). A proposal to ratify the IACHR was actively considered by the Liberal government in the 1990s, but got stuck on some possible conflicts between the Convention and Canadian law. The fact that these are easily resolvable led a Senate committee to recommend ratification in 2004,[55] but there was no follow up by the Harper government to that recommendation.

Finally, this wariness towards international standards was evident too in Canada's refusal to sign up to the Extractive Industry Transparency Initiative (EITI). This is not a formal treaty, but a set of guidelines that states voluntarily commit to follow in regard to the agreements they reach with extractive companies. EITI standards commit states to transparency as regards such contracts and all royalty arrangements, and to engage local civil society in monitoring such agreements. The purpose is to minimize corruption and to ensure the funds states receive from the extractive sector are going towards meeting the basic needs of their citizens– a key concern in many developing countries. Admittedly, corruption is less of a concern in Canada, and indeed the government, while supporting EITI for *developing* countries, argued it was not necessary for Canada to sign on to EITI standards. However, other developed countries with major mining and oil activity, including Norway and the US, did fully commit to EITI standards. They believed that in doing so they would be in a better position to promote EITI adherence in the developing world.[56] This was not an argument that won support from the Harper government.

As a UN member state, and through its existing obligations under other UN human rights treaties, Canada is already subject to periodic reviews, scrutiny, and visits by various UN bodies charged with monitoring states' treaty obligations. Between 2006 and 2015, Conservative ministers and members of Parliament were nonetheless openly critical of UN scrutiny of Canada. They did not simply disagree with the findings of the UN bodies, they also questioned the right of such bodies to examine Canada's record along with their impartiality in doing so. For example, when a UN expert on the right to food came to Canada, Jason Kenney, then the minister of citizenship and immigration described the visit as "completely ridiculous."The minister of health added that it was "insulting" that a UN representative might investigate the food security challenges facing Canada's aboriginal peoples. The Parliamentary Secretary to the Minister of Foreign Affairs stated that "it is an insult to Canadians and their tax dollars that this fellow came over here to waste the dollars they have contributed."[57]

The government also chastised the UN Committee against Torture for carrying out its regular, treaty-mandated review of Canada's record under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in May 2012. A government spokesperson stated that, "in times when there are serious concerns regarding human rights violations across the world, it is disappointing that the UN would spend its time decrying Canada."[58]

Finally, evidence of the Harper government's disdain for UN bodies is found in its refusal over many years to heed the advice of numerous UN bodies that it should establish a national inquiry and/or plan of action to address the problem of murdered or missing indigenous women in Canada. Since it took office in 2006, four of the UN human rights treaty bodies, the Committee on the Elimination of Discrimination against Women (2008)[59], the Committee on the

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55 Parliament of Canada, Standing Senate Committee on Human Rights, *Canadian Adherence to the American Convention on Human Rights: It is Time to Proceed*, Report of the Standing Committee on Human Rights, November 3, 2004, http://www.parl.gc.ca/Content/SEN/Committee/381/huma/rep/rep18may05-e.htm.

56 "Extractive Industries Transparency Initiative Board Approves U.S. Candidacy Application"*Press Releases*. U.S. Department of the Interior (DOI), March19, 2014, https://www.doi.gov/news/pressreleases/extractive-industries-transparency-initiative-board-approves-us-candidacy-application. See also: "Norway Approved as a Full Member of the EITI",Government.no - *Press Release*, February 21, 2011, https://www.regjeringen.no/en/sub/eiti---extractive-industries-tranparency/news/norway-approved-as-a-full-member-of-the-/id635021/.

57 See an open letter to Prime Minister Harper signed by several Canadian human rights groups, criticizing the government's open contempt for the UN expert, 30 May 2012, http://www.amnesty.ca/sites/default/files/canadaletterpmonsr30may12.pdf; Colleen Kimmett, "Human rights groups blast Tories reaction to UN envoy,"u*The Tyee*, 30 May 2012, http://thetyee.ca/Blogs/TheHook/Federal-Politics/2012/05/30/Tory_Reaction_UN_Envoy/.

58 The Canadian Press, "UN torture report condemns Canada for being 'complicit' in rights violations," *The National Post*, June 2, 2012, http://news.nationalpost.com/news/canada/un-torture-report-condemns-canada-for-being-complicit-in-rights-violations

59 Committee on the Elimination of Discrimination against Women, Concluding observations on Canada, CEDAW/?C/CAN/CO/7, 7 November 2008, at para 32. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/CAN/CO/7&Lang=En.

Elimination of Racial Discrimination (2012)[60], the Committee against Torture (2012)[61], and the Human Rights Committee (2015)[62] all called on the Harper government to establish a national inquiry and or plan of action into the issue, to understand the reasons underlying the disproportionate levels of violence suffered by indigenous women, why so many cases of their murder and disappearance go unsolved, and what can be done to end such abuse. In the face of repeated refusal by the government to heed these calls, the Committee on the Elimination of Discrimination against Women (CEDAW) instituted a special procedure permitting it to establish a distinct inquiry into this situation of systemic abuse. Its report was published in March 2015, again calling for the establishment of a national inquiry into this situation of "grave violations."[63] The government accepted a number of the report's recommendations, but not the call for a national inquiry. The call for a national inquiry was also among the most frequent recommendations made to Canada by other UN Member States (including many of its allies) when its human rights record was considered during the Universal Periodic Review in 2013 (a process at the UN Human Rights Council where the human rights situation in all states is periodically reviewed). Again, the government specifically rejected this recommendation.

AN INCONSEQUENTIAL RESULT

The place and importance of human rights in Canadian foreign policy is an under-examined topic. Although the human rights policies pursued vis-à-vis particular countries have been studied, there are few critical analyses of Canada's *general* approach to human rights in its foreign policy. Some authors have noted that, contrary to the conventional wisdom, Canada was ambivalent –even hostile –to the drafting and adoption of the Universal Declaration of Human Rights in 1948, and only reluctantly voted in favour of the Declaration at the General Assembly (having abstained in earlier votes).[64] Later, Canadian diplomats barely engaged in the great standard-setting exercises of the 1950s and 1960s when the two International Covenants on human rights were adopted, as well as standards to prohibit racial discrimination and advance the rights of women. Canada also declined opportunities to sit on the UN Commission on Human Rights (the predecessor to the Human Rights Council), taking only one 2-year stint (from 1963-65) during the Commission's first 30 years.

However, this ambivalence shifted dramatically in the 1970s towards fulsome support for human rights concerns in foreign policy, and this stance has been maintained by every government since. Indeed, the author of the leading study in this area suggests that one reason for the dearth of study in this area might be the almost unquestioned prominence given to human rights by all Canadian governments and foreign ministers since the late 1970s.[65] His exhaustive study concludes that both self-interest and idealism (or at least a strong sense of Canadian identity and what it stands for), have motivated the actual operationalization of the policy, leading to numerous inconsistencies and a continual struggle between principle and pragmatism (where any particular human rights stance might conflict with Canadian economic, security or other interests)[66] Different governments may have chosen to focus on specific issues or countries, and, to be sure, political factors have shaped those decisions. Inconsistency is not a hallmark only of the Harper government. Earlier governments too were not always consistent in raising human rights concerns. Liberal governments under Prime Minister Chretien often downplayed or gave inadequate public attention to the human rights situation in China, for example, and were roundly criticized for doing so.[67] In earlier periods,

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60 UN Committee on the Elimination of Racial Discrimination, Concluding observation on Canada, , CERD/C/CAN/CO/19-20 4 April 2012, at para 17 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/CAN/CO/19-20&Lang=En.

61 Committee against Torture, Concluding observations on Canada, CAT/C/CAN/CO/6, 25 June 2012, at para 20.http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/CAN/CO/6&Lang=En.

62 UN Human Rights Committee, Concluding observations on sixth periodic report of Canada, CCPR/C/CAN/CO/6 13 August 2015, at para9. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/179/99/PDF/G1517999.pdf?OpenElem.

63 Committee on the Elimination of Discrimination against Women, Report of the inquiry concerning Canada, CEDAW/C/OP.8/CAN/1, 6 March 2015.

64 William A. Schabas, "Canada and the adoption of the Universal Declaration of Human Rights", (1998) 43 McGill L. J. 403.

65 Lui, Andrew, *Why Canada Cares: Human Rights and Foreign Policy in Theory and Practice*, McGill-Queen's University Press: 2012. Luiargues that "...because human rights have become such a taken-for-granted fixture of Canadian foreign policy, the subject remains overlooked and under-scrutinized."olbid. p.171.

66 Ibid. See in particular chapter 6, "Conclusion: Interests, Identities and Human Rights in Canadian Foreign Policy and International Relations", p 164 – 176.

67 Jeff Sallot, "Chretien Too Timid on Human Rights, Activists Say: Prime Minister's Quiet Trade Trip to China is Compared with Bill Clinton's '98 Tour, when He Kept Confronting Chinese Leaders",*The Globe and Mail* (1936-Current): A11. 2001.

the inconsistencies of both Liberal and Conservative governments were subject to critical commentary.[68]

The distinguishing feature of the Conservative approach to promoting human rights abroad was, therefore, less its selectivity than its ambivalence to multilateral efforts in this area; an ambivalence that included less than wholehearted support for the international legal regime and its various institutions that anchor international action on human rights. This, coupled with the government's evident bias in its policy, served to undermine those initiatives it did pursue. Committed Iranian human rights activists, for example, perceived the Harper government's refusal to condemn Israeli policies, and silence as regards the human rights records of Iran's neighbours in the Gulf, as a hindrance to Canada's efforts to effectively mobilise support for the resolution on Iran in the General Assembly. In contrast to previous governments, under the Harper government Canada championed no major new human rights initiatives at the United Nations. The only exception was as regards child, early and forced marriages where Canada successfully led efforts to secure a UN resolution condemning such practices and urging government action to protect girls.[69]

CONCLUSION

The hard truth is that Canada acting alone has very few levers with which to change the behaviour of repressive regimes. In his speech to the UN General Assembly in 2011, John Baird pointed proudly to various UN meetings Canada had boycotted due to the involvement or chairpersonship of repressive regimes. But in doing so he ignored the obvious –a Canadian policy of walking out every time a tyrant takes the stage leaves only our diplomats – but no one else – on the edge of their seats. That is, as a middle power, Canada needs the multilateral system to advance human rights in the world. Some of Canada's greatest achievements –the Ottawa Treaty banning landmines, the negotiations to establish an International Criminal Court, the isolation of the apartheid South African regime, winning global endorsement of the Responsibility to Protect, and the mainstreaming of women's rights –resulted from a very determined multilateralism; and from anchoring Canadian concerns firmly within an international legal framework. The Conservatives failure to do so left, for the most part, their lofty pronouncements on human rights with little practical effect.

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68 Robert O. Matthews and Cranford Pratt, "Conclusion: Questions and Prospects", in Matthews, Robert O. and Pratt, Cranford, eds.,*Human Rights in Canadian Foreign Policy*, McGill-Queen's University Press: 1988. Matthews and Pratt conclude that "Canada pursues human rights actively only when that interest coincides or overlaps with other foreign policy goals, when its other interests are negligible, or when the public forces its hand."ibid at p.297.

69 Canada and Zambia co-led an initiative that resulted in the first UN General Assembly resolution calling for an end to child, early and forced marriage. http://www.international.gc.ca/media/aff/news-communiques/2014/11/21b.aspx?lang=eng

LES RAPPORTS ANNUELS SUR LES IMPACTS DE L'ALE CANADA-COLOMBIE SUR LES DROITS HUMAINS AU REGARD DES ENJEUX ENTOURANT L'INVESTISSEMENT EXTRACTIF EN COLOMBIE : LIMITES MÉTHODOLOGIQUES, CRÉDIBILITÉ ET PERTINENCE

Etienne Roy Grégoire[1]

Résumé : Un accord conclut en 2010 entre la Colombie et la Canada établit une obligation, inédite en droit international, d'étudier les impacts d'un traité de libre-échange sur les droits humains. La méthodologie utilisée par le Canada pour en faire rapport est cependant restrictive au point d'en miner radicalement la crédibilité et la pertinence. Elle exclut en particulier l'étude des impacts de compagnies extractives canadiennes en Colombie; l'étude de politiques néolibérales de promotion de l'investissement mises en cause par différents acteurs civils et institutionnels; et l'étude des réponses données par le gouvernement colombien aux enjeux particuliers de droits humains soulevés par le conflit armé au regard de l'exploitation des ressources naturelles. Cette note de recherche analyse ces limites et propose d'y remédier en élargissant la portée des rapports produits par le Canada et en appliquant à leur élaboration des critères d'indépendance et de statut. Ce second critère demande de revoir l'articulation de ces rapports avec les mécanismes démocratiques de prise de décision relatifs aux obligations et à la responsabilité du Canada en matière d'exploitation des ressources naturelles dans le monde, lesquels souffrent du rôle prépondérant accordé actuellement aux mécanismes de Responsabilité sociale des entreprise.

A bilateral agreement signed in 2010 between Colombia and Canada establishes the obligation, unprecedented in international law, to study the impact of a free trade agreement on human rights. The methodology used by Canada to report on these impacts, however, is restrictive to the point of radically undermining their credibility and relevance. It excludes, in particular, the study of the impacts of Canadian extractive companies in Colombia; the study of neo-liberal investment promotion policies questioned by various civil society and institutional actors; and the study of the Colombian government's responses to the specific human rights issues raised by the armed conflict with regards to the exploitation of natural resources. This research paper analyzes these limitations and proposes to address them by expanding the scope of the reports produced by Canada and by applying the criteria of independence in their elaboration and status. This second criterion calls for a review of the articulation of the reports with democratic decision-making mechanisms relating to Canada's obligations and responsibility in relation to the exploitation of the world's natural resources. Currently, this responsibility suffers greatly from the predominant role reserved to Corporate Social Responsibility.

INTRODUCTION

LES ENJEUX MÉTHODOLOGIQUES D'UN ACCORD INÉDIT ET LEUR PORTÉE POLITIQUE

Dans la foulée des procédures de mise en œuvre de l'accord de libre-échange signé en 2008 entre le Canada et la Colombie (ALECCO), les gouvernements de ces deux pays ont également signé en 2010 un autre accord par lequel ils s'engagent à remettre chaque année à leurs législatures respectives un « rapport concernant les impact des mesures prises dans le cadre de l'[ALECCO] »[2]. À l'époque, ce deuxième accord devait notamment justifier l'appui du parti Libéral à l'ALECCO dans un contexte de gouvernement Conservateur minoritaire, et dans le cadre de pressions d'organisations de la société civile qui demandaient une évaluation *préliminaire* de ses impacts[3].

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2 Canada et Colombie. « Accord concernant des rapports annuels sur les droits de l'homme et le libre-échange entre le Canada et la République de Colombie ». Accord signé entre le Canada et la Colombie, 2010.

3 Voir Roy Grégoire, Etienne. *Traité de libre-échange Canada-Colombie: nécessité d'une étude d'impact sur les droits de la personne*. Témoignage présenté au Comité permanent du Commerce international de la Chambre des Communes, 2e session. 40e législature, 1er mars 2009, Ottawa. En ligne : <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4286334&Language=F&Mode=2&Parl=40&Ses=2>. Consulté le 15 novembre 2016. Voir également CCIC « Americas Policy Group Briefing Note: The Canada - Colombia Free Trade Agreement Human Rights Impact Report ». Canadian Council for International Cooperation, 2012. En ligne. <http://www.ccic.ca/_files/en/working_groups/apg_2012-05-14 _brief_CCOFTA_Human_Rights_Impact_Report.pdf>. Consulté le 2 mars 2016.

L'accord est inédit en droit international. Le Canada et la Colombie seraient ainsi les premiers à établir une obligation d'étudier les relations de causalité entre les accords commerciaux ou d'investissement et les droits humains.[4] Le traité est également singulier dans la mesure où il ne fait référence à aucun instrument international de droits humains et parce qu'il n'inclut aucun préambule permettant de cerner de quelle manière les parties établissent qu'il existe un lien entre les droits humains et les questions de commerce et d'investissement. Duhaime considère, pour ces raisons, que cet accord induit une certaine confusion, voire de l'instabilité au regard des autres obligations internationales des deux pays en matière de droits humains.[5]

Nous nous concentrons cependant ici sur un enjeu méthodologique. Le traité lui-même n'établit aucune méthodologie, offrant ainsi un cas d'étude particulièrement intéressant quant à la manière dont les deux pays s'acquittent des obligations internationales qu'ils se sont créés. Après cinq ans de mise en œuvre, cette note de recherche se penche particulièrement sur les rapports produits par le Canada. Il ressort de cette analyse que l'interprétation restrictive que fait le Canada du libellé de l'accord pose problème au regard de sa crédibilité et de sa pertinence, compte tenu des enjeux de droits humains soulevés par le déploiement des intérêts canadiens dans le secteur colombien des ressources naturelles. La note se conclut sur des recommandations visant à récupérer la crédibilité de ces rapports, tout en faisant face de manière cohérente aux obligations et à la responsabilité du Canada quant aux impacts de l'exploitation des ressources naturelles dans le monde.

LA PORTÉE DES RAPPORTS, LEUR UTILITÉ ET LEUR CRÉDIBILITÉ

La méthodologie énoncée dans le premier rapport produit par le canada en 2012 prévoyait d'étudier les enjeux de droits humains pertinents au regard de chacun des secteurs économiques affectés par l'ALECCO, y compris, de manière particulièrement importante, les enjeux de droits humains relatifs au secteur minier colombien.[6] Les rapports subséquents, cependant, rendent compte d'une volte-face en adoptant une lecture particulièrement restrictive des obligations du Canada. Le libellé de l'accord – « l'impact des mesures prises en vertu de l'Accord de libre-échange », et non « l'impact de l'Accord de libre-échange » – permet bien sûr une telle interprétation; cependant, la loi de mise en œuvre adopte une perspective encore plus restrictive que le traité lui-même, tel que l'énonce par exemple le rapport publié par le Canada en 2015 : « *only the impact of actions taken by Canada under these agreements will be considered in this report. Issues such as foreign investment fall outside the scope of this report as no actions were taken by Canada in these areas* »; et ce même si, selon le même rapport, l'ALECCO « *provides greater stability and predictability for Canadian exporters, service providers, and investors, including expanded opportunities in a broad range of sectors, particularly oil and gas, mining, agriculture and agri-food, and manufacturing* » (nous soulignons).[7]

Comme en témoigne le même rapport, ce choix méthodologique en rend à toutes fins pratiques la production inutile :

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4 Voir SA Aaronson. « Human Rights ». Dans J-P Chauffour et J-C Maur (dir.), *Preferential Trade Agreement Policies for Development: A Handbook*, Washington, DC : The International Bank for Reconstruction and Development / The World Bank, 2011 at 437. Selon Aaronson, puisque plusieurs des économies les plus importantes ont inclus des éléments de droits humains dans leurs accords commerciaux ou d'investissement (ACI), 70 % des gouvernements du monde seraient partie à un ACI incluant des exigences formulées en termes de droits humains (Aaronson 2011: 429). En termes généraux tous ces ACI partagent le fait que les obligations en termes de droits humains ne sont pas établies en fonction d'une analyse explicite et systématique de l'impact des accords de commerce et d'investissement sur les droits humains. Les raisons qui expliquent cet état de fait dépassent le cadre de cette note de recherche, mais Aaronson souligne que s'il existe bel et bien une littérature qui traite de l'effet de ces accords sur les droits humain, les études empiriques sur des cas précis ne sont pas courantes (Aaronson 2011: 435). Avec l'ALECCO, le Canada et la Colombie auraient ainsi été les premiers à établir une obligation d'étudier les relations de causalité entre les ACI et les droits humains (Aaronson 2011: 437).

5 B Duhaime. « Canada and the inter-American human rights system: Time to become a full player ». (2012) 67:3 *International Journal*, p. 639-659 at 657.

6 Secteur dans lequel les entreprises et les capitaux canadiens sont très importants, comme en témoigne par exemple la liste des membres de la Chambre de commerce colombo-canadienne (CTI 2013: 11). Voir également MAECI. *Rapport annuel conformément à l'Accord concernant des rapports annuels sur les droits de l'homme et le libre-échange entre le Canada et la République de Colombie*. Ottawa : Gouvernement du Canada, Ministère des Affaires étrangères et du Commerce international, 2012.

7 DFATD. *Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia for the period January 1, 2014 to December 31, 2014*. Ottawa : Government of Canada, Department of Foreign Affairs, Trade and International Development, 2015.

> [G]*iven that the vast majority of tariff elimination and reduction actions were completed January 1, 2013, it will become increasingly difficult to study the specific effects of tariff elimination on the enjoyment and respect of human rights from one year to the next. As such, at this time, it is not possible to establish a direct link between the [ALECCO] and the human rights situation in Colombia [...] As was noted in the last year's Annual Report, it is not possible to demonstrate that any of the factors impacting upon the enjoyment of and respect for human rights are directly related to the implementation of the [ALECCO].*[8]

Cette interprétation restrictive peut bien sûr soulever des doutes quant à a bonne foi du gouvernement canadien; en l'occurrence, elle s'éloigne des logiques politiques qui ont mené initialement à la signature du traité, au centre desquelles se trouvaient en effet les enjeux d'investissement, et plus spécifiquement dans le secteur minier colombien.[9] En ce sens, il est remarquable que les rapports de la Colombie adoptent une toute autre méthodologie en ce qui concerne les enjeux de droits humains associés à l'exploitation des ressources naturelles. L'interprétation que fait la *Procuraduría General de la Nación* du traité est d'ailleurs beaucoup plus généreuse que celle qu'en fait le Canada:

> [C]e traité souligne l'importance du respect de la démocratie et des droits humains, et prend en compte l'existence, dans chacun des deux pays, d'organismes chargés de promouvoir et de protéger ces droits au sein de leurs territoires respectifs [...] [L'] engagement qui fait l'objet du présent traité permet d'approfondir l'analyse de l'impact de la politique d'internationalisation de l'économie sur la protection et la promotion des droits humains, et constitue en ce sens un élément des politiques mises en œuvre par l'État colombien pour promouvoir et protéger les droits humains (nous soulignons).[10]

La décision d'exclure ces enjeux des rapports du Canada – alors que les rapports de la Colombie font grand état des mesures prises par son gouvernement en matière de Responsabilité sociale des entreprises (RSE), et notamment de l'adoption d'une politique sur les droits humains et les entreprises[11] – contribue à miner leur crédibilité et leur utilité. La société civile canadienne en a d'ailleurs fait part au gouvernement.[12]

En outre, si l'on fait abstraction de l'interprétation restrictive de la loi de mise en œuvre, l'affirmation selon laquelle aucune mesure relative au secteur minier colombien n'aurait été prise en vertu de l'ALECCO est également discutable. Un rapport préparé par une équipe de chercheurs colombiens en 2012 à la demande d'ONG canadiennes et colombiennes fait en effet état de nombreuses mesures prises la Colombie pour assurer la protection des investissement étrangers, de conformer sa législations à la signature de traités de libre-échange, et d'éviter que la Colombie fasse l'objet de plaintes de la part d'investisseurs étrangers en vertu de ces traités.[13] Plusieurs de ces mesures ont bien sûr été prises avant la ratification de l'ALECCO; cependant en toute logique l'ALECCO contribue à restreindre la capacité de la Colombie de les amender dans la mesure où cela l'exposerait à des recours devant des tribunaux internationaux d'arbitrage.[14]

Or, plusieurs de ces mesures concernent directement le secteur minier; de plus, elles ont été mise en cause à plusieurs reprises pour leurs effets sur les droits humains : par la société civile colombienne, notamment pour omission de consulter les peuples

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8 *Ibid.*

9 Voir SCIT [Standing Committee on International Trade]. 2008. *Human Rights, the Environment and Free Trade with Colombia, Report of the Standing Committee on International Trade*. 2e session, 39e législature. Ottawa : Standing Committee on International Trade.

10 PGN [Procuraduría General de la Nación]. 2011. « Revisión constitucional de la Ley 1411 del 19 de octubre de 2010, "Por medio de la cual se aprueba el 'Acuerdo en materia de informes anuales sobre derechos humanos y libre Comercio entre la República de Colombia y Canadá'", hecho en Bogotá el día 27 de mayo de 2010 ». Bogota: Procuraduría General de la Nación, page 7. Toutes les citations en espagnol ont été traduites par l'auteur.

11 CTI, supra note 6.

12 Voir Americas Policy Group. 2016. « Letter to the Honourable Chrystia Freeland re : Concerns of the Americas Policy Group (APG) with regard to the Fifth Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia and request to meet », 18 octobre 2016. En ligne. <http://www.ccic.ca/_files/en/working_groups/2016_10_APG_Letter_Minister_Freeland_re_CCOFTA_HR%20Report.pdf>. Consulté le 21 novembre 2016.

13 González, Juan Diego, Diana Salcedo, Laura Rangel, Guillermo Correa et Yessika Hoyos. 2012. *Impactos en los Derechos Humanos de la implementación del Tratado de Libre Comercio entre Colombia y Canadá: Línea base*. En ligne, 112 sq. <http://www.pasc.ca/sites/pasc.ca/files/u6/Colombian-Base-TLC-final1.pdf>. Consulté le 15 novembre 2016.

14 Durant l'année 2016, au moins deux compagnies minières canadiennes ont annoncé leur intention d'initier des procédures d'arbitrage en vertu de l'ALECCO suite à des décisions judiciaires rendues sur des enjeux de droits humains (Americas Policy Group 2016 : 2).

autochtones et pour l'octroi de concessions sur les territoires de peuples autochtones considérés comme étant « en voie d'extinction » en vertu d'ordonnances spécifiques de la Cour constitutionnelle ; par la Cour constitutionnelle, notamment en ce qui concerne le défaut de consultation du code minier actuellement en vigueur[15] et, dans une décision rendue en mai 2016, concernant la protection de certains écosystèmes vitaux et la garantie constitutionnelle du caractère participatif et décentralisé de l'organisation territoriale[16]; ainsi que par la *Contraloría General de la República* (CGR)[17] dans un rapport publié en 2013[18], dont nous reprenons quelques éléments ci-dessous.

LES RISQUES SPÉCIFIQUES LIÉS AU SECTEUR EXTRACTIF EN COLOMBIE

Depuis le début de son gouvernement en 2010, le président Juan Manuel Santos a placé l'activité minière et l'extraction de pétrole et de gaz au centre de sa politique économique. Cette politique se pose en continuité des réformes néolibérales mises en œuvre en Colombie depuis les années 1980, notamment dans le secteur minier.[19] Le code minier colombien actuel définit l'activité minière comme étant « d'intérêt public et social dans toutes ses dimensions et toutes ses étapes » et priorise systématiquement les intérêts de l'autorité minière (*i.e.*, les agences gouvernementales en charge de promouvoir et de réguler l'activité minière) et des propriétaires de titres miniers dans l'utilisation du territoire.[20] Selon la CGR, le code minier inclut aussi « des articles qui protègent le secteur minier de droits accordés par la [Constitution], comme le droit à un environnement sain, à la vie [et] aux moyens de subsistance ».[21]

Ainsi, la « locomotive minière » est devenue un élément clé du Plan national de développement[22], qui souligne la contribution vitale attendue de la part de ce secteur pour financer « les programmes qui visent à construire un pays en paix »[23]. La paix acquiert dans ce contexte le statut de bien public transcendant, inscrivant *de facto* l'activité minière dans le registre de la Raison d'État.[24] Pour promouvoir l'activité minière, le gouvernement promet « [d'envoyer] des signes clairs en matière de politiques publiques aux investisseurs privés [et d'] ajuster la régulation pour qu'elle s'ajuste à la réalité du secteur »[25].

Or, il existe une importante proximité entre le secteur minier et les violations aux droits humains liées au conflit armé. En effet, la majeure partie de la violence politique en Colombie est liée au contrôle territorial[26]; et en 2012 déjà plus du tiers de son territoire faisait l'objet de concessions minières (octroyées ou sollicités) ou avait été désigné comme « région minière stratégique »[27]. Comme le documentait la CGR dans son rapport de 2013, l'activité minière est donc intimement liée aux dynamiques du conflit armé. En particulier, la CGR craint qu'elle ne donne lieu à

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15 Ley 685 de 2001, "Por la cual se expide el Código de Minas y se dictan otras disposiciones", loi adoptée le 15 août 2001.

16 Voir *La Silla Vacía*. 2016. « La Corte mueve el eje de la política minera de Casa de Nariño a los municipios ». La Silla Vacía. En ligne. <http://lasillavacia.com/historia/la-corte-mueve-el-eje-de-la-politica-minera-de-palacio-de-narino-los-municipios-52996>. Consulté le 10 février 2016. Voir également Sentencia C-273/16 de 2016, "Prohibición a las autoridades regionales locales o seccionales para establecer que zonas del territorio quedan excluidas de manera permanente o temporal de actividad minera", décision constitutionnelle émise le 25 mai 2016.

17 La CGR est une agence de contrôle jouant un rôle similaire à celui du Vérificateur général au Canada.

18 CGR [Contraloría General de la República]. 2013. *Minería en Colombia. Fundamentos para superar el modelo extractivista*. Sous la dir. de. Luis Jorge Garay Salamanca. Bogota : Colombia, Contraloría General de la República.

19 *Ibid.*, pp. 180-194.

20 *Ibid.*, p. 185; 188.

21 *Ibid.*, p. 201.

22 Le Plan national de développement 2011-2014 identifie cinq « locomotives » qui « mènent la croissance économique en Colombie », incluant la « locomotive minière » à laquelle un « rôle crucial » est accordé (DNP 2011: 53). DNP [Departamento Nacional de Planeación]. 2011. « Prosperidad para todos: más empleo, menos pobreza y más seguridad - Bases del Plan Nacional de Desarrollo 2011-2014 ». República de Colombia, Departamento Nacional de Planeación. En ligne. <https://colaboracion.dnp.gov.co/CDT/PND/Bases%20PND%202010-2014%20Versi%C3%B3n%205%2014-04-2011%20completo.pdf>. Consulté le 19 juin 2015.

23 DNP [Departamento Nacional de Planeación]. 2014. « Todos por un nuevo país: Paz Equidad Educación - Bases del Plan Nacional de Desarrollo 2014-2018 ». República de Colombia, Departamento Nacional de Planeación, p. 72; 175. En ligne. <https://colaboracion.dnp.gov.co/CDT/Prensa/Bases%20Plan%20Nacional%20de%20Desarrollo%202014-2018.pdf>. Consulté le 19 juin 2015.

24 Voir Etienne Roy Grégoire et Luz Marina Monzón. 2017. « Institutionalising CSR in Colombia's Extractive Sector: Disciplining Society, Destabilising Enforcement? ». Canadian Journal of Development Studies / Revue canadienne d'études du développement. DOI: 10.1080/02255189.2017.1289077.

25 DNP, supra note 23, p. 189.

26 CGR, supra note 18, p. 19.

27 *Ibid.*, p. 24.

l'appropriation, la cooptation et la reconfiguration d'institutions étatiques par des compagnies qui peuvent être transnationales, nationales, légales, grises (i.e. qui agissent dans la zone grise entre ce qui est légal et ce qui ne l'est pas) ou ouvertement illégales[,] avec le défi supplémentaire que dans les prochaines décennies la lutte pour monopoliser le sol et le sous-sol pourrait bien devenir un des facteur les plus importants, sinon le facteur le plus important, de création et de maintien de conflit et de violence[.] [Cela est particulièrement inquiétant] dans un pays comme la Colombie, qui a été témoin d'une lutte sans fin pour la terre comme instrument de contrôle politique et de pouvoir économique, à travers différentes avenues illégales ou illégitimes, et sans exclure celles qui ont l'apparence de la légalité[28].

Certains travaux, comme ceux de Massé et Camargo[29] cités ci-dessous, permettent de dégager un certain nombre de cas de figure relatifs à l'activité extractive industrielle dans le contexte colombien :

1. *Le rançonnement de grandes entreprises du secteur extractif par des acteurs armés illégaux*. Il n'existe pas de statistiques fiables pour évaluer l'ampleur du phénomène, mais certains évaluent par exemple que les montants payés équivalent, dans le secteur pétrolier, à 10 % de la valeur du pétrole extrait;
2. *La captation illégale, par des acteurs armés illégaux, des redevances* payées à différent paliers de gouvernement, notamment au niveau local, et parfois en influant sur les résultats électoraux;
3. *La possession de nombreuses concessions minières par des acteurs armés illégaux* à travers de prête-noms, lesquelles peuvent faire l'objet de spéculation ou être rachetées par des compagnies nationales ou étrangères;
4. *La provision de « protection » par des acteurs armés illégaux*, que ce soit clandestinement ou officiellement à travers d'entreprises de sécurité légalisées;
5. *Le contrôle exercé par des acteurs armés illégaux sur le marché des sous-contractants* ou de la main-d'œuvre;
6. *La facilitation de l'accès de compagnies minières transnationales aux territoires par des acteurs armés illégaux*, en attaquant les opposants à l'activité minière sous la forme de menaces, intimidations, homicides sélectifs et déplacements forcés (à l'insu ou non des compagnies elles-mêmes). Ainsi, 87 % des personnes déplacées en Colombie proviendraient de municipalités à vocation minières ou pétrolières, qui ne représentent que 35 % du total des municipalités colombiennes;
7. *La perpétration de certaines graves violations aux droits humains par des membres des forces armées colombiennes* affectées spécifiquement à la protection de « l'infrastructure minière et énergétique », comme des exécutions extrajudiciaires ou des violences sexuelles commises à l'endroit de femmes autochtones.

INSUFFISANTE ET PROBLÉMATIQUE INSTITUTIONNALISA DE LA RSE SOUS L'ÉGIDE D'UNE « APPROACHE PAR LES DROITS » EN COLOMBIE

Il va de soi que les risques mentionnés ci-dessus dépassent de loin la portée des politiques de RSE mises de l'avant par les compagnies minières opérant en Colombie[30] et appellent une intervention étatique au niveau de la gouvernance du secteur dans son ensemble, à commencer par une réévaluation du rôle prépondérant accordé à l'activité minière dans le modèle de développement mis en place par le gouvernement colombien, avec l'appui du gouvernement canadien, depuis le début des années 2000.

Il est intéressant de considérer, dans ce contexte, les différentes politiques mises en place par le gouvernement colombien pour institutionnaliser la RSE sous un modèle de corégulation publique-privée. En 2011, le ministère du Commerce et du Tourisme, dont l'une des tâches est de promouvoir, d'encourager et d'attirer l'investissement, a lancé un « Système de compétitivité nationale » dont l'objectif est de « renforcer la coordination entre le secteur privé et le

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28 *Ibid.*, p. 19.

29 Massé, Frédéric et Johanna Camargo. 2012. *Actores Armados Ilegales y Sector Extractivo en Colombia*. Bogota : CITPax y el Observatorio Internacional DDR – Ley de Justicia y Paz.

30 Mining Watch Canada, CENSAT Agua Viva et Inter Pares. 2009. *Tierras y conflicto. Extracción de recursos, derechos humanos y la responsabilidad social empresarial: compañías canadienses en Colombia*. Ottawa : Inter Pares, Mining Watch Canadá, CENSAT Agua Viva.

31 VDE [Viceministerio de Desarrollo Empresarial]. 2011. « Política de desarrollo empresarial: la "política industrial" de Colombia ». República de Colombia, Ministerio de Comercio, Industria y Turismo, Viceministerio de Desarrollo Empresarial. En ligne. <http://www.mincit.gov.co/minindustria/descargar.php?id=62206>. Consulté le 22 juillet 2015.

gouvernement »[31]. En 2014, le président a nommé un Haut conseiller présidentiel pour la gestion publique et privée[32] dont les fonctions incluent « l'harmonisation des activités économiques et des politiques publiques, le renforcement de la confiance mutuelle entre la société et les compagnies, l'amélioration des conditions pour l'investissement étranger, et la maximisation de la contribution du secteur privé au développement durable »[33]. En même temps, le gouvernement colombien affirme utiliser une « approche par les droits humains » dans ses politiques publiques, en vertu de laquelle il propose « que les droits humains constituent la cadre conceptuel commun pour les partenariats entre l'État et le secteur privé » et « que les compagnies mènent les activités de RSE à l'intérieur de ce cadre »[34].

Dans le cadre de ce processus, cependant, le gouvernement colombien ne fait à toute fin pratique aucune mention de la riche jurisprudence constitutionnelle pertinente au regard de l'activité minière, que la CGR, entres autres, a recensée en 2013. Les politiques qui concourent à l'institutionnalisation de la RSE octroient plutôt à l'État un rôle supplétif par rapport aux stratégies de prévention et de réparation mises en place par les opérateurs miniers, ce qui semble tout-à-fait inadéquat au regard des dynamiques de violations de droits humains qui entourent l'activité minière en Colombie et pourraient même faciliter des processus de « disciplinement » de la société[35].

CONCLUSION :

UNE NOUVELLE MÉTHODOLOGIE POUR RÉTABLIR LA CRÉDIBILITÉ ET L'UTILITÉ DE L'EXERCICE?

Une étude d'impact en matière de droits humains est un exercice à la fois technique et politique dont la méthodologie n'est jamais sans problème, surtout quand il s'agit d'évaluations *ex-post*.[36] Sans doute, l'exercice auquel s'est astreint le Canada est, dans le meilleur des cas, un casse-tête méthodologique. Il est également politiquement délicat, pour un État promouvant les intérêts de ses compagnies extractives à l'étranger, de se poser comme juge et partie lorsque des violations de droits humains engagent les intérêts de ces compagnies.[37]

Pour se sortir de l'impasse à laquelle l'accule la méthodologie actuelle, le Canada devrait en élargir la portée pour y inclure les enjeux liés à l'investissement; il aurait également avantage à s'appuyer sur les Principes directeurs applicables aux études de l'impact des accords de commerce et d'investissement sur les droits de l'homme définis par le Rapporteur spécial sur le droit à l'alimentation[38], particulièrement en ce

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32 Noticias RCN. 2015. « Santos reestructura Presidencia para su segundo mandato ». *Noticias RCN*, 13 août 2015. En ligne. <http://www.noticiasrcn.com/nacional-pais/presidente-santos-reestructura-presidencia-republica-su-segundo-mandato>. Consulté le 29 juillet 2015.

33 Acevedo Guerrero, Javier Alejandro, Ruth Zárate Rueda et William Fernando Garzón Ruíz. 2013. « Estatus jurídico de la Responsabilidad Social Empresarial (RSE) en Colombia ». *Dikaion*, vol. 22, no 2, p. 310.

34 PPDHDIH [Programa Presidencial de Derechos Humanos y Derecho Internacional Humanitario]. 2014. *Lineamientos para una política pública de derechos humanos y empresas*. Bogota : República de Colombia, Presidencia de la República, Programa Presidencial de Derechos Humanos y Derecho Internacional Humanitario, p. 9; 44; 48; et note 33. En ligne. <http://www.derechoshumanos.gov.co/Observatorio/Publicaciones/Documents/2014/140724-lineamientos-politica_web.pdf>. Consulté le 17 juillet 2015.

35 Roy Grégoire et Monzón, supra note 24.

36 Ainsi l'exprime le rapporteur spécial des Nations Unies sur le droit à l'alimentation, Olivier de Schutter : « *Human rights impact assessments can constitute a complex endeavour, and challenges may be encountered in developing a robust methodology. A number of factors contribute to this, including: (a) the difficulties of establishing causality between human rights outcomes and specific trade/investment reforms or initiatives; (b) the paucity of data, especially in least-developed countries; and (c) the limitations of quantitative and qualitative methods in capturing dynamic effects of trade/investment reforms* » (p. 10). ONU. 2011. *Rapport du Rapporteur spécial sur le droit à l'alimentation, Olivier De Schutter. Additif: Principes directeurs applicables aux études de l'impact des Accords de commerce et d'investissement sur les droits de l'homme. Genève : Nations Unies, Conseil des droits de l'homme*. En ligne. <http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_fr.pdf>

37 Pour reprendre de nouveau les paroles de Olivier de Schutter : « [S]*ince compliance with the obligations imposed under trade and investment agreements typically is ensured by the threat of economic sanctions or reparations authorized or awarded by an agreement-specific dispute settlement mechanism or international arbitral tribunals, it is important that any inconsistency with pre-existing human rights obligations imposed on the State are identified beforehand, to the fullest extent possible. Where an inconsistency between the human rights obligations of a State and its obligations under a trade or investment agreement becomes apparent only after the entry into force of the said agreement, the pre-existing human rights obligations must prevail* » (*Ibid*., p. 5).

38 *Ibid*.

39 « *Whether it is prepared by a national institution for the promotion and protection of human rights, by experts specifically designated for this task, by a parliamentary committee in which opposition political voices are included, or by others, the human rights impact assessment should be initially prepared by a body or group of experts that is independent from the Executive which is negotiating, or has negotiated, the trade or investment agreement* » (*Ibid*., p. 10, nous soulignons).

qui a trait aux critères d'indépendance,[39] de transparence, de participation inclusive et de statut (i.e., d'articulation avec les mécanismes démocratiques de décision).[40]

En l'occurrence, les critères d'indépendance et de statut semblent revêtir une importance particulière. Si ces rapports doivent être d'une quelconque utilité, leur méthodologie ne peut être soumise à l'interprétation trop étroite – et, en apparence du moins, partiale – du gouvernement du Canada. Mais surtout, ils doivent servir à nourrir une compréhension politique renouvelée des obligations et de la responsabilité du Canada en matière de droits humains relatifs aux activités minières et pétrolières dans le monde. Cette responsabilité est présentement bien mal servie par le rôle prépondérant qu'occupe la RSE dans la stratégie du gouvernement canadien. Il y aurait lieu, en ce sens, de reprendre la perspective beaucoup plus large qui avait mené, en 2007, au rapport du Groupe consultatif[41] sur les Tables rondes sur la responsabilité sociale et l'industrie extractive minière dans les pays en développement.

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40 « *It follows from [the] very purpose of human rights impact assessments that, while such assessments may be prepared by external experts commissioned for that purpose, or by a body with a purely advisory role such as a national human rights institution for the promotion and protection of human rights, they must then feed into the decision-making process that leads to the conclusion and approval of the trade or investment treaty concerned (ex ante assessments), or that leads to the decision whether or not to denounce such treaty or to withdraw from it (ex post assessments). Ideally, this implies that the results of the assessment will be presented to the Parliament, and that the conclusions to be drawn will be the subject of a parliamentary debate* » (*Ibid*., p. 11, nous soulignons).

41 Groupe consultatif. 2007. *Rapport sur les Tables rondes nationales sur la responsabilité sociale et l'industrie extractive minière dans les pays en développement*. En ligne. <http://www.cooperation.uqam.ca/IMG/pdf/CSR_reportFR.pdf>. Consulté le 3 mars 2016.

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CGR [Contraloría General de la República]. 2013. *Minería en Colombia. Fundamentos para superar el modelo extractivista*. Sous la dir. de. Luis Jorge Garay Salamanca. Bogota : Colombia, Contraloría General de la República.

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DFATD. Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia for the period January 1, 2014 to December 31, 2014. Ottawa : Government of Canada, Department of Foreign Affairs, Trade and International Development, 2015.

DNP [Departamento Nacional de Planeación]. 2011. « Prosperidad para todos: más empleo, menos pobreza y más seguridad - Bases del Plan Nacional de Desarrollo 2011-2014 ». República de Colombia, Departamento Nacional de Planeación. En ligne. <https://colaboracion.dnp.gov.co/CDT/PND/Bases%20PND%20 2010-2014%20Versi%C3%B3n%205%2014-04-2011%20completo.pdf>. Consulté le 19 juin 2015.

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"TAKING THE CALL: AN INTRODUCTION TO THE TRUTH & RECONCILIATION COMMISSION AND ITS 94 CALLS TO ACTION"

Rebecca Johnson[1]

Abstract: This article examines the report conducted by the Truth & Reconciliation Commission of Canada entitled *Honouring the truth, Reconciling for the future, the executive summary*, a report which provides recommendations to aid in redressing the legacy of Canada's Indian Residential Schools and advancing the process of reconciliation. This article provides a brief introduction to the "94 Calls to Action", first situating the Calls in the context of the litigation history that gave birth to the TRC and second, describing the structure of the 94 Calls. It then explicitly investigates sections #27 & #28 which address education in the Legal Profession. Finally, strategies for those beginning to take up the responsibilities of reconciliation are explored.

Résumé : Cet article traite du rapport produit par la Commission de vérité et réconciliation (CVR) du Canada intitulé *Honorer la vérité, réconcilier pour l'avenir – Sommaire exécutif*, qui fournit des recommandations pour aider à remédier aux séquelles laissées par les pensionnats indiens au Canada et à faire progresser le processus de réconciliation. Il présente brièvement les « 94 appels à l'action », d'abord en les replaçant dans le contexte des litiges qui ont donné naissance à la CVR, puis en décrivant leur structure. Il s'intéresse ensuite explicitement aux appels nos 27 et 28, qui portent sur la formation des juristes. Finalement, l'article propose des stratégies pour ceux qui commencent à assumer la responsabilité de la réconciliation.

INTRODUCTION

In the summer of 2015, the Truth & Reconciliation Commission of Canada (TRC) released *Honouring the Truth, Reconciling for the Future*, the executive summary of its Final Report.[2] Over the six-year mandate, the three Commissioners had heard more than 6,750 survivor and witness statements from across the country, speaking to more than a century of experience with the Indian Residential Schools.[3] The resulting recommendations were issued as "94 Calls to Action."[4] These calls, said the commissioners, represented the first step toward redressing the legacy of Indian Residential Schools and advancing the process of reconciliation.[5] This note seeks to provide a brief introduction to the 94 Calls to Action, first situating the Calls in the context of the litigation history that gave birth to the TRC; second, describing the structure of the 94 Calls; third, turning briefly to Sections #27 and #28, two of the Calls explicitly addressing education in the Legal Profession; and finally, reflecting on a few additional strategies of reading that can assist the person (whether human rights activist or not) beginning to take up the responsibilities of reconciliation.

SITUATING THE TRC IN THE CONTEXT OF THE INDIAN RESIDENTIAL SCHOOLS SETTLEMENT AGREEMENT

The TRC was in many ways unlike Royal Commissions before it. First, it was unusual for its focus on the lives and experiences of children. Second, it did not arise as a response to a public demand for public discussion and study. On the contrary, it was born in the context of litigation by residential school survivors; the Commission was one the requirements in a negotiated out-of-court settlement. How did this unusual situation arise?

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2 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Lorimer: Toronto, 2015). http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdfa

3 The six-volume report is published as: Truth and Reconciliation Commission of Canada, *Canada's Residential Schools* (Montreal & Kingston, London, Chicago: McGill-Queen's University Press, 2015). *Vol 1: The History, Part 1 - Origins to 1939; Vol 1: The History, Part 2 - 1939 to 2000; Vol 2: The Inuit and Northern Experience; Vol 3: The Métis Experience; Vol 4: Missing Children and Unmarked Burials; Vol 5: The Legacy; Vol 6: Reconciliation.*

4 http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

5 The June 2, 2015 News Release can be found on the TRC website. http://www.trc.ca/websites/trcinstitution/File/TRCReportPressRelease%20(1).pdf

There are many versions that one could tell of this story, a story that is inseparable from Canada's particular colonial history.[6] But one entry point is 1876 with the first *Indian Act*, and the assertion of federal government authority over First Nations in Canada. In that period of time we have the beginnings of government cooperation with Roman Catholic and Protestant Churches to establish a system of residential schools. Within less than 20 years, the Act is amended to make it possible for attendance at residential schools to be made mandatory. We then have a one-hundred-year history with the schools, as the last one is closed in 1996.

Throughout that period of history, there were multiple forms of resistance by both children, and their families. The period cannot be understood without a sense of other pieces of legislation and protest. Parents refused to send children, people left and hid, people tried to work with the schools, etc.

Well before the last school closed, individual students had begun using law to initiate legal actions against governments and churches to push for recognition of the harms inflicted and experienced through the schools. As the number of claims mounted, it also became clear that the volume of cases would result in the clogging of the courts for years to come: pressure mounted for the government to seek a forum for alternative dispute resolution (ADR). By 1998, there was a "Statement of Reconciliation"[7], leading to a 2003 ADR process for an out-of-court mechanism for the claims. This resulted in the 2007 "Indian Residential Schools Settlement Agreement" (IRSSA).[8] The TRC arises out of this Agreement.

The IRSSA is the largest class action settlement in Canadian history: recognizing the damage inflicted by residential schools, and establishing a multi-billion-dollar fund to help former students in recovery. There are five components to the Agreement, the first three of which were only available to former residential school students covered by the Agreement, the last two which focused out more broadly:

1. Common Experience Payment ($1.9 billion)
   - The Common Experience Payment was based simply on number of years one was in residential school [$10,000 for first year, and $3,000 for each subsequent year];
2. Independent Assessment Process ($1.7 billion)
   - The Independent Assessment Process was a separate process set up to resolve particular claims of sexual abuse and serious physical and psychological abuse;
3. Health & Healing Services ($125 million)
   - Health and Healing Services were to enable elders and aboriginal community health workers to support former students in terms of mental and emotional health.
4. Truth & Reconciliation Commission ($60 million)
   - The Commission was to provide opportunities to share experiences; to raise public awareness; to create a comprehensive historical record; to create a research centre.
5. Commemoration ($20 million)
   - The Commemoration component was to create projects of art and commemoration to honour and publically acknowledge the experiences of former students, families, communities.

In understanding the importance of the TRC and Commemoration components of the IRSSA, it is useful to return to the question of monetary compensation, and of what former students were agreeing to. This was the largest class action in Canadian history, but the money paid out under the agreement went to a smaller number of people than was commonly understood in public commentary. The Common Experience Payments, and compensation available through the Independent Assessment Process were available to (the approximately 150,000) students from 139 schools co-managed between Canada and four Church Parties.

The number of people impacted by residential schools, however, was much larger than the group covered by the Settlement Agreement. The Settlement Agreement did not apply, for example, to day students (who returned to their homes at night). Nor did it apply to students who had attended residential schools where there was not direct co-management with Canada. Nor did it apply to schools run by other religious institutions, nor one which involved the provinces. Nor did it include schools from Newfoundland or Labrador (who joined confederation in the 1950s). Métis students were governed by other regimes. Nor did it include compensation for the parents or families impacted by the removal of their children.

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6 See in particular, *The History, Part 1 – Origin to 1939*, supra, note 2.

7 The "Statement of Reconciliation" can be found at p. 2 of the document, "Gathering Strength: Canada's Aboriginal Action Plan". See http://www.ahf.ca/downloads/gathering-strength.pdf

8 The Settlement Agreement itself is available online: http://www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf

On the basis of work done during the life of the Commission, Murray Sinclair estimated that there were around 1300 schools and perhaps a million or more people falling outside the Agreement.[9] Thus, without dismissing the place of money as a vehicle for restitution (as limited and problematic as some have argued it might be in this case) the compensatory aspects of the IRSSA were available to a relatively small subset of people impacted by residential schools.

Further, in accepting this out-of-court settlement, survivors would be required to give up the right to have their stories told (and be heard) in the public spaces of justice that are the courts. Survivors and their families feared that the truth of the past would remain unheard. The TRC and Commemoration aspects of the Settlement Agreement were thus of central importance. The TRC would provide a venue in which stories could be told, and could become part of the public record of Canada's past. The work of the Commission was work that would hopefully be for the benefit of all those touched by the history of residential schools, indigenous and non-indigenous, the living and the dead. That the TRC spoke to all of Canada is visible if one turns to the mandate of the Commission itself, set out in Schedule N to the IRSSA. Here, the text states:

> "Reconciliation is an ongoing individual and collective process, and *will require commitment from those affected including* First Nations, Inuit and Metis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and *the people of Canada*. Reconciliation may occur between any of the above groups."[10] [emphasis added]

Several aspects of this statement are worthy of attention. First, note that reconciliation is identified as a PROCESS rather than an OUTCOME. The focus is placed on the activity of reconciliation. Second, it focuses on this process as having both collective and individual aspects to it. That is, it makes visible that people will need to be doing individual work, as well as work in groups. Third, it is worth comparing the list of those 'affected' with the list of those 'covered' by the agreement (i.e. the Settlement Parties). The first three components of the IRSSA settlement (the common experience payment, the assessment process, the health and healing services) were directed exclusively to former students of residential schools. That is, to students of the 139 schools covered by the agreement. The latter two components (the TRC and Commemoration) are explicitly designed to increase the scope of the settlement, to draw in people who might not otherwise understand themselves to be part of the picture. In particular, note that the TRC's mandate includes in this list "the people of Canada". In short, we all are envisaged as affected by the history of residential schools; it is from all of us that a commitment to reconciliation is required.

THINKING ABOUT THE STRUCTURE OF THE 94 CALLS TO ACTION

Let us then turn to the 94 Calls to Action themselves. The document opens with the following statement:

> "In order to redress the legacy of residential schools and advance the process of Canadian reconciliation, the Truth and Reconciliation Commission makes the following calls to action."

The calls that follow are then separated into two parts: the first 42 Calls are placed under the heading "LEGACY". The remaining 52 calls are gathered under the heading "RECONCILIATION". There is a structural logic here that is helpful in thinking about the Calls as a whole. This distinction mirrors in part the structure of the final report, *Canada's Residential Schools*, as Volume 5 is titled *Legacy*, and Volume 6 is titled *Reconciliation*. Within these two parts, the Calls are then sorted into smaller clusters.

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9 See Murray Sinclair, "Will truth bring reconciliation? Justice Murray Sinclair says not without education" radio interview on the CBC Program "Unreserved" (Dec 6, 2015) http://ccrweb.ca/en/will-truth-bring-reconciliation-justice-murray-sinclair-says-not-without-education-home-unreserved

10 http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf at p. 1

"to redress the LEGACY of residential schools..."	"...to advance the process of Canadian RECONCILIATION"
• Child Welfare: 1-5 • Education: 6-12 • Language & Culture: 13-17 • Health: 18-24 • Justice: 25-42	• Canadian Governments & the UNDRIP • Royal Proclamation & Covenant • Settlement Agreement Parties & UNDRIP • Equity in Legal System • National Council for Reconciliation • Training for Public Servants • Church Apologies • Education for Reconciliation • Youth Programs • Museums and Archives • Missing Children & Burial Information • National Centre for Truth & Reconciliation • Commemoration • Media & Reconciliation • Sports & Reconciliation • Business & Reconciliation • Newcomers to Canada

A first thing to note is that, on the "Legacy" side, the five headings mirror the major institutions implicated in the residential school experience. These institutions have carried the legacies of the residential school period into the present. The first cluster of calls, Child Welfare, implicates institutions dealing with children, parents and families. These recommendations focus attention on the separation of children from families, and on the need for contemporary structures to support families. The second cluster, Education, takes up the legacy of Residential school failure as an educational system (even judged on the criteria of the past), and thus the focus is on strategies to address educational and income gaps that have been drawn forward in the present. The third cluster acknowledges the systematic attempts that were made to detach students from their Languages and Cultures, focusing on institutional actions needed to provide funding and support for both. The fourth cluster focuses on Health, based on an understanding that one legacy of residential schools is visible in contemporary and continuing compromised health outcomes for Aboriginal peoples. Indeed, these Calls make visible the social roots of health disparities, drawing attention to action required to address the impact of the past on health and well-being in the present. Fifth, there is a cluster of Calls linked to Justice. The number of Calls in this section acknowledges that the residential school experience is deeply implicated in the current disproportionate incarceration of Aboriginal people.

In the recommendations linked to the Legacy of the schools, the TRC speaks to the need for institutional and systemic change. This is not to say that individuals are not called to action in these first 42 calls. It is rather to see that the structure of the first half helps focus attention on the 'Institutions' through which all of us live our lives (Family, School, Language, Health, Justice). One might see this structure as a way of making visible the persistence of the past in the present; it also functions as a reminder that institutional action may be required in order to address the legacies that we carry forward through structures which all too often remain blind to Indigenous lives and realities.

11 There is significant work being done about the language of reconciliation, and this work is important for the ways it makes visible different understandings of what the work of reconciliation might involve. As a starting point, part of the very work of reconciliation is likely to involve lots more openness about what this means, and resists a move towards closure, or putting the past behind us without first passing through truth. A few very good resources on these debates are; Rachel Flowers, Gordon Christie, Glen Coulthard

The remaining 52 Calls seek to advance the process of Canadian "Reconciliation". The headings make visible the multiple sites in which the work of reconciliation will be necessary.[11] Institutions, associations, organizations, and individuals are implicated here. While governments and institutions are called to in this section, the focus invites people to create ways to transform our society, and find new ways of living with each other, including in our spaces of arts, public memory, sports, spirituality, and economy.

SITUATING EDUCATION IN THE CALLS TO ACTION

For many of us working in and around Law, much of the focus has been on the Calls that focus on TRC education for the Legal Profession as a whole, #27 and #28. In #28, Law Schools have been called upon to create new mandatory courses, ones which expand the borders of a basic legal education. In #27, the Law Societies have been called to do similarly, to ensure that lawyers have basic cultural competency. One can position these two calls in parallel (and alter the formatting) to get a better sense of the elements which are imagined here as part of a new "TRC competency".

#28 – To all law schools in Canada	#27 – To the Federation of Law Societies
We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes • the history and legacy of residential schools, • the United Nations Declaration on the Rights of Indigenous Peoples, • Treaties and Aboriginal rights • Indigenous law, and • Aboriginal–Crown relations. This will require skills-based training in • intercultural competency, • conflict resolution, • human rights, and • anti-racism.	We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes • the history and legacy of residential schools, • the United Nations Declaration on the Rights of Indigenous Peoples, • Treaties and Aboriginal rights • Indigenous law, and • Aboriginal–Crown relations. This will require skills-based training in • intercultural competency, • conflict resolution, • human rights, and • anti-racism.

A few notes here. First, in reading these calls, one could focus on the 'mandatory' piece of the puzzle (that law schools should *require*, and the Federation *ensure)*. One might worry that such an approach may generate backlash or resistance. Certainly, there is room for discussion about whether it would be good policy (or strategy) for law schools and law societies to enforce a mandatory requirement for such training.[12] But another interesting avenue into these calls is to turn the discussion from 'requiring' and 'ensuring', to the magnitude of *what* is imagined as a basic legal education. While it might go without saying, though law school course offerings have expanded in recent years, very few practicing lawyers or judges will have had an education that matches what is imagined above. One might indeed argue that the Profession has some significant work to do before it is capable of putting these calls into action.[13]

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12 See for example, Jula Hughes thoughtful response to this question at https://reconciliationsyllabus.wordpress.com/2016/09/05/academic-freedom-implications-of-responding-to-the-trc/

13 There is much work to be done in order for Indigenous Laws to be meaningfully present in the Canadian legal system. One can see the importance here of Call #50, which calls for collaborative work in the "establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada."

These Calls then, ask for something more than just another course offering. These calls invite a significant re-imagining about what is crucial in the project of being a lawyer, in the skills thought to be an integral part of the work of law. They also invite the Legal Profession to consider how it will get there. Who will be asked to teach these courses? Who will develop these materials? Where will they go for resources? Law Schools and Law Societies have begun to turn attention to necessary questions about research agendas, funding patterns, hiring decisions, relations with indigenous communities and their knowledge holders.

But before one too quickly concludes that the responsibilities for these two calls lays with folks higher up in the food chain, it is worth remembering that the TRC suggested that the work of Reconciliation is work for all Canadians. Institutions may sometimes move at a (shall we call it) 'institutional' pace, but there is nothing stopping individual educational moves in the present. These two calls invite the law student and the practicing lawyer, to re-imagine what it means to be a competent legal professional, and offer a curricular roadmap to get there. Indeed, 'clients' are similarly invited to imagine through these calls what knowledge and skills they should be able to expect from their lawyers. I find it interesting, for example, that the calls tell us that training in anti-racism and human rights is integral to the work of Reconciliation.

That Calls #27 and #28 are directed not only to legal institutions but also legal individuals is visible in the 2015 press release by the Law Society of BC. President David Crossin noted, "While the majority of the report's recommendations are not directly aimed at lawyers, their *implementation largely depends on the engagement of lawyers*".[14] Put another way, lawyers and human rights actors are invited to understand we are implicated throughout. It is crucial that we have a solid understanding of what is contained in the 94 Calls.

Let me turn finally to a few strategies of reading that might be of assistance as lawyers try to make these calls their own – attempt to become as familiar with them as they are with the rights enumerated in the *Canadian Charter of Rights and Freedoms.*

But before doing that, one last point. If the last few paragraphs made enough sense to you that you think you could explain the shape of #27 or #28 to a friend, then you are already several steps further ahead than you imagined. Education is not only an issue for Law. The Call to the legal profession is mirrored in Calls to other professional and public bodies and organizations.

- Medical and Nursing Schools (#24)
- Public Servants (#57)
- Church parties (#59)
- Religious training centres (#60)
- Public Education for grades K-12 (#62)
- Journalism programs & media schools (#86)
- Corporate sector (#92iii)

In each of these calls, there is the invitation to rethink the role of education. There is a call for both institutional and individual action in the processes of redressing legacies of the past, and moving towards reconciliation. In short, you now have a sense of 9 Calls to Action! Only another 86 to learn!

SOME FINAL STRATEGIES FOR READING

Here is a place for me to make a quick confession: in my initial attempts to become familiar with the 94 Calls to Action, I felt that I was in (what I think of as) "The Teflon Zone". It's a place I sometimes find myself when reading reports and government documents. That is, as the (strings of clearly important) words accumulate, I find my mind slipping off of them too quickly. I know I have read it, but it is difficult to remember specifics or repeat them (like one of those games where you need to remember as many words as possible from random list). At first, reading the Calls felt a bit overwhelming.

The strategy I found useful was to make a photocopy of the Calls, and then read the document with coloured pens and highlighters in hand. Here I am quite serious. I think each of us needs to go to the Calls with coloured pens and a will to use them! This is a place where all the law school (or grad school) strategies of close reading can be both helpful and (frankly) fun. Pens in hand, I would encourage you to start reading the Calls, asking WHO has been asked to do WHAT?

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[14] See the Law Society of BC News Release, Nov 4, 2015. See also https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/

A. READING FOR WHO (ACTORS!)

On the first question (WHO), take a highlighter, and mark ever person/association you can see. I found this a very helpful way to see who specifically was called into action. It helped me to see that this was not simply a generic call "to government". The Calls offer precision. So, for example, one can see: Canada

- The Prime Minister
- The Pope
- Federal Government
- Provincial/Territorial Government
- Municipal Government
- Aboriginal Government
- Aboriginal Spiritual Leaders
- Aboriginal Healers
- Aboriginal Organizations
- Aboriginal Peoples
- Parties to the Agreement
- University educators
- Health care workers
- Parents
- Elders
- Youth Groups
- Religious congregations
- faith groups
- Social justice groups
- Journalists
- Coaches
- archivists
- land owners

As you look for the "Who", it is also important to make note of all the sections which call for people to work together in collaboration. Use the highlighter to mark all the words that indicate a collaborative practice (in collaboration, with, together, etc.). Seeing the amount of collaboration called for also made visible the need for people (particularly but not exclusively on the non-Indigenous side) to begin making the connections that are necessary in order to work in collaboration. It is noteworthy that this is a shift away from the language of 'consultation' to something that imagines the building of relationships. It asks people to imagine the connections necessary to give the Calls life.

To make this concrete, here is an example in what is now one of my favourite Calls to Action:

> We call upon *those who can effect change within the Canadian health-care system* to recognize the value of Aboriginal healing practices and use them in the treatment of Aboriginal patients in collaboration with Aboriginal healers and Elders where requested by Aboriginal patients.

When I took my highlighter pen to this section, I initially stumbled over the "Who": Those who can effect change?! On the one hand, we might presume this is just another way to identify health-care workers. But as I thought more about this Call, I began to think about what it means to effect change. Does change come from pressure on the demand-side, or the supply-side, or some combination of both? I wondered about the ways we are all embedded in the Canadian health-care system, not only as providers, but also as clients. There is something quite lovely in the "who" that appears in this Call to Action, since it most openly asks us to consider if we might not indeed belong to the group of 'those who can effect change', even if the ways that we can effect change might be indirect (including the ways we begin to talk differently to and with each other about what health current currently looks like, and what collaboration might be able to bring). I find it helpful to think about the way that there may be openings for "those who can effect change" throughout the 94 Calls.

B. READING FOR WHAT (VERBS!)

Another strategy is to focus on verbs: to ask what people are actually being called to *do?* With respect to verbs, they can be meaningfully broken down into different categories. For example, I sorted them thus:

- FUNDING VERBS (to provide money or resources to something)
- PROGRAM DEVELOPMENT VERBS (to develop programs or services, to train people, to educate)
- LEGISLATING VERBS (to enact legislation, regulation or policy; to repeal or amend; to adopt, establish, or appoint)
- MONITORING/REPORTING VERBS (to report, monitor, document, ensure, gather and share information, provide feedback, follow through on action)
- SYMBOLIC/RECOGNITION VERBS (statements that situate 'words' as the action: to acknowledge, to admit, to apologize, to commit, to consider)

Here, I recommend that you use a different colour of pen (or pencil crayon) for each category of verb. I used green for the funding verbs (yes, I was thinking about

the money), pink for program development, orange for legislating (I wasn't necessarily thinking about my NDP leanings... use the political colour of your choice!), red for reporting, and blue for the symbolic.[15] One advantage of this strategy is that it helps to make visible the ways that the calls to action can invite people to see the many paths that are open for those who want to see themselves as invited to participation. As just one example, consider Call to Action #18 (again, found in the Health cluster in the "Legacy" section of the Calls)

#18. We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.

In some ways, this section seems quite distant from the ordinary person. It is directed at 4 levels of government, and it asks them to do three things:

1. ACKNOWLEDGE that current health is a direct result of past action.

2. RECOGNIZE health-care rights as identified in International Law, Constitutional law, and Treaties.

3. IMPLEMENT health-care rights (again, as identified in International, Constitutional and Treaty law)

For many people, "implement" is the most distant of the three verbs: it implicates highly political discussions about funding decisions, and the deployment of resources. But before one heads there, it is worth thinking about how all three verbs can help open up the structure of the call, so one can see multiple paths for action

Consider the call to acknowledge that current experiences of health are the result of past action. Formal governmental acknowledgements may well be required, but these formal moves lack power where they do not resonate with a public that is also prepared to affirm the acknowledgment. In order to truly understand the connection between current health and past governmental policies, we need to know the history of residential schools and other governmental policies.

This section also calls for us to "recognize" and "to implement" Aboriginal health-care rights in international law, constitutional law, and under the Treaties. In order to implement a health-care right, one must recognize that it exists. And the wording of the section points us to three different sources of rights requiring recognition. And I think I will not be alone in confessing gaps in my own knowledge. Thinking about health-care rights in a constitutional sense was not new to me (i.e. federal jurisdiction over 'indian and lands reserved for indians', provincial jurisdiction over health). But I could see that I had some learning to do with respect to Treaty based health-care rights. And it was clear to me that I had no idea about indigenous health care rights in International Law.[16]

CONCLUSION

It is hard to recognize something you know nothing about. As they say, we don't even know what we don't know. In the contemporary moment, what is required is the recognition that we do not know our history. But there can be no reconciliation without truth. As Murray Sinclair put it, "Education got us into this and education will get us out". In the TRC report, the question of how to undertake this education is foregrounded, and close attention to and interaction with the TRC report itself provides us with a roadmap to this education.

The work of both TRUTH and RECONCILIATION begins with learning how to read the recommendations

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15 For a visual example, see a blogpost on this strategy of reading at: https://rebeccaj63.wordpress.com/2015/06/16/truth-reconciliation-commission-calls-to-action-it-begins-with-coloured-pens/

16 And so a friend pointed me in the direction of the UNDRIP. It was a chance for me to make a connection to another section:
Article 24 1. Indigenous peoples have the **right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals**. Indigenous individuals also have the **right to access**, without any discrimination, **to all social and health services**.
2. Indigenous individuals have an **equal right to the enjoyment of the highest attainable standard of physical and mental health**. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Looking at this section helped me to see that, in International Law, there is a relationship between health and the conservation of medicinal plants, animals and minerals, which then leads to a series of questions about the relationship between land and health. But that is for another paper!

themselves, to see infinite possibility in the verbs that we are offered. The great thing about verbs is that they can open up space to help you see small but deliberate actions that you can take, based on where you currently are, that will help move the urgent work of reconciliation forward.

The small steps we take in the direction collaboration and education matter. We can start with sustained interaction with the 94 Calls to Action. You can't recognize what you haven't studied. Print off the Calls to Action. Be a student. Search the report and yourself or your institutions, seek the verbs. In the action of studying, you will find that you can recognize, acknowledge and begin to implement. Education is really at the heart of much of what is here. This is the way to honour those whose testimony founds the work of the TRC.

CANADIAN DOMESTIC PROSECUTION OF INTERNATIONAL CRIME

Jennifer Moore

Abstract: Despite lofty ambitions and initial enthusiasm, and Canada's *War Crimes Act*, Canada's contribution to the international fight against impunity in terms of domestic prosecutions of war crimes and crimes against humanity has been a lackluster venture. Since the introduction of the Act, which provides for a form of universal jurisdiction over the most serious of international crimes, Canada has taken only modest and increasingly diminishing steps towards flexing its prosecutorial muscle. Reasons for this include the difficulty and expense of the undertaking, the absence of a binding international obligation, and ultimately the lack of domestic political will. This paper argues that Canada is likely to not prosecute again under the *War Crimes Act*, while providing suggestions for future improvement.

Résumé : Malgré de grandes ambitions et un enthousiasme initial, et malgré la *Loi sur les crimes contre l'humanité et les crimes de guerre*, la contribution du Canada à la lutte internationale contre l'impunité quant aux poursuites nationales liées à des crimes de guerre et à des crimes contre l'humanité s'est avérée être une piètre initiative. Depuis l'adoption de la *Loi*, qui fournit une forme d'autorité universelle dans le cas des crimes internationaux les plus graves, le Canada n'a pris que des mesures modestes et décroissantes en matière de poursuites pénales. Cette situation s'explique par la difficulté de la tâche et son coût, par l'absence d'obligation contraignante internationale, et finalement par le manque de volonté politique à l'échelle nationale. Ce document prétend que le Canada n'intentera probablement pas d'autres poursuites en vertu de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, et fournit des suggestions d'amélioration.

INTRODUCTION

Despite lofty ambitions and initial enthusiasm, Canada's contribution to the international fight against impunity in terms of domestic prosecutions has been a lackluster venture. Reasons for this include the difficulty and expense of the undertaking, the absence of a binding obligation, and ultimately the lack of political will. The trials have proven to be very difficult to prosecute successfully (the *Mungwarere* case[1]), and when successfully prosecuted the cases are long, arduous, and very expensive (the *Munyaneza* case[2]). The absence of a clear and binding international obligation upon Canada to commence prosecutions is also a significant weakness – with *in dedere aut prosequi* better understood as a general duty to pursue justice rather than a categorical obligation to do the same.[3] Lastly, a political will to engage in more prosecutions does not appear to exist. The lack of political will is evidenced directly by statements made by Government Ministers and indirectly by insufficient funding. However, although not meeting initial expectations, the Canadian efforts match or exceed the efforts found in other countries. The international community is hobbled by political considerations and the universal jurisdiction movement suffered a significant diplomatic backlash, illustrated by the Belgian and Spanish experiences, after high profile defendants were targeted.

Canada has had a dubious history with respect to the prosecution of war criminals.[4] However, at the turn of the century, Canada began to indicate a renewed willingness to contribute to the universal fight against impunity.[5] On June 29, 2000, Canada became the first country to domesticate the *Rome Statute of the International Criminal Court6 (Rome Statute) by enacting the Crimes Against Humanity and War*

1 *R. v. Mungwarere*, 2013 ONSC 4594 (CanLII).

2 *R. v. Munyaneza*, 2009 QCCS 2201 (CanLII), [2009] RJQ 1432.

3 P. Akhavan, "Whither National Courts? The Rome Statute's Missing Half", 8 J. Int'l Crim. Just. (2010) at 1264.

4 Canada was a safe haven for Nazi war criminals. It is estimated that up to 3,000 Nazi war criminals moved to Canada after World War II. No steps were taken by the Canadian Government to locate and punish these individuals until 1982. In 1995, an estimated 1,550 remained alive and in Canada. See N. P. Weiss, "Somebody else's problem: how the United States and Canada violate international law and fail to ensure the prosecution of war criminals", Case West Res J. Int'l L (Fall 2012) 579-609; C.H. Farnsworth, "Canada Says It Will Punish War Criminals", *New York Times*, April 9, 1995, http://www.nytimes.com/1995/04/09/world/canada-says-it-will-punish-war-criminals.html. However, the Deschênes Commission reported that the estimated number of Nazi war criminals in Canada was greatly exaggerated. See G. Purves, "War Criminals: The Deschênes Commission" in Canada, Library of Parliament. Current Issue Review (Ottawa: Ministry of Supply and Services Canada, 1987) online: Library of Parliament <http://www.parl.gc/information/library/PRBpubs/873-e.htm>

5 F. Lafontaine, "The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada's *Crimes against Humanity and War Crimes Act*," 23 Revue québecoise de droit international (2010) at 3.

Crimes Act7 (War Crimes Act). In the preamble to the *Rome Statute*, States Parties affirm that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level." The preamble continues by asking all States Parties to recall "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[8]

The *War Crimes Act* provides for a form of universal jurisdiction over the most serious of international crimes and gives Canada the statutory authority to prosecute the perpetrators of genocide, crimes against humanity, and war crimes regardless of where those "core" crimes took place or against whom they were perpetrated. Once a suspected war criminal is found to be on Canadian territory or otherwise falls within the jurisdiction of the Act, Canada has a positive obligation to the international community to ensure that the person is held accountable. The universal jurisdiction provided for under the *War Crimes Act* is limited by the need for written consent of the Attorney General[9] and the requirement for a territorial nexus.[10]

Since the domestication of the *Rome Statute*, Canada has amassed the resources necessary to identify, investigate, and prosecute those suspected of committing the core crimes. However, in practical terms Canada has taken only modest and increasingly diminishing steps towards flexing its prosecutorial muscle. Seroussi[11] argues that the potential for the worldwide adoption of universal jurisdiction failed to match the hopes of early proponents. Advocates of universal jurisdiction had hoped to capitalize on the momentum created by the *Pinochet* case.[12] However, instead of methodically strengthening its legal basis, the universal jurisdiction movement exploded so broadly and haphazardly that it undermined its very legitimacy. Canada's participation in the fight against impunity waned in concert with the international community. Despite a promising launch, the intervening half decade saw Canada take only small steps in the fight against impunity. Canada did not commence a domestic prosecution until 2005 when charges were laid against Desire Munyaneza for his role in the Rwandan genocide.

Despite having the capacity to participate in a vigorous campaign aimed at the eradication of impunity, this paper will conclude that it is unlikely that Canada will undertake another prosecution under the *War Crimes Act* for acts committed in a foreign country by a foreign national.[13] Reflecting upon Canada's so far non-vigorous adoption of the complementarity envisioned in the *Rome Statute*, this paper will finish with suggestions for future improvement.

The *War Crimes Act* creates two different categories of crimes differentiated by whether they were committed inside or outside of Canada. Only those crimes committed outside of Canada are subject to retrospective jurisdiction[14]. To date the only crimes prosecuted under the *Act* have occurred outside of Canada and the focus of this paper will be restricted to those prosecutions and the potential future prosecution in Canada of war crimes committed outside of Canada.

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6 *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90.

7 *Crimes Against Humanity and War Crimes Act*, S.C. 2000. C.24.

8 *Supra* note 6 at preamble, paras. 4-6.

9 Section 9(3) of the *War Crimes Act* requires the personal consent in writing of the Attorney General before any proceeding can be commenced.

10 Section 8 of the *War Crimes Act* provides the grounds for jurisdiction for crimes committed outside Canada. The grounds for jurisdiction include the following: s.8(a)(i) the accused is a Canadian citizen or employed by Canada in a civilian or military capacity; s.8(a)(ii) the accused is a citizen of country engaged in an armed conflict with Canada or employed in a civilian of military capacity by such a state; s.8(a)(iii) the victim of the alleged offence was a Canadian citizen; s.8(a)(iv) the victim of the alleged offence was a citizen of a state allied with Canada in an armed conflict; or s.8(b) after the alleged offence the accused is present in Canada.

11 J. Seroussi, "The Cause of Universal Jurisdiction: the Rise and Fall of an International Mobilisation", in Y. Dezalay & B.G. Garth (eds), *Lawyers and the Construction of Transnational Justice* (London & New York: Routledge Taylor and Francis Group, 2012).

12 *Commissioner of Police for the Metropolis and Others, Ex Parte* Pinochet [1999] UKHL 17 (24 March 1999). Louise Arbour was openly hopeful that universal jurisdiction law would work in conjunction with the ICC: "It seems to me that.... With the apprehension of Pinochet, the 120 countries in Rome who signed the text of the treaty are also domestically starting to reflect on the need to break this culture of impunity in the international scene. [The Pinochet situation] fits exactly within the spirit of the Rome Treaty--that domestic courts will take the initiative and that only when they are unwilling or unable to carry out these prosecutions will the international forum be activated"; H. Ball, *Prosecuting War Crimes and Genocide The Twentieth-Century Experience* (Lawrence, KS: University Press of Kansas, 1999), p. 233.

13 This paper is inspired in part by a paper written by this author entitled "Will Canada Prosecute Another Rwandan Genocidaire? Challenges Under Canada's *Crimes Against Humanity and War Crimes Act*", December 2, 2014. It should be noted that in 2005 Nicholas Ribic, a Canadian, was prosecuted for crimes committed while he fought with the Bosnian Serb Army. He was prosecuted under the Canadian Criminal Code and sentenced to three years in prison. See: R. v. Ribic, 2008 ONCA 790 (CanLII),238 CCC (3d) 225; 63 CR (6th) 70; [2008] OJ No 4681 (QL); 181 CRR 262; 242 OAC 299. online: <http://canlii.ca/t/21mq8>.

14 See supra note 7; s.6(1) provides: "Every person who, either before or after the coming into force of this section, commits outside Canada [a core crime] is guilty of an indictable offence and may be prosecuted for that offence..."

THE MISSING OR MISGUIDED POLITICAL WILL

The lack of political is the primary debilitating factor preventing Canada from fulfilling commitments made under the *Rome Statute*. A robust political will to prosecute war criminals would make the absence of a binding obligation to prosecute irrelevant and would ensure all anti-impunity initiatives were properly funded.

In 1985, the Canadian Government, in response to international criticism,[15] announced a commission of inquiry into suggestions that Nazi war criminals were living in Canada.[16] The Deschênes Commission confirmed that suspected war criminals were, in fact, residing in Canada. In response to the Deschênes Report, the Canadian Government created a War Crimes Unit to pursue criminal prosecutions under the freshly amended Canadian *Criminal Code*. Four unsuccessful prosecutions were launched between 1987 and 1994.[17] Prosecutions under the *Criminal Code* were cumbersome and the Supreme Court of Canada (SCC) decision in *Finta*[18] made future prosecutions improbable. The Canadian Government took no steps to address the issue of war criminals residing in Canada for the balance of the 20th century.

As the legislative scheme for prosecuting suspected war criminals evolved from the provisions of the *Criminal Code* to the *War Crimes Act*, there were renewed hopes among human rights scholars that Canada might engage in a more vigorous pursuit of international war criminals and there were indications that the Canadian Government would throw its support behind the project. When the *Rome Statute* was domesticated into Canadian law in 2000, it easily passed through the House of Commons with only 36 votes opposed.[19] At the time, Secretary of State Raymond Chan spoke about the new legislation:

> The *Crimes Against Humanity and War Crimes Act* has been amended to ensure that Canada will be able to fully prosecute individuals who commit mass murder, rape, torture or any other similar heinous crimes against humanity. The customary international law definitions of genocide, crimes against humanity and war crimes will now be recognized inside Canada.
>
> Canada's ability to assert universal jurisdiction for these crimes has also been streamlined and simplified. Now, as long as the person accused of the crime is found in Canada, they will fall under our jurisdiction, regardless of when or where the crime took place. This change ensures that those who have committed or who commit in the future the most egregious crimes will not find a safe haven in Canada.[20]

The Canadian War Crimes Unit eventually matured into the current War Crimes Program and the Government's focus shifted from a stated intention to prosecute to a stated preference for immigration tools. The current War Crimes Program is a partnership of the Department of Justice, the Royal Canadian Mounted Police, Citizenship and Immigration Canada, and Canada Border Services Agency.[21] The goals of the War Crimes Program[22] are to implement and promote Canada's policy of denying safe haven to suspected perpetrators of genocide, crimes against humanity or war crimes, to contribute to the domestic and international fight against impunity, to reflect Canada's commitment to international justice and respect for human rights, and to strengthen border security.[23] According to the Department of Justice website[24], the War Crimes Program employs a three-pronged approach to dealing with suspected war

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15 Farnsworth, *supra* note 4.

16 Canada, Crimes Against Humanity and War Crimes Program. Website, online: <http://www.justice.ca/warcrimes-crimesdeguerre/process-processus-eng.asp>, Commission of Inquiry on War Criminals. *Report-Part 1: Public* (Ottawa: Minister of Supply and Services Canada, 1986).

17 *Supra* note 5 at 3.

18 *R. v. Finta*, [1994] 1 SCR 701, 1994.

19 Y. Dutton, *Rules, Politics and the International Criminal Court* (London and New York: Routledge Taylor & Francis Group, 2013), p. 89. Those 36 Members of Parliament opposing the *War Crimes Act* reflected the totality of the Canadian Alliance Party.

20 House of Commons Debates, 36th legislature, 2nd session, No. 113 (13 June 2000) at 1110.

21 Canada, *supra* note 16. Commission of Inquiry on War Criminals. *Report-Part 1: Public* (Ottawa: Minister of Supply and Services Canada, 1986).

22 The overall budget for the program was $78 million for the period of 2005-2010. See *supra* note 5 at 5, Canada, *Crimes against humanity and war crimes program - Summative evaluation (Final Report)* (Ottawa: Evaluation Division, Office of Strategic Planning and Performance Management, 2008) online: <http://justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/08/war-guerre/index.html >.

23 *Supra* note16, Commission of Inquiry on War Criminals, and *supra* note 21, F. Lafontaine, "'Wanted: War Criminals'?: The Challenge of Ensuring Justice for Canada's Unwanted War Criminals", *Legal Frontiers, McGill's Blog on International Law*, June 30, 2011.

24 Canada, *supra* note 16, Commission of Inquiry on War Criminals, and *supra* note 21.

criminals. The heads of action include:

1. Preventing suspected war criminals from reaching Canada by refusing their immigrant, refugee or visitor applications abroad
2. Detecting those who have managed to come to Canada and take the necessary steps to:
   a. exclude them from the refugee determination process;
   b. prevent them from becoming Canadian citizens;
   c. revoke their citizenship should they be detected after acquiring that status; and,
   d. remove these individuals from Canada;
3. Considering criminal prosecution, where appropriate, or extradition.[25]

As can be seen from the clear wording of the text, Canada only commits itself to *consider criminal prosecution* and then only *where appropriate*. The double discretionary qualifiers foreshadow a reluctance to be bound to criminal prosecutions. Further insight into Canada's policy preferences can be found in the Crimes Against Humanity and War Crimes Program Summative Evaluation Final Report (the SE Report).[26] The SE Report confirms the purpose of the War Crimes Program is to support Canada's policy of no safe haven and to contribute to the international fight against impunity. However, the report concedes that budget constraints limit the ability to achieve the dual objectives. In 2011 funding for the War Crimes Program became permanent at $15.6 million per annum.[27] In discussing the success of the program the SE Report notes the effect of budget restrictions:

> At the same time, there is an apparent discrepancy between the size of the RCMP/DOJ inventory of modern war crimes cases and the resources available to the RCMP War Crimes Section for investigation. The limited resources available for investigation, in relation to the inventory of serious cases, place an important limitation on the Program's contribution to the objective of denying safe haven.[28]

The SE Report outlines the mechanisms available when presented with an alleged war criminal.[29] The choice of mechanism is based on: the ability to substantiate and verify evidence; the resources available to conduct the proceedings; the likelihood of success of a given remedy; and Canada's obligations under international law. In 2007, the War Crimes Steering Committee made a decision to place greater emphasis on immigration tools claiming there is a "strong cost effectiveness argument for using the criminal prosecution remedy sparingly, even if the costs of the investigation phase can be reduced in future cases."[30]

Of the nine mechanisms listed in the SE Report, only three contemplate seeking accountability for war crimes. The report acknowledges that the mechanisms vary tremendously in terms of cost and that a consideration of cost-effectiveness requires a greater emphasis be placed on immigration related remedies.[31] The mechanisms listed include:

1. Screening and denial of visas to persons outside of Canada;
2. Denial of access to Canada's refugee determination system;
3. Exclusion from the protection of the 1951 United Nations Convention relating to the Status of Refugees;
4. Prosecution in Canada under the *Crimes Against Humanity and War Crimes Act*;
5. Extradition to a foreign government (upon request);
6. Surrender to an International Tribunal;
7. Revocation of citizenship and deportation;
8. Inquiry and removal from Canada under the *Immigration and Refugee Protection Act (IRPA)*; and
9. Denial of status to senior officials from designated governments considered to have engaged in gross human rights violations under 35(1)(b) of the *IRPA*.

As mentioned earlier, criminal proceedings require "the personal consent in writing of the Attorney General or the Deputy Attorney General of Canada,

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25 Ibid.

26 Canada, *supra* note 22.

27 Despite having permanent funding, the War Crimes Program funding has not increased since the inception of the program in 1998.

28 Canada, *supra* note 22 at v.

29 Ibid., and *supra* note 5 at 2.

30 *Supra* note 5 at 48.

31 Canada, *supra* note 22 at vi, and *supra* note 5 at 47.

and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf."[32] Without the consent of the Attorney General courts will lack the jurisdiction to hear any matter under the *War Crimes Act*. This limitation prevents the initiation of private prosecutions available under the *Criminal Code*, plus it allows the Government to restrict prosecutions to those cases that fit within foreign policy objectives[33] and presumably budget objectives.

Critics lament the lack of funding provided to the War Crimes Program. Jayne Stoyles, of the Ottawa-based Canadian Centre for International Justice (a group that helps survivors of atrocities bring the perpetrators to justice) has stated that "resources are not sufficient for the RCMP and the Department of Justice to meet their mandates to investigate and prosecute."[34] It is perhaps unsurprising that Canada has also been reticent about the funding given to the ICC. In 2014, Canada was the only State Party to oppose a consensus to increase the ICC budget.[35]

The Canadian Government frames its public policy position vis-à-vis war criminals as a preference to employ immigration procedures rather than a reluctance to prosecute. The 12th (and most recent) Report on Canada's Crimes Against Humanity and War Crimes Program[36] summarizes program activities between April 2008 and March 2011. This report clearly demonstrates the emphasis on immigration procedures. During this period, 61 people were removed from Canada on the basis that there were reasonable grounds to believe they committed or were complicit in war crimes. Another 199 people were subject to enforceable removal orders, a further 89 people were subject to removal orders and were awaiting a pre-removal risk assessment, and finally there were arrest warrants issued for an additional 177 people. In comparison, Jacques Mungwarere was the only person to be charged with a crime during this period.

The *Branko Rogan*[37] case is an example of the Canadian Government choosing to use immigration tools over prosecutorial tools. This was the first time the *Citizenship Act* [38] was used to address suspected war criminals found within Canada and it resulted in the first citizenship revocation for a war crimes related matter in the modern context. Rogan had come to Canada in 1994 and became a Canadian citizen in 1997.[39] He was suspected of committing crimes against humanity while acting as a reserve police officer and guard at a detention facility in Bosnia-Herzegovina. On August 18, 2011, Justice MacTavish found that Rogan had been untruthful with Canadian immigration and citizenship officials. Specifically, the Court found, on a balance of probabilities, that Rogan participated directly and indirectly in the abuse of Muslim prisoners in detention facilities in Bileca. By making a declaration that Rogan had obtained his Canadian citizenship by false representation, the Federal Court allowed Canada to adopt an order to revoke his citizenship.

In 2011, Canada's reluctance to prosecute war criminals was laid bare. On July 21, 2011, the Government launched a website identifying 30 suspected perpetrators of genocide, war crimes or crimes against humanity.[40] At the website launch,

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32 *Supra* note 7, section 9(3).

33 F. Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Toronto: Carswell, 2012), pp. 65-66; D A Tallman, "Universal Jurisdiction: Lesson's From Belgium's Experience" in J. E. Stromseth (ed), *Accountability For Atrocities: National and International Responses* (Ardsley & New York: Transnational Publishers Inc., 2003); F. Lafontaine, "Universal Jurisdiction and the Realistic Utopia", J Int'l Crim Just 10 (2012) at 1278; and A. Zimmermann, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters" in C. Tomuschat & J-M. Thouvenin (eds), The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes (Leiden & Boston: Martinus Nijhoff Publishers, 2006).

34 N.Keung & R.J.Brennan, "Ottawa identifies 30 suspected war criminals living in Canada", *thestar.com* (July 21, 2011) online: <https://www.thestar.com/news/canada/2011/07/21/ottawa_identifies_30_suspected_war_criminals_living_in_canada.html> last retrieved March 15, 2016.

35 M. Kersten, "Public letter: How Canada Can Reclaim Its Reputation for International Justice", *Justice in Conflict* (October 10, 2015) online: < http://justiceinconflict.org/2015/10/10/public-letter-how-canada-can-reclaim-its-reputation-for-international-justice> last retrieved March 17, 2016.

36 Canada, Crimes Against Humanity and War Crimes Program, *Twelfth Annual Report, 2008-2011*, online: Canadian Border Services Agency < http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html>

37 Canada (*Citizenship and Immigration) v. Rogan*, 2011 FC 1007 (CanLII), <http://canlii.ca/t/fmnhj> retrieved on 2016-01-07.

38 *Citizenship Act* (R.S.C., 1985, c. C-29).

39 *Supra* note 37, at para. 1.

40 L. Elliott, "Ottawa Names War Crimes Suspects in Canada", CBC News, July 21, 2011, online: <http://www.cbc.ca/news/politics/ottawa-names-war-crimes-suspects-in-canada-1.1068892>. The Wanted by the CBSA program continues to exist and has been expanded to include those accused of non-ICC crimes. As of February 5, 2016, there were 8 alleged criminals at large. The Program claims to have located 66 persons in Canada and removed 61 persons from Canada. In addition, 18 persons were located outside of Canada. Canada Border Services Agency website online: <http://www.cbsa-asfc.gc.ca/wc-cg/menu-eng.html> retrieved March 15, 2016.

Canadian Immigration Minister Jason Kenney said that those suspected of being involved in war crimes should be "rounded up and kicked out of Canada."[41] Canadian Public Safety Minister Vic Toews falsely added[42] that the 30 people named on the website had been found guilty of heinous crimes.[43] Toews claimed his responsibility was to deport these individuals as a matter of public safety and he made it clear that it was not Canada's responsibility to "investigate, prosecute and imprison people who commit crimes against humanity in other countries."[44] When questions arose about the likelihood of the accused being held accountable after they were deported from Canada, Toews claimed "Canada is not the UN. It's not our responsibility to make sure each one of these faces justice in their own countries."[45] Neither Kenney nor Toews spoke to Canada's responsibilities under the *Rome Statute* or under other international treaties such as the *Geneva Conventions*[46] or the *Genocide Convention*[47] even though it is inconceivable that these responsibilities were unknown to them. In fact, their public comments directly denied the principle of *in dedere aut prosequi*. Days later, Toews is quoted as saying "usually the crimes are prosecuted in the countries where they're committed, or through the UN—that's the most appropriate jurisdiction."[48] At the time, Amnesty International called Canada's approach to dealing with war criminals within her border "deeply flawed"[49] and stated that, once deported, those 30 individuals were unlikely to stand trial in their countries of origin.

Scholars have observed and lamented that even countries that were once enthusiastic supporters of the *Rome Statute* and have the ability to undertake such prosecutions have demonstrated a "lack of political and prosecutorial will"[50] to commence investigations. This seems to be evidenced in Canada by the stagnant funding of the War Crimes Program, the initiation of only two prosecutions under the *War Crimes Act*, and direct unequivocal comments made by members of the Canadian Government.

FAILURE OF THE ROME STATUTE TO CREATE BINDING OBLIGATIONS AND THE FAILURE OF THE ICC TO ENCOURAGE POSITIVE COMPLEMENTARITY

The *Rome Statute* and the creation of the ICC reversed the primacy of jurisdiction over international criminal law from an international focus (the ICTY/ICTR regimes) to a domestic jurisdiction focus with all signatories agreeing that they had a primary duty to investigate and prosecute genocide, war crimes and crimes against humanity.[51] Article 1 of the *Rome Statute* sets out the basis upon which the ICC should operate and that it is complementary to national criminal jurisdictions.[52]

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41 Ibid.

42 Ibid.

43 Ibid.

44 L. Payton, "War Crimes Prosecution Not Up to Canada, Toews Says", CBC News, August 3, 2011, http://www.cbc.ca/news/canada/war-crimes-prosecution-not-up-to-canada-toews-says-1.1065599. On July 21, 2011, Toews incorrectly stated that each name on the list had been found guilty of crimes. On July 27, 2007, Toews claimed the Canadian Government was not making an assumption of guilt with respect to the 30 named. The Canadian Government confirmed that none of the 30 on the list was facing criminal charges abroad.

45 Ibid.

46 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Conventions), 12 August 49, 75 UNTS 31, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Geneva Convention Relative to the Protection of Civilians in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

47 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

48 "War Crimes Suspects' Prosecution Uncertain", CBC News, July 27, 2011, online: <http://www.cbc.ca/news/politics/story/2011/07/27/pol-war-crimes-prosecution.html>.

49 *Supra* note 44.

50 E.P. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Northampton, MA: Edwin Elgar, 2010), p. 155.

51 *Supra* note 6, Preamble.

52 "Article 1. An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."

Complementarity serves various and diverse purposes including relieving the ICC of a massive workload, but also allowing States Parties to maintain some prosecutorial prerogative. Dembowski notes that "where the ICC serves as a check on absolute sovereignty, the complementarity principle may be thought of as a check on that check."[53] In the early days of the *Rome Statute*, the eminent Judge Antonio Casesse wrote that all signatories have an obligation to see that serious breaches of international law are punished.[54] Other scholars have also emphasized that States alone bear the principle and primary obligation to prosecute the core crimes.[55] Philippe Kirsch, one of the architects of the ICC, noted that properly functioning national judicial systems would result in the ICC having no reason ever to assume jurisdiction.[56] Mendes characterizes the duty to extradite or prosecute as a key feature of positive international complementarity and refers to it as the "most recent evolution of the concept of universal jurisdiction."[57]

The duty for States Parties to prosecute war criminals under the principle of complementarity is clear. As such, it might be assumed that both the ICC and States Parties would embrace the expectations of the Statute. This has not been the case. The system of complementarity fundamental to the *Rome Statute* is flawed because a mechanism to compel prosecutions is absent and the ICC, until recently, has been reticent to encourage the initiative of States Parties. Even Article 1 of the Statute does not require domestic implementation in express terms. In the *Katanga* decision, the ICC Appeals Chamber clarified[58] that while the preamble to the *Rome Statute* clearly holds that States have the primary responsibility to exercise jurisdiction in international criminal matters, the Statute does not give the ICC power to order States either to open investigations or to prosecute domestically.

Accordingly, even though the *Rome Statute* created a duty for Canada to prosecute international crime – for which Canada did take measures to modify its domestic legislation to fulfill this duty as a general matter – and the Appeal Chamber of the ICC has acknowledged parties "have a duty to exercise their criminal jurisdiction over international crime"[59], it appears that Canada is not specifically required to take any particular measure to satisfy this duty vis-à-vis a particular case. This appears to allow signatories to pledge a *general* duty to prosecute, but then not, in fact, prosecute which is what Canada did in the *Rogan* case.[60]

In the absence of a political will to prosecute, the importance of a binding obligation to do so becomes apparent. There will be limited success in any endeavor that is reliant upon non-binding, discretionary and potentially politically charged duties. Akhavan, a former United Nations prosecutor at The Hague,[61] argues that this enforcement gap renders the system of complementarity ineffectual:

> Thus, while the ICC Prosecutor must necessarily exercise broad discretion in initiating prosecutions, the *Rome Statute* gives states virtually unlimited discretion, or rather, no obligation to prosecute at all, notwithstanding other obligations that may or may not exist under international law. It is this reality of international criminal justice that fundamentally differentiates the division of labour between the ICC and national courts from other comparable treaties. Absent a means of ensuring that national courts will assume their share of the burden, the complementarity scheme of the *Rome Statute* remains inadequate and incomplete.[62]

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53 L.C. Dembowski, "The International Criminal Court: Complementary and Its Consequences" in J.E. Stromseth (ed), *Accountability For Atrocities: National and International Responses* (Ardsley & New York: Transnational Publishers Inc., 2003), p. 140.

54 A. Cassese, "The Rome Statute: A Tentative Assessment" in Cassese, Gaeta, & Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002).

55 F. Lafontaine, supra note 23. F. Lafontaine, "'Think Globally, Act Locally': Using Canada's *Crimes Against Humanity and War Crimes Act* for the 'Sustainable Development' of International Criminal Law" (October 19, 2007). Canadian Council of International Law's Annual Conference: "Canada's Contribution to International Law," October 2007 at 3, *supra* note 53 at 143.

56 P. Kirsch, "Keynote Address (The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes and Aggression)", Cornell Int'l L J, 32(3) (1999) at 438.

57 *Supra* note 50 at 132.

58 Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07OA8), Appeals Chamber, 25 September 2009.

59 Ibid. at para. 85.

60 *Supra* note 37.

61 L. Mowen, "Quebec's Court of Appeal Upholds Conviction for His Role in Rwandan Genocide", *Legal Monitor Worldwide*, May 8, 2014.

62 *Supra* note 3 at 1247.

He goes on to explain:

> Whatever the circumstances that prompted the exclusion of a national repression obligation from the *Rome Statute*, there can be no doubt that the entire complementarity scheme rests on the fundamental assumption that national prosecutions are essential to the viability of the international criminal justice system. Beyond considerations such as domestic capacity-building and local ownership of justice, the most important practical reason for this is that the ICC cannot realistically be expected to exercise jurisdiction over anything but a small fraction of the perpetrators of large-scale international crimes. It is now common wisdom—based especially on the experience of the ICTY-ICTR—that the inordinate cost and length of proceedings imposes a serious limitation on the quantity of trials at The Hague. It is in this respect that the Court can never become a full substitute for domestic prosecutions in eradicating impunity.[63]

Akhavan argues that an effective complementarity scheme requires a variation to the current *Rome Statute*. He recommends the adoption of an Additional Protocol containing an "express and enforceable obligation to exercise national jurisdiction."[64] Although an Additional Protocol mandating prosecution would render obligations found in the *Rome Statute* more meaningful, this prospect is likely academic. There would need to be an international consensus on the part of governments to push this agenda forward – and States that have chosen to prosecute sparingly or not at all are unlikely to commit themselves to mandatory prosecutions.

Notwithstanding the above shortcomings of the *Rome Statute*, Canada's positive obligation to prosecute can be found in other international treaties, including the 1949 *Geneva Conventions* and the 1977 *Additional Protocol 1*. Each of the Conventions has an identical clause[65] that provides as follows:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Conventions defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed [...] grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

These obligations apply only to war crimes committed in international armed conflict, and thus the scope of mandatory prosecutions is limited. The obligation to prosecute is not applicable to non-international armed conflicts or atrocities committed by a government in the absence of armed conflict.[66] In comparison, the *Genocide Convention*[67] at Article VI requires the State in which the genocide occurred to prosecute, but does not require other States Parties to prosecute perpetrators of genocide. Scholars now agree that customary international law permits the prosecution of authors of genocide, but does not require it.[68]

While customary international law does not yet include a specific obligation to either prosecute or extradite those suspected of genocide, war crimes, or crimes against humanity,[69] the preamble of the *Rome Statute* does include specific references to such a duty: "the most serious crimes of concern to the international community as a whole must not go unpunished," and "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[70] Some authors have suggested that the preamble might be the foundation for a customary

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63 Ibid. at 1251.

64 Ibid.

65 *First Geneva Convention* Art. 49; *Second Geneva Convention* Art. 50; *Third Geneva Convention* Art. 129; and *Fourth Geneva Convention* Art. 146.

66 *Supra* note 3 at 1255.

67 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

68 V. Thalmann, "National Criminal Jurisdiction over Genocide" in P. Geata (ed.), *The UN Genocide Convention – A Commentary* (Oxford: Oxford University Press, 2009), p. 244; and *Convention on the Prevention and Punishment of the Crime of Genocide, op. cit.*

69 Weiss, *supra* note 4 at 600.

70 *Supra* note 6.

international law norm for every State to exercise universal jurisdiction over those responsible for core crimes.[71] Weiss points out that this would be consistent with basic treaty interpretation provided under Article 31(2) of the *Vienna Convention*, which suggests the preamble to any treaty be given the same interpretive weight as the text.[72] While Weiss concedes that the preamble to the *Rome Statute* does not create an explicit duty to prosecute, he suggests the "preamble creates an inference that there is already a pre-existing duty in customary international law to seek out and ensure the prosecution of war criminals."[73]

There are both passive and positive elements to complementarity. The most commonly known, passive complementarity, envisions the ICC as "the court of last resort when states failed to fulfil their duty to investigate and prosecute crimes genuinely."[74] Alternatively, positive complementarity denotes a responsibility on the part of the ICC to encourage States to fulfil their duties under the *Rome Statute* by actively pursuing those responsible for international crime.[75] Similarly, the prospect that the ICC might commence an investigation was intended to inspire domestic accountability. It could be argued that the ICC failed to inspire States Parties to prosecute war crimes domestically. Rather than encouraging States Parties to meet their obligations under the *Rome Statute*, the Office of the Prosecutor indicated that "it was not its concern and that it was entirely up to states to decide what to do with regard to any crimes that it was not investigating or prosecuting."[76] Hall points out that the early ambivalence of the ICC towards domestic prosecutions and the policy of leaving it up to States Parties to make decisions about the prosecution of war crimes appears to be directly contrary to the intention set out in the Preamble of the *Rome Statute*. He notes that the stipulation that: "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level" has no listed exceptions.

THE DIFFICULTIES AND EXPENSE INHERENT IN THE CANADIAN PROSECUTION OF FOREIGN WAR CRIMES

Even if the political will existed fully to accept universal jurisdiction or even if the *Rome Statute* was amended to require States to undertake prosecutions, there is reason to believe that Canada might still be reluctant to undertake further prosecutions. The prosecution of foreign offences under the *War Crimes Act* requires a selective approach. It is an extremely difficult undertaking and also very expensive. The investigation of the crime and the collection of evidence, to a large extent, must be done outside of Canada, almost always in a foreign language, and often years after the event. Furthermore, Canadian prosecutors do not have standing to demand documentation or even cooperation from foreign governments. The usual challenges of prosecution are compounded by distance in geography and time. Witnesses are typically difficult to find, die, disappear, forget, incorrectly remember or are reluctant to engage with the investigation. Canadian investigators must be educated about, and be attuned to, cultural nuance in assembling the evidence and understand that assumptions that might be benign in Canada could be disastrous for the prosecution of a foreign crime. as a consequence, domestic courts are not well-suited venues for the prosecution of foreign international core crimes.

In the Canadian domestic criminal system, there is an approximate 3% acquittal rate.[77] In comparison, the ICTR had an acquittal rate of slightly less than 19%.[78] The low acquittal rate in Canada is largely because criminal cases may only proceed to trial after careful consideration by the crown attorney.[79] The crown attorney must be satisfied that there is sufficient evidence to support a reasonable prospect of conviction and that a prosecution would best serve

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71 Weiss, *supra* note 4 at 601.

72 *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331.

73 Weiss, *supra* note 4 at 602.

74 C.K. Hall, "Developing and Implementing an Effective Positive Complementarity Prosecution Strategy" in C. Stahn & G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (The Netherlands: Koninlijke Brill, 2009), p. 219.

75 Ibid. at 220.

76 Ibid. at 227.

77 F. Lafontaine, "Les acquittes rwandais dont personne ne veut," *Huffington Post Quebec*, November 18, 2014, online: <http://quebec.huffingtonpost.ca/fannie-lafontaine/rwanda-genocide-acquittes_b_6174248.html>.

78 Ibid.

79 Public Prosecution Service of Canada. The Public Prosecution Service of Canada Deskbook, online: < http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html > Careful consideration is given to the decision to prosecute because "a wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system", section.2.3(1).

the public interest.[80] If there is any weakness in the evidence, the matter should not proceed.

To date there have only been two prosecutions commenced under Canada's *War Crimes Act*. These are the trials of Desire Munyaneza[81] and Jacques Mungwarere[82] for crimes committed in the Rwandan genocide. On May 22, 2009, Mr. Munyaneza was convicted of seven counts of genocide, crimes against humanity, and war crimes by the Honourable Justice Andre Denis of the Superior Court of Quebec for acts of murder, sexual violence and pillage.[83] He was sentenced to life imprisonment without eligibility for parole for twenty-five years.[84] On July 5, 2013, Mr. Mungwarere was acquitted by the Honourable Justice Michel Charbonneau of the Ontario Superior Court of Justice. The decision of Charbonneau J. was not appealed.

The *Munyaneza* convictions were unanimously upheld by a three-member panel of the Quebec Court of Appeal.[85] Because the Quebec Court of Appeal decision was unanimous, Munyaneza required leave to appeal to the SCC. He filed for the same on August 6, 2015.[86] The SCC enjoys wide discretion in deciding whether to grant leave. The application for leave was dismissed without costs on December 18, 2014.[87]

Prior to the SCC decision to deny leave, one Canadian scholar had speculated that given the strength of the Quebec Court of Appeal decision the SCC might be inclined to decline leave until such time as a conflicting judgement emanated from a different province.[88]

The trial of Desire Munyaneza cost an estimated $1.6 million before it even reached the Quebec Court of Appeal.[89] Depending upon the complexity of the case, the SE Report estimated a prosecution under the *War Crimes Act* will cost between $4,027,284.00 and $4,170,372.00.[90] Accordingly, the decision to pursue these prosecutions must not be made lightly.

In his decision Denis J, outlines the enormous amount of work that went into the trial.[91] Parts of the trial took place in France,[92] Rwanda,[93] Tanzania,[94] and Canada.[95] When it was over, the trial had heard from 66 witnesses over a period of almost two years. Denis J., in making reference to the demands of such a trial, noted: "the organization of four rogatory commissions, in the circumstances, was a colossal undertaking for all participants."[96] He stated earlier in his decision[97] that the rogatory commissions could have proceeded via video-conferencing, but that he preferred to attend personally so that he could see, hear and assess the credibility of the witnesses. It should be noted that

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80 Ibid., section 2.3(2).

81 *Supra* note 2.

82 *Supra* note 1.

83 F. Lafontaine, "Canada's *Crimes Against Humanity and War Crimes Act* on Trial: An Analysis of the *Munyaneza* Case", J Int'l Crim Just 8 (2010) at 269.

84 *Supra* note 2, paras. 59-62.

85 *R. v. Munyaneza*, 2014 QCCA 906.

86 Supreme Court of Canada, Docket 35993, *Desire Munyaneza v. Her Majesty the Queen*, online: < http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35993>.

87 Ibid.

88 F. Lafontaine, "Universal Jurisdiction in Canada: Quebec Court of Appeal Judgement in Munyaneza Clarifies the Law and Paves the Way for Future (Unlikely?) Cases", *Blogue Clinique de droit international penal et humanitaire*, (May 19, 2014).

89 *Supra* note 61. However, the immigration case of Leon Mugsera had to be similarly costly. See "Accused Rwandan War Criminal Wants Canadian Trial", *Canadian Press*, August 1, 2007, *infra* note 110.

90 *Supra* note 5. These figures seem to include proceeding to the appellate level which was not the case in *Mungwarere*.

91 It also must be noted that members of the Royal Canadian Mounted Police also travelled to Rwanda in February and March 2005 to investigate Munyeneza prior to charges being laid; *supra* note 85 at para. 5.

92 *Supra* note 2 at para 20. In January 2008, Denis J. heard three witnesses for the defense in Paris.

93 Ibid. at paras. 15 and 21. Denis J. presided over rogatory commissions in January and February 2007 at which he heard fourteen witnesses for the prosecution who could not travel to Canada. He returned to Kigali in April 2008 to hear seven witnesses for the defense.

94 Ibid. at para. 22. Denis J. heard fourteen witnesses for the defense in Dar es Salaam, Tanzania.

95 Ibid. at paras. 18 and 24. Beginning on March 27, 2007, Denis J. heard sixteen witnesses for the prosecution. After returning to Canada from Tanzania, he heard a final twelve witnesses for the defense.

96 Ibid. at para. 23.

97 Ibid. at para. 16.

there are examples of similar trials in other countries that have been successfully prosecuted in a fraction of the time.[98]

In November 2009, Jacques Mungwarere was charged under the *War Crimes Act* with one count of genocide and one count of crimes against humanity. The charges were laid on the heels of the successful *Munyaneza* prosecution. After a 26-week trial Charbonneau J. found Mungwarere not guilty of both charges.[99] The *Mungwarere* trial differed significantly from the *Munyaneza* trial in that much of the evidence was given via video link. While the *Mungwarere* trial was less onerous, it was not without its troubles particularly with respect to witness testimony. In rendering his final decision, Charbonneau J. stated that he did not believe Mungwarere to be credible. Surprisingly, he even suggested that Mungwarere was likely guilty.[100] However, Charbonneau J. felt compelled to acquit because he felt that the Crown did not discharge its burden of establishing guilt beyond a reasonable doubt on all the essential elements of the crimes.[101]

Witnesses for the prosecution provided evidence that was at times confusing and contradictory.[102] Furthermore, the testimony of one prosecution witness gave rise to fatal doubts about the credibility of other prosecution witnesses. In his testimony, Chief RCMP Investigator Marc Lishchynski acknowledged that certain witnesses he had interviewed had fabricated evidence against Mungwarere.[103] Lishchynski also testified that at various times, he received information that made him question the good faith of some witnesses.[104]

The Court also heard from Dr. Brian Endless, a political scientist, from Loyola University who testified as an expert witness for the defense. Dr. Endless gave evidence about the inherent difficulties in assessing the credibility of witnesses in Rwandan genocide trials. He attributed these difficulties to two factors: pressure and coercion from the current Rwandan Government and the notion of a collective responsibility of all Hutus for the genocide. Dr. Endless testified that witnesses in domestic Rwandan trials, the ICTR or foreign domestic courts are often thought to testify in accordance with what they think is the current Government agenda. Further, Dr. Endless testified that it was often dangerous for witnesses to give evidence that contradicted the official position of the Rwandan Government. Dr. Endless testified that, in his opinion, it was not possible to get a fair trial in Rwanda on charges of genocide and that this impossibility reached beyond the borders of Rwanda and taints genocide trials against Rwandans in third party States such as Canada. Although Charbonneau J. did not completely rely on the testimony of Dr. Endless[105], the prospect of endemic politically motivated testimony, whether true or not, lends itself to a reasonable doubt and may be fatal to future prosecutions. At paragraph 409, Charbonneau J. notes that both expert witnesses[106] agree that the current Rwandan Government interferes with the domestic judicial system rendering decisions suspect.

The expert testimony of Dr. Endless and the testimony of RCMP Investigator Lishchynski given in the *Mungwarere* trial bode poorly for the likelihood of future Canadian prosecutions for crimes committed during the Rwandan genocide. Canadian prosecutions are not commenced unless there is a reasonable prospect of conviction. Evidence provided in the *Mungwarere* trial suggests that the possibility of raising a reasonable doubt through allegations of coerced testimony will be a strong tool for the defence. This will continue to be a difficult hurdle for domestic prosecution to overcome even if the Rwandan justice system adopts more mechanisms to ensure procedural fairness.

Even the use of administrative or immigration procedures can be an arduous and expensive enterprise for the Canadian authorities. There

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98 In 2001, Belgium prosecuted the Butare Four for crimes committed during the Rwandan genocide. All were found guilty of war crimes after an eight-week trial; E.K. Leonard, "Global Governance and the State: Domestic Enforcement of Universal Jurisdiction", Hum Rts Rev 16 (2015), p. 152.

99 *Supra* note 1.

100 Ibid. at para. 1260, Justice Charbonneau states: "Tout au plus, cette preuve établit une probabilité de culpabilité" [English translation: "at most, this evidence establishes a probability of guilt"].

101 *Supra* note 1 at para. 1261.

102 Canadian Centre for International Justice, "Mungwarere Trial-Weekly Summaries" (2012-2013) online: < http://www.ccij.ca/programs/index.php?DOC_INST=1#Week1>.

103 *Supra* note 1 at para. 112.

104 Ibid. at para. 120.

105 Ibid. at para. 67.

106 Dr. Tom Longman of Vassar College testified as an expert for the prosecution.

have been cases where it might have been simpler to prosecute an individual rather than resort to immigration remedies. An example of this type of situation is the lengthy and circuitous case of Leon Mugesera.[107] In 1995 the Canadian Government began proceedings to deport Mugesera to Rwanda.[108] He was accused of inciting genocide in a fiery anti-Tutsi speech he delivered in 1992 in which he referred to Tutsis as cockroaches and suggested they should be exterminated. At the time, Mugesera was a member of the National Republican Movement for Democracy and Development – the ruling party largely blamed for the genocide. Mugesera, a former Université Laval lecturer, maintained he was not a particularly important politician and that there's no way to prove his speech affected events in 1994. After winding his way through the Immigration and Refugee Board and Canadian courts for 17 years, Mugesera was finally extradited to Rwanda in January 2012.[109] This was a full seven years after the SCC[110] declared that all necessary steps had been taken to ensure Mugesera would receive a fair trial and not be tortured upon his return to Rwanda. Mugesera was subsequently found guilty of incitement to commit genocide, inciting ethnic hatred and persecution as a crime against humanity and sentenced to life imprisonment. Mugesera has indicated that he would appeal the verdict.[111]

SELECTED COMPARATIVE ANALYSIS

Currently, universal jurisdiction is anything but universal. Individual State Parties, have commenced prosecutions against perpetrators of the gravest crimes but only in very small doses. As of 2011, approximately twenty-four individuals in ten different countries had been tried for war crimes committed abroad under the auspices of universal jurisdiction. Countries undertaking such prosecutions included Canada, Austria, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland.[112]. The success of the first few universal jurisdiction trials opened the doors to a flood of requests to commence additional trials and this sudden interest in using universal jurisdiction as a tool to fight impunity ironically led to its eventual decline.

Despite Canada's seemingly meager contribution to the fight against impunity (i.e. only three trials in 16 years), Canada does not stand out as a country shirking from its international responsibilities. As will be discussed, many of Canada's allies have prosecuted fewer. Furthermore, the wide assertion of jurisdiction found in Canada's *War Crimes Act* is actually much more aggressive than that found in the legislation of other countries including the United Kingdom, France, Belgium and Spain. What follows is a sampling of the efforts made by other *Rome Statute* parties. The countries discussed below were chosen as they were either members of the Commonwealth, sites of pivotal development in the rise and fall of universal jurisdiction (particularly illustrative of the importance of *in dedere aut prosequi*) or, in the case of South Africa, touching on the future of the ICC.

It should be noted that along with the dearth of domestic prosecutions some countries have shown a reticence to extradite offenders and sometimes a refusal to cooperate with the ICC. For example, the first countries to agree to requests to extradite genocide suspects to Rwanda were Norway and Sweden[113] and they only did so after the ICTR referred the *Uwinkindi*[114] case from its jurisdiction to Rwanda in 2011. Additional confirmation that European States would not be violating the human rights of suspected war criminals by extraditing them to Rwanda came from the European Court of Human Rights (ECHR)

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107 It should be noted that this matter commenced prior to the enactment of the *War Crimes Act*. However, for the vast majority of time this matter was being adjudicated, the *War Crimes Act* was an available tool.

108 A. Lau, "Leon Mugesera: A Lesson in Trying Judicial Deference", TheCourt.ca (27 February 2012) online: <http://www.thecourt.ca/2012/02/leon-mugesera-a-lesson-in-trying-judicial-deference/?subscribe=success#blog_subscription-2>.

109 Ibid.

110 *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100

111 R. Rwirahira, "Leon Mugesera gets life term for Genocide crimes", *The New Times*, April 16, 2016,

112 L. Reydams, "The Rise and Fall of Universal Jurisdiction" in W.A. Schabas & N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (London & New York: Routledge Taylor and Francis Group, 2011), p. 347.

113 H.L. Touille, "France, Universal Jurisdiction and the Rwandan génocidaires", J Int'l Crim Just (2016), p. 11.

114 Decision on Prosecutor's Request for Referral to the Republic of Rwanda, *Uwinkindi* (ICTR-2001-75-r11bis) Referral Chamber, 28 June 2011.

115 *Ahorugeze v. Sweden*, No. 37075.09 (2011), European Court of Human Rights, *Extradition of Genocide Suspect Would Not Breach the European Convention on Human Rights*, 216 (Strasbourg: ECHR 27 10 2011).

in that same year. The ECHR upheld the decision of Sweden to extradite Sylvere Ahorugeze to Rwanda.[115]

BELGIUM

There were several links between Belgium and the Rwandan genocide. In the initial stages of the violence, elements of the Rwandan media commenced an anti-Belgium campaign and 25 Belgian nationals were killed. In addition, one of the individuals involved in the radio broadcast that is commonly cited as an instigating factor to the genocide was a Belgian national.[116] Further, as Rwanda's former colonizing power, Belgium found itself to be a common destination for Hutu refugees seeking to avoid prosecution.

Almost immediately after the violence had ended, Belgium began investigating genocidaires and, in 2001, commenced a trial against four individuals for crimes of genocide and crimes against humanity. In *Public Prosecutor v. Higaniro et al*. (commonly known as the Butare Four case) all four defendants were convicted and received sentences ranging from 12 to 20 years. This trial was expeditiously held over a period of eight weeks. The international reaction to this trial was generally positive and Belgium faced no political repercussions.[117] It should also be noted that the mandatory 'try or extradite regimes' of the Geneva Conventions did not apply and therefore Belgium was under no positive obligation to prosecute these individuals.[118]

The reception to Belgium's exercise of universal jurisdiction in the Butare Four trial emboldened other complainants to pursue higher level political figures.[119] What followed was a trend of headline-making private prosecutions filed against a number of senior government officials and before the success of the Butare Four case and the concept of using universal jurisdiction to combat impunity was able to gain a foothold there was a crippling backlash. Reydams refers to these high profile cases as "virtual cases"[120] as most of the cases were given extensive media exposure without reaching a court. The potential defendants included Fidel Castro, George Bush, Ariel Sharon, Dick Cheney, Colin Powell, Norman Schwarzkopf, Amos Yaron, Tzipi Livni, Hissene Habre, Donald Rumsfeld, Ali Akbar Rafsanjani, and Paul Kagame.[121]

After the flood of "virtual cases", two subsequent cases limited the scope of Belgium's ability to exercise universal jurisdiction. The first was in a decision of the International Court of Justice (ICJ) in a case against Yerodia Ndombasi. While not rejecting Belgium's right to exercise universal jurisdiction, the Court held that Ndombasi enjoyed immunity due to his ministerial position with the Democratic Republic of Congo. This decision established the immunity of current government officials and placed them outside the scope of Belgium's jurisdiction.[122] The second case involved Ariel Sharon. In 2001, Belgian investigators began to explore allegations of war crimes made against Sharon by survivors of the 1982 massacre of Palestinian refugees in Lebanon. It was alleged that the occupying Israeli army, under the command of then Defense Minister Sharon, assisted as the Lebanese Phalangists killed the refugees.[123] In 2002, the Belgian Appeals Court held that Sharon could not be prosecuted *in absentia*. This ruling was overturned the next year when the Belgian Supreme Court held that although Sharon's presence was not necessary, he enjoyed immunity as he was, at that time, serving as the Prime Minister of Israel.[124] Although Sharon was never formally charged, the investigation caused considerable tension between Israel and Belgium with Israel claiming the investigation was a breach of Israeli sovereignty.[125] Tallman and others have pointed to the "potentially high political cost of exercising universal jurisdiction."[126]

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116 L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003), p. 109.

117 Tallman, *supra* note 33 at 388.

118 *Supra* note 116 at 111.

119 E.K. Leonard, "Global Governance and the State: Domestic Enforcement of Universal Jurisdiction", *Hum Rts Rev*16 (2015), 153.

120 *Supra* note 112 at 348.

121 Ibid. at 348; Tallman, *supra* note 33 at 388; and *supra* note 119 at 153.

122 Supra note 119 at 153.

123 Tallman, *supra* note 33 at 389. A 1983 Israeli national commission found Sharon personally responsible for the massacre and Sharon was forced to resign his post.

124 *Supra* note 119 at 153.

125 Tallman, *supra* note 33 at 391and *supra* note 116 at 117.

126 Tallman, *supra* note 33 at 391.

In the aftermath of the Sharon investigation, the Belgian Government, under pressure from the United States and Israel, revised their universal jurisdiction law twice within the scope of four months. In April 2003, the law was amended to require the consent of the Procureur Federal (the equivalent of Canada's Attorney General) before taking any action against a crime with no direct connection to Belgium. Consent would not be given if the matter could be referred to the ICC or to the State where the crime had been committed as long as that State had an impartial and independent judiciary.[127] This amendment did little to satisfy critics and the diplomatic pressure against Belgium was increased. US Secretary of State Donald Rumsfeld threatened to withhold funding for a new NATO headquarters and he also opined that he might prohibit US officials from traveling to Belgium for NATO meetings.[128] With their ability to continue hosting NATO threatened, Belgium agreed to make a further amendment in July 2003. This second amendment completely abandoned the notion of universal jurisdiction principles and acted to restrict the application of the law to individuals (perpetrators or victims) who were Belgian nationals or those persons resident in Belgium for at least three years at the time of the commission of the offence.[129]

In a way, the Belgian experience illustrates the modern life cycle of universal jurisdiction, from initial enthusiasm and success to political backlash and substantial compromise or effective rejection. The much heralded success of the Butare Four trial cannot now be replicated under Belgian law. Turns claims:

> Unfortunately, political interference has sabotaged the operation of Belgian law as originally conceived by its drafters. It will now operate, if at all, within a drastically circumscribed remit. As such, it has largely been deprived of its impact, which was initially so bold and striking. As the highest-profile cases are now certain to be removed from the Belgian court's docket, the usefulness of such cases as testimony to the wisdom and practicability of adopting the principle of complementarity as the operational basis of the ICC Statute will be virtually nil. Indeed, it is arguable that the saga of the Belgian law and its eventual *denouement* testifies, rather, to the imperative need for a functioning and truly international tribunal.[130]

SPAIN

Spain bounded into international attention in 1998 when it invoked universal jurisdiction to seek the arrest of Augusto Pinochet, former Chilean strongman. It subsequently undertook a handful of other high profile prosecutions. However, in 2009, the Spanish Government also repealed its universal jurisdiction legislation under pressure from the international community.[131] The new law provides jurisdiction for the prosecution of crimes perpetrated outside of Spain only in cases where Spanish citizens were impacted. At the time of the amendment, Spanish judges were investigating thirteen individual cases including claims against citizens of Israel for crimes alleged to have been committed in Gaza in 2002, claims against American citizens for allegations of torture committed at Guantanamo Bay Naval Base, claims against Chinese citizens for crimes committed in Tibet, and several claims against Latin American strongmen for crimes committed during their dirty wars.[132] These investigations were heralded by human rights activists but created enormous diplomatic problems for the Spanish Government.

SOUTH AFRICA

South Africa was the first African State to domesticate the *Rome Statute* into its national law.[133] The stated purpose of the legislation is to enable prosecution in

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127 D. Turns, "Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States" in D. McGoldrick, P. Rowe & E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (London: Hart Publishing, 2004), p. 365; retrieved October 22, 2015, online: <http://dx.doi.org.proxy.bib.uottawa.ca/10.5040/9781472562944.ch-013>.

128 *Supra* note 119 at 154.

129 *Supra* note 127 at 341 and *supra* note 119 at 154.

130 *Supra* note 127 at 341.

131 *Ley Organica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislation procesal para la implantacion de la nueva Oficina judicial, por la quese modifica la Ley Organica* 6/1985, de 1 de Julio, del Poder Judicial, online: <http://noticias.juridicas.com/base_datos/Admin/lo1-2009.html >. L. Skeen, "Universal Jurisdiction: Spain Steps Down", *Global Policy Forum* (2009), online: <www.globalpolicy.org/international-justice/universal-jurisdiction-6-31/48104.html>.

132 Ibid.

133 *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315; 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014) para. 33. Thank you to John McManus of the Department of Justice for bringing this case and others to my attention.

South African courts of persons accused of committing ICC offences beyond the borders of South Africa.[134] The legislation provides jurisdiction over South African citizens, those ordinarily resident in South Africa, those present in South Africa after the commission of the crime, and those people who commit crimes against South African citizens or those ordinarily resident in South Africa. The scope of jurisdiction is similar to that found in the Canadian legislation. The South African judiciary have taken a proactive approach to the country's responsibilities in the fight against impunity and have held that the police not only have the power to investigate international crimes but also have a duty to investigate such crimes even when the suspects are not present in South Africa.[135] This duty is only limited by the principle of subsidiarity and the principle of non-intervention in domestic affairs.[136]

Recently, South Africa has taken a politically contrarian attitude towards the ICC and has threatened to withdraw from the court. In the summer of 2015, South Africa hosted the African Union Summit to which the President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir (Bashir), was invited. Bashir is and was subject to outstanding ICC arrest warrants for war crimes committed in Darfur.[137] Previously, South African officials had confirmed that they would honour their obligations to the ICC and arrest Bashir should he enter South Africa.[138] However, in 2015, the South African cabinet decided that they were bound to uphold the immunities Bashir enjoyed as Head of State and that protecting the inviolability of Bashir trumped the ICC arrest warrants.[139] Once Bashir arrived in the country, the South African High Court made an order that Bashir not be permitted to leave the country until the issue of his arrest could be properly considered. Bashir was able to leave the country in contravention of that order. A clearly angry High Court had this to say:

> A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.[140]

In concluding, the High Court said:

> We stated earlier that the departure of President Bashir from this country before the finalization of this application and in the full awareness of the explicit order of Sunday 14 June 2015, objectively viewed, demonstrates noncompliance with that order. For this reason, we also find it prudent to invite the National Director of Public Prosecutions to consider whether criminal proceedings are appropriate.[141]

The South African Government unsuccessfully appealed this decision and the Supreme Court of Appeal affirmed that the Government had acted unlawfully when it refused to detain and surrender Bashir to the ICC.[142]

DENMARK

The *Ahorugeza*[143] case illustrates the impunity that can result from the failure to prosecute or extradite. Sylvere Ahorugeza was a Rwandan national and former director of the Rwandan Civil Aviation Authority. After the genocide he fled Rwanda for Denmark. Ahorugeza was subject to an Interpol warrant and was arrested in Denmark in 2006. He was

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134 Ibid. para. 34.

135 Ibid. para. 55.

136 Ibid. para. 61.

137 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015) online: <http://www.saflii.org/za/cases/ZAGPPHC/2015/402.html> para. 12.

138 Ibid. para. 12.

139 Ibid. para. 21.

140 Ibid. para. 37.

141 Ibid. para. 39.

142 M. Kersten, "David beats Goliath in the Bashir case but does the international community give a hoot", Justice in Conflict (March 18, 2016), online: < http://justiceinconflict.org/2016/03/18/david-beats-goliath-in-the-bashir-case-but-does-the-international-community-give-a-hoot> last retrieved March 19, 2016.

143 *Supra* note 115.

charged with killing 25 Tutsis on the first day of the genocide.[144] The following year, the Danish authorities released him on the grounds that the Rwandan extradition request lacked the requisite evidence.[145] In 2008, Ahorugeze was arrested while on a visit to Sweden and the following year the Swedish Government agreed to extradite him to Rwanda.[146] Ahorugeze appealed the deportation order and was released pending a decision of the European Court of Human Rights (ECHR). Before the ECHR dismissed his appeal and upheld the deportation order, Ahorugeze returned to Denmark, where he continues to reside freely with his family.[147]

FRANCE

After having refused to extradite Pascal Simbikangwa to Rwanda, France successfully prosecuted him for his participation in the Rwandan atrocities.[148] This marks the first prosecution of a Rwandan war criminal in France. Simbikangwa was prosecuted under the French ICTR statute and was sentenced to 25 years in prison. He has appealed his conviction and the appeal is scheduled to be heard later in 2016.[149] After the *Simbikangwa* verdict there was a flurry of other arrests.[150]

In 2012, France created a special office for the prosecution of genocide and crimes against humanity *(pole génocide et crimes contre l'humanité)* at the *Tribunal de grande instance* in Paris. This office now employs three full-time magistrates, two prosecutors, and four legal assistants. The scope of their current interest includes the Rwandan genocide,[151] alleged torture in Chad, chemical attacks in Iraq, and the disappearance of civilians from a Brazzaville beach.[152] Although the creation of a special office to investigate and prosecute war criminals found upon French territory is positive, staffing such an office with a total of only nine people belies a relatively small interest in the fight against impunity. In this regard, the efforts of France are dwarfed by the Canadian War Crimes Program.

AUSTRALIA

Historically, Australia had a strong interest in the prosecution of war crimes. Following World War II, Australia tried 807 Japanese defendants in military tribunals for crimes committed under the *War Crimes Act* 1945 (Cth) Australia.[153] From 1946-1951 there were 579 convictions and 137 executions.[154] In 1961, after 10 years of inactivity, the Australian Government announced they would no longer undertake war crimes prosecutions.[155]

In response to media reports suggesting a number of Nazi war criminals were residing in Australia, the Australian Government appointed A.C.C. Menzies to review the matter and make recommendations.[156] The Menzies Report[157] concluded that there were numerous war criminals residing with impunity in Australia and suggested the Australian war crimes legislation be amended. The *War Crimes Amendment Act* 1988 (Cth)[158] was subsequently used three times in failed attempts to prosecute Ukrainian men accused of killing hundreds of Jews.[159]

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144 *Supra* note 113 at 12.

145 European Court of Human Rights, *Extradition of Genocide Suspect Would Not Breach the European Convention on Human Rights*, 216 (ECHR 27 October 2011).

146 *Supra* note 113 at 12.

147 Ibid. at 12.

148 Ibid. at 1.

149 Ibid. at 19.

150 Ibid. at 20.

151 As of late 2015, there were 27 Rwandan genocide suspects under investigation by the *pole génocide et crimes contre l'humanité*; ibid. at 19.

152 Ibid. at 18.

153 G. Boas, "War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations" 21 Crim L F. (2010) at 315.

154 Ibid. at 315.

155 Ibid. at 316.

156 *Supra* note 116 at 86.

157 A. Menzies, *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (1987).

158 *War Crimes Amendment Act*, 1988 (Cth), c. 3 (1989).

159 *Supra* note 153 at 319.

Like Canada, Australia was an active member of the Assembly of States Parties responsible for the creation of the *Rome Statute*.[160] Australia implemented the *Rome Statute* into domestic law in 2002. Despite being an early proponent of the *Rome Statute*, the Australian authorities have not fully embraced their responsibilities and have not demonstrated any significant commitment to the prosecution of war criminals located in its territory nor a will to extradite.[161]

In 2006, Australia commenced extradition proceedings against Croatian-Australian Dragan Vasiljkovic (aka Martin Snedden) at the request of Croatian State prosecutors. Vasiljkovic was alleged to have committed war crimes while acting as commander of the Red Berets paramilitary unit during the 1991-95 Croatian war. Australia had no extradition treaty with Croatia and the Federal Court of Australia was asked to assess the request and consider whether Vasiljkovic would receive a fair trial in Croatia.[162] In 2009, the Federal Court found that he would likely not face a fair trial in Croatia and ordered that he be released from custody.[163] The Australian Government appealed to the High Court of Australia. Vasiljkovic was finally extradited to Croatia in July 2015 where he has been charged with war crimes; his trial is pending.[164]

The efforts of the Australian Government to meet their responsibilities under the complementarity provisions of the *Rome Statute* have been weaker than the efforts made by the Canadian Government. Boas states:

> Despite efforts by Australia to support extradition requests in some cases, it appears reluctant not to act on the ICC complementarity principle of being a primary jurisdiction for the prosecution of war criminals located on its territory. There is a serious lacuna caused by a lack of legislation specifically catering for the prosecution of international crimes committed outside of the ICC's limited jurisdiction. [...]The acknowledged presence in Australia of war criminals from many conflicts raises questions for Australia over where it stands on the politically charged concept of impunity for crimes of mass atrocity.[165]

UNITED KINGDOM

Canada's contribution to the fight against impunity has also been more vigorous than that waged in the United Kingdom (UK). "Having let a large number of Nazi collaborators into the UK immediately following the Second World War, it was not until the 1980s that Britain began to confront the fact that war criminals resided in the UK."[166] As happened in Canada and Australia, the British Government commissioned an inquiry to investigate and the Hetherington-Chalmers Report concluded that there may be hundreds of potential war criminals living in the UK.[167] The Hetherington-Chalmers Report led to the passing of the *UK War Crimes Act* in 1991 which was considered largely ineffectual.[168] The narrow focus of this legislation provided for jurisdiction over persons if the acts in question occurred in Germany or German occupied Europe between the years of 1939 and 1945 and the offender was a British citizen or ordinarily resident in the UK as of March 1990 or sometime thereafter.[169] Turns characterizes the UK effort in the following way:

> The implementation of international humanitarian law generally in the UK has always been characterized by what some commentators have labeled a "generally minimalist approach" with specific legal provisions being incorporated piecemeal and in such a manner as to do the bare minimum strictly necessary in order to achieve basic compliance with the relevant requirements of international law.[170]

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160 Ibid. at 320.

161 Ibid. at 322.

162 Ibid.

163 *Snedden v. Republic of Croatia* [2009] F.C.A.F.C. 111 (Fed. Ct., Aust1.).

164 "Serb captain charged with war crimes", *Associated Press* (January 9, 2016).

165 *Supra* note 153 at 323.

166 Ibid. at 323.

167 T. Hetherington & W. Chalmers, *Report of the War Crimes Inquiry*, Cm 744 (Great Britain Home Office, 1989).

168 *Supra* note 127 at 343.

169 Ibid. at 342. There was one successful prosecution under this Act. In 1999 Anthony Sawoniuk was sentenced to life imprisonment for the murder of two Jews. See *supra* note 153 at 324.

170 *Supra* note 127 at 341.

The UK signed the *Rome Statute* on November 30, 1998, and their domesticating legislation, the *International Criminal Court Act 2001*[171] *(UK Act)* entered into force on September 1, 2001.[172] The *UK Act* had four main purposes which are as follows:

1. to enable the UK authorities to arrest and surrender persons wanted for trial by the ICC;
2. to enable "other co-operation" with the ICC;
3. to enable prisoners convicted by the ICC to serve any sentences in the UK; and,
4. to incorporate the offences set out in the *Rome Statute* into UK domestic law.[173]

The final part of the *UK Act* creates the substantive domestic criminal offences. It makes genocide, crimes against humanity, and war crimes criminal offences in UK domestic law if the offence was committed in the UK[174] or if committed outside of the UK by British nationals, British residents[175], or those within the service jurisdiction of British military law.[176] The scope of persons that fall within the jurisdiction of the *UK Act* is narrower than that found in the Canadian legislation as it excludes those present in the UK on a temporary visit or those without official residency status. Like the Canadian legislation matters can proceed only upon the consent of the Attorney-General.[177]

The *UK Act* has attracted criticism for casting a too narrow net, falling short of the complementarity principle. According to Turns:

> The ultimate problem with the Act is that it is premised on the assumption that there will never be any prosecutions of ICC crimes in the UK courts. The whole structure of the Act, with its extremely detailed procedural provisions on arrest and transfer of suspects and its skeletal provisions regarding substantive law, which look almost as though they were added as an afterthought, indicates that in any case where a foreign suspect is apprehended in the UK, prosecution will be deferred either to the ICC itself or to the national courts of the State of territoriality or nationality. In other words, any possible expedient *other than* prosecuting the accused in the UK will be used.[178]

Initially the *UK Act* only allowed for the prosecution of genocide, war crimes or crimes against humanity committed after 2001. The injustice of this shortcoming was illustrated in the *Brown et al case*.[179] In 2006, Rwanda issued arrest warrants for and sought the extradition of four British residents. Despite a finding at the lower district court level that there was a *prima facie* case that all four defendants participated in acts of genocide and should be extradited to face trial in Rwanda, the High Court refused to uphold an extradition order on the basis that the defendants could not be ensured a fair trial in Rwanda, saying the four men "would suffer a real risk of a flagrant denial of justice by reason of their likely inability to adduce the evidence of supporting witnesses."[180] At the time, prosecution under the *UK Act* was not possible and all four were released from custody.[181] It was not until 2010 that the legislation was amended to include crimes committed since 1991. The *Brown et al* extradition request was revisited in 2013 after Rwanda took measures to ensure their courts had increased procedural fairness protocols.[182] This second request for extradition was denied on December 22, 2015, by the District Court which found extradition to Rwanda to be contrary to UK human rights legislation.[183]

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171 *International Criminal Court Act 2001* c. 17.

172 *Supra* note 127 at 344.

173 Ibid.

174 With the exception of Scotland. Scotland has its own criminal legislation and adopted legislation domesticating the *Rome Statute* which mirrors the *UK Act*.

175 The provision providing jurisdiction over those people resident in the UK was not in the first draft of the UK Act and was only added after pressure from those who felt the scope of the UK Act was unnecessarily restrictive. See *supra* note 127 at 349.

176 Ibid. at 345.

177 The *UK Act*, section 53.

178 *Supra* note 127 at 343.

179 *Brown, Munyaneza, Nteziryayo, and Ugirashebuja v. The Government of Rwanda and the Secretary of State for the Home Department*, Case No. CO/8862/2008, [2009] EWHC 770 (Admin) (8 April 2009).

180 Ibid. para. 66.

181 M. Drumbl, "Prosecution of Genocide v. the Fair Trial Principle: Comments on *Brown and others v. The Government of Rwanda and the UK Secretary of State for the Home Department*", 8 J Int'l Crim Just 1 (2010) at 291.

182 *Supra* note 113 at 22.

183 *Government of the Republic of Rwanda v. Brown and Others*, Westminster Magistrate Court (22 December 2015) online:< https://www.judiciary.gov.uk/wp-content/uploads/2015/12/rwandan-five-judgment-211215.pdf>

It now seems unlikely the five men (one defendant was added) will stand trial in the UK. In response to the ruling William Gelling, the UK High Commissioner to Rwanda, said:

> The matter is now in the hands of the court although there will be an immediate appeal and the British Prosecutor General will work on the case on behalf of the Government of Rwanda. The British government supports the idea that all genocide suspects residing on their soil, including the five suspects, be extradited to Rwanda to face charges where crimes were committed.[184]

In defending the narrow scope of intervention, comments from UK officials bear a striking similarity to comments previously made by Canadian Ministers Kenney and Toews. The Foreign Office Minister of State made the following comments:

> We have a long-established practice of taking universal jurisdiction only as part of international law. The problem is that the [ICC] Statute does not require universal jurisdiction, so we do not think that we should go it alone and say that we will do it all if the court will not do it [....] The principle is that we would not stand in the way of extradition to another State [...] or of transfer to the ICC, but we cannot set ourselves up as a substitute court and go further than is proposed in the Statute.[185]

Some believe the primary purpose served by the prosecution portion of the *UK Act* is simply to ensure that the UK, and not the ICC, will have jurisdiction over any allegations made against a UK national or resident or serviceman.[186] Turns also refers to a quote made by Baroness Scotland in the House of Lords which seems to deny completely the complementarity provisions fundamental to the *Rome Statute*. She is quoted as follows:

> ...[W]e remain of the view that where [an accused] has no ties to this country, surrender to the ICC or extradition to another State is the proper and most practical course. That approach is based on a realistic appraisal of what our criminal justice system, with its strong dependency on the principle of territoriality, is organized to deliver. It is also in line with the long-standing policy of this country not to take universal jurisdiction except as required by an international agreement. We do not believe that the UK should unilaterally take on the role of global prosecutor. Where a crime is committed with no clear nexus to the UK, it must be for the countries concerned to prosecute and for the ICC to step in if they fail to do so. That is precisely the reason that we are establishing the International Criminal Court.[187]

Another limitation found in the *UK Act* is the definition of a UK resident which is set out in section 6(7) as "a person who is resident in the United Kingdom." It has been pointed out that the test for residency varies among different pieces of UK legislation.[188] This lends itself to the unpalatable yet very possible scenario in which a person charged with a war crime can raise a valid jurisdictional defense by disputing the definition of residency.

As has been illustrated, there is very little homogeneity in regard to how States Parties of the ICC meet their obligations under the *Rome Statute*. In summary, a review of the domestic legislation, prosecutions, and extraditions in a sample of countries indicates that Canada has contributed to the fight against impunity in a measure equal to or exceeding that of other States – meager though it is. Accordingly, there will be no international pressure upon Canada from other States to change the direction of the current War Crimes Program.

CONCLUSION AND RECOMMENDATIONS

According to Canadian scholar William Schabas:

> The exercise of universal jurisdiction reminds us of Mark Twain's famous comment about the weather: 'Everybody talks about it, but nobody does anything about it [...] For one reason or another, States rarely undertake prosecutions of crimes in the absence of a territorial or personal nexus, or an explicit treaty obligation to

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184 R. Rwirahira, "Government seeks appeal in UK Genocide fugitives case", *The New Times*, December 24, 2015; retrieved January 12, 2016, from: http://www.newtimes.co.rw/section/article/2015-12-24/195537/.

185 Hansard HC Debs (3 April 2001), Vol 366, col 278.

186 Hansard HC Debs, Standing Committee D, 3 May 2000, *supra* note 127 at 351.

187 *Supra* note 127 at 351.

188 Ibid. at 352.

> prosecute or extradite, no matter how horrible the criminal acts may be.[189]

Over the past twenty years, there have been some advances in the fight against impunity. However, the commission of mass atrocities vastly outweighs the international willingness to address them. Schabas has queried the future of universal jurisdiction and the pledges made by States ratifying the *Rome Statute*.

> Only time will tell whether it is all symbolism, or if the pledge in the Rome Statute's preamble that – it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes – means that States will use the entire arsenal of mechanisms, including universal jurisdiction, to ensure accountability for serious violations of human rights.[190]

In the years since Schabas pondered the future of domestic prosecutions of international crime, Canada has only rarely availed itself of its arsenal of mechanisms to ensure accountability for war crimes. The past decade has witnessed a deflation in Canada's contribution to international criminal justice. While perhaps disappointing, this lack of effort does not seem to be a blemish on Canada's international profile: while it can be said that Canada has only weakly contributed to the fight against impunity, Canada has often done more than her peers. There is, however, a danger in assuming that Canada's efforts are good enough as the deterrent value of prosecution depends upon the likelihood of being prosecuted.

The *Munyaneza* case demonstrated Canada's ability to prosecute foreign war crimes. The *War Crimes Act* is a strong piece of legislation that fulfils the promises made by Canada when it signed and ratified the *Rome Statute*. However, charges under Canada's *War Crimes Act* have only been laid twice since the Act was adopted and no charges have been laid in the past six years. Any promise created by the *Munyaneza* case for a more muscular Canadian approach to the prosecution of core crimes has faded. Some claim[191] that Canada does not even put forth a pretense of ensuring people suspected of war crimes and found in Canada would actually face justice. Neve believes that "it is an overarching human rights imperative that individuals responsible for war crimes and crimes against humanity face justice. And in Canada, there is a long-standing failure to do just that."[192] Although the deportation of alleged war criminals allows Canada to meet a no-safe-haven goal, it does little to ensure accountability. In 2011, Amnesty International Canada wrote an open letter to the Minister of Justice and the Minister of Public Safety to voice the organization's concerns about Canada's reliance upon immigration tools to deal with war criminals.[193] Among their listed concerns was that Canada was failing to meet its duty to prosecute when cases warranted prosecution. With respect to deportation, the letter stated:

> It fails to ensure that such individuals will in fact face justice. An official process of extradition or surrender would ensure that individuals are going to be dealt with under criminal proceedings in another jurisdiction. Deportation does not. All the deportation guarantees is that the person concerned will be removed from Canada. It is entirely possible that the individual, once deported, will not face any further investigation or criminal charges.[194]

Just prior to the last Canadian federal election (October 2015), a group of 20 scholars from universities across the country drafted an open letter to the next federal government. Discouraged by Canada's diminished role in the fight against impunity, these scholars outlined a number of changes they suggest would return Canada to the forefront of the fight for justice.[195] Not surprisingly, the group called upon the next government to increase funding towards the effort. The letter noted that the Canadian Government had donated $500,000 to the ICC investigation of crimes committed in Darfur. They suggested that not only should Canada advocate for an ICC budget increase but should also make donations to ongoing ICC investigations. The group also called for increasing the budget for the Canadian War Crimes Program. It

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189 *Supra* note 116 at ix.

190 Ibid. at. xi.

191 "War Crimes Suspects' Prosecution Uncertain", CBC News, July 27, 2011, found at: <http://www.cbc.ca/news/politics/story/2011/07/27/pol-war-crimes-prosecution.html>.

192 *Supra* note 44.

193 Amnesty International Canada, Open Letter to Ministers Toews and Kenney about "Wanted by the CBSA" (August 2, 2011) online: <http://www.amnesty.ca/news/news-item/amnesty-international-canada-open-letter-to-ministers-toews-and-kenney>.

194 Ibid.

195 *Supra* note 35.

remains to be seen whether the subsequently elected Liberal government will heed these suggestions.

Canada's timid approach to prosecutions under the *War Crimes Act* is understandable. These cases are expensive and current financial realities restrict the capacity to prosecute. Canada will not be able to commence prosecutorial action against every suspected international criminal within its reach. However, notwithstanding the difficulties inherent in prosecuting these cases, Canada has made a commitment to fight impunity and must make reasonable efforts towards fulfilling that commitment.[196]

What follows are a number preliminary ideas for consideration should Canada wish to engage more seriously in the fight against impunity. For example, other jurisdictions have mandated a minimum number of prosecutions to be started each year and Canada could adopt similar measures. In the SE Report it was noted:

> While Canada continues to be regarded as a global leader, some international stakeholders and a few staff of participating departments felt that at least some other jurisdictions were making more progress in conducting criminal prosecutions, most notably the Netherlands. For the purposes of planning, the Netherlands program targets three refugee cases (Article 1F) and one criminal prosecution of a Dutch national each year.[197]

Weiss has suggested that Canada can meet its international obligations while still prosecuting sparingly. He suggests this can be done by amending the *Immigration and Refugee Protection Act*.[198] Noting that the Act already prohibits deportation in certain circumstances[199] he suggests[200] that the Act be amended to "prohibit the removal of suspected war criminals without the guarantee of criminal prosecution" in their home country. Hypothetically this is possible but it seems unlikely that Canada would make such an amendment. There is no evidence of any political appetite for the domestic prosecution of war criminals on a scale greater than what is currently being done. Canada could, however, adopt a policy of encouraging the home countries to prosecute. To that end, Canada could transfer the evidence collected in the immigration investigation, cooperate with the home country and contribute financially to further investigation and prosecution in the home country. The political risk involved in encouraging other, often poorer, countries to prosecute the deportees is that Canada might be exposed as a hypocrite for failing to do the heavy-lifting domestically.

Canada could also consider pursuing charges of immigration fraud against those who are in Canada and are thought to be guilty of war crimes. Pursuant to sections 127 and 128 of the *Immigration and Refugee Protection Act* any person who knowingly misrepresents or withholds material facts relating to a relevant matter or communicates false or misleading information in an attempt to immigrate to Canada is guilty of an offence and can be liable for a fine of not more than $100,000 and/or to imprisonment for a term of not more than five years. Although immigration fraud trials might not directly address the commission of a core ICC crime they would be a tool to ensure a period of incarceration for the perpetrator and some level of accountability.

There is also the possibility of burden sharing amongst a group of like-minded countries. Such countries could pool resources to create hubs of expertise related to specific atrocities. For example, Canada could further develop the resources it acquired during the successful prosecution of Desire Munyaneza and become the prosecutorial authority over a particular event in the Rwandan genocide (assuming the reasonable doubt issues created in *Mungwarere* could be overcome). Canada would then specifically search for other similar perpetrators within its borders and aim to proceed with multi-defendant trials. Canada could even consider prosecuting event-specific perpetrators located within the territories of its like-minded partners. Canada would have to amend the *War Crimes Act* to extend jurisdiction to those found within the territory of a like-minded partner. Should the political will be found the amendment would be simple. However, recruiting such like-minded partners and convincing them to expand their jurisdiction would likely be futile. For example, there appears to be a fierce reluctance in the UK to expand its jurisdiction to include all accused actually found within the UK and

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196 Weiss, *supra* note 4 at 600.

197 *Supra* note 5 at 40.

198 *Immigration and Refugee Protection Act* (S.C. 2001, c. 27).

199 Weiss notes that under the Canadian immigration legislation deportation is prohibited if the deportee would be subject to torture, persecution, or cruel and unusual punishment.

200 Weiss, *supra* note 4 at 606.

accordingly would be very unlikely to take jurisdiction over suspects found within Canada. The same can be said for many other countries. However implausible the affiliation of like-minded partners might be, Canada should at least advocate for the creation of an affiliation of ICC States Parties who agree to contribute financially to prosecutions in other States Parties.

The role of Canada's domestic courts in the prosecution of ICC core crimes should not be understated. However, in conclusion, until there is an enforceable and unavoidable duty to exercise universal jurisdiction, it remains unlikely that Canada will increase the rate at which it initiates prosecutions under the *War Crimes Act*. Given the difficulties facing domestic prosecutions some serious thought should be given to funding other avenues of enforcing accountability. There have been promising innovations in the prosecution of war criminals in Rwanda that could be developed, funded and replicated in other jurisdictions. Indeed, Trouille notes "since the transfer of Uwinkindi to Rwanda by the ICTR in 2011, many States are handing genocide suspects back to Rwandan courts."[201] There is good argument that these trials are best handled in Rwanda and to date "Rwandan national courts have borne and will continue to bear the brunt of the genocide trials."[202] Although Rwandan domestic courts were severely criticized in the early years for failing to ensure procedural fairness[203], those worries have subsided. In addition to domestic courts, Rwanda has implemented a system of community based justice called *gacaca*.[204] The *gacaca* system was developed to address the overwhelming judicial caseload in the Rwandan domestic courts and is modeled after a traditional conflict resolution model aimed at achieving reconciliation.[205] The *gacaca* model only deals with lower level offenders and is able to provide a speedy method to address these offenders typically in the community where the offence occurred. In 2001, Rwandans elected 200,000 *gacaca* judges to preside over 11,000 *gacaca* courts.[206] It is doubtful that Rwanda has the resources to try all those suspected of being complicit in the genocide without international assistance. Canada could contribute financially to these prosecutions and other forms of transitional justice and encourage its allies to do the same.

Canada could also increase its international humanitarian outreach efforts. The 12th Report on Canada's Program on Crimes Against Humanity and War Crimes,[207] indicates that Canada does invest in anti-war crimes programs outside of Canada, but the investment seems marginal. Canada participated in teaching international law in developing countries and held one program for the Law Society of Uganda. There was also a note about delivering a war crimes workshop in Nairobi. These are the only two international outreach programs mentioned in the three-year period covered by the Report and there was no information provided about the costs associated with the educational outreach. In the same vein, some scholars[208] have suggested that Canada create and appoint an Ambassador of International Justice within its foreign affairs ministry, the progressively renamed 'Global Affairs Canada'.

Lastly, Canada needs to hold the ICC in greater esteem and be a better defender of the court. The success of the ICC must be non-negotiable. Canada needs to speak out about the international indifference to the ICC including the disrespect shown towards the Bashir arrest warrants. Canada should make it clear that there will be consequences for States which continue to host alleged war criminals. Unfettered travel by those who commit war crimes must be condemned by Canada. A positive sign of renewed respect for the ICC would be to increase unilaterally Canadian funding for the Court and encourage other States Parties to do the same.

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201 *Supra* note 113 at 22.

202 J. Strain & E. Keyes, "Accountability in the Aftermath of Rwanda's Genocide" in J. E. Stromseth (ed), *Accountability For Atrocities: National and International Responses* (Ardsley & New York: Transnational Publishers Inc., 2003), p. 109.

203 Ibid. at 114.

204 Ibid. at 117 – "*Gacaca*" is loosely translated to mean "justice on the grass".

205 Ibid. at 11.

206 Ibid. at 120.

207 *Supra* note 36.

208 M. Kersten, "Canada's Back: Let it be – and have – an Ambassador of International Justice", *Justice in Conflict* (October 22, 2015) online: < https://justiceinconflict.org/2015/10/22/canadas-back-let-it-be-and-have-an-ambassador-of-international-justice/>.

SPECIAL SECTION: CANADA'S NATIONAL SECURITY AND HUMAN RIGHTS

RIGHTING SECURITY: A CONTEXTUAL AND CRITICAL ANALYSIS AND RESPONSE TO CANADA'S 2016 NATIONAL SECURITY GREEN PAPER

Craig Forcese[i] and Kent Roach[ii]

Abstract: This article responds to the government's 2016 consultation on national security law and policy. It outlines a series of concerns, both with laws enacted in 2015 (and especially bill C-51) and some interpretations of C-51 and other laws in the consultation documents. It urges the need for a systematic and contextual understanding of the many issues raised in the consultation. For example, information sharing and increased investigative powers should not be discussed without attention to inadequate review and accountability structures. Similarly, CSIS's new disruption powers need to be understood in the context of the intelligence and evidence relationship. The article proposes concrete and significant changes to the current legal and policy regime motivated both by civil liberties and security-based concerns.

Cet article répond à la consultation sur les lois et politiques en matière de sécurité nationale lancée par le gouvernement du Canada en 2016. Il expose une série de préoccupations relatives aux lois promulguées en 2015 (en particulier au projet de loi C-51) et à certaines interprétations de C-51 et d'autres lois dans les documents à l'appui de la consultation. Il insiste sur la nécessité d'une compréhension systématique et contextuelle des diverses questions soulevées dans la consultation. Par exemple, l'échange de renseignements et les pouvoirs d'enquête accrus ne devraient être analysés qu'en considération des structures de contrôle et de responsabilisation inadéquates. De même, il faut examiner le nouveau pouvoir de perturbation du SCRS en tenant compte de la question du renseignement et de la preuve. L'article propose des modifications concrètes et importantes au cadre juridique et politique actuel pour des raisons liées aux libertés civiles et à la sécurité.

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I. INTRODUCTION

In September 2016, the government of Canada issued a 21-page "Green Paper" accompanied by a 73-page background document on national security, entitled *Our Security, Our Rights*.[1]These documents pose questions to the public, as part of a consultation process on national security law and policy.

This process is an apparent first step in Prime Minister Justin Trudeau's government promise to remove the "problematic"[2] aspects of Bill C-51, the Harper government's 2015 security omnibus bill.[3] That bill was a political response to two Daesh-inspired terrorists attacks in October 2014 that saw a terrorist enter Parliament and resulted in the murder of two members of the Canadian Forces as well as both "lone wolf" terrorists.

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1 Public Safety Canada, *Our Security, Our Rights: National Security Green Paper, 2016* ("Green Paper"), online: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016/index-en.aspx ; Public Safety Canada, *Our Security, Our Rights: National Security Green Paper, 2016 Background Document* ("Background Document"), online: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016-bckgrndr/index-en.aspx.

2 Prime Minister's Mandate Letter to Minister of Public Safety (November 2015), online: http://pm.gc.ca/eng/minister-public-safety-and-emergency-preparedness-mandate-letter (instructing the Minister of Public Safety, to "[w]ork to repeal, in collaboration with the Minister of Justice, the problematic elements of Bill C-51 and int roduce new legislation that strengthens accountability with respect to national security and better balances collective security with rights and freedoms.").

3 Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2d Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 20.

The Green Paper goes considerably beyond Bill C-51's already significant and (we have argued)[4] often radical content. There are some risks in expanding the topics for consultation beyond Bill C-51, especially the risk of delay. Delay may entrench C-51's new and problematic powers, such as the Canadian Security Intelligence Service (CSIS) new disruption powers and C-51's broad information-sharing regime. And with the passage of time, political momentum may stall, especially if terror fears are reignited by events in Canada or abroad.

Nevertheless, we welcome the expansive Green Paper – not least because C-51 was notorious not simply for what it did, but also for the problems it failed to address. Two of the most pressing such problems, Canada's inadequate review and accountability structure and its troubled relationship between intelligence and evidence, are addressed in the Green Paper.

We see the consultation as a first step to returning to more measured and evidence-based policy making in the contentious and dynamic anti-terrorism field. In particular, we welcome the Green Paper for its recognition that the findings and recommendations of the commissions of inquiry on the treatment of Maher Arar(2006)[5] and the Air India bombings (2010)[6] provide an unprecedented evidence base for national security policy-making -- one that was largely ignored during the enactment of Bill C-51.

The Green Paper is not, however, immune from criticism. We share the federal Privacy Commissioner's concerns that the "tone of the Government's discussion... focuses heavily on challenges for law enforcement and national security agencies" as opposed to "democratic rights and privacy"[7] and, we would add, freedom of expression.

The Green Paper is in some respects the public defence of Bill C-51 that the Harper government did not provide. It likely reflects the sincere beliefs of many in the national security bureaucracies that they need more powers to perform their difficult jobs. The Paper and background document gives us a better sense of the government's objectives and concerns, and for that reason alone deserve careful study. That said, security concerns and objectives are not sufficient in a constitutional democracy. There is a need to understand the effects of new or proposed security powers on rights and minority communities and to measure their proportionality. We also need to ask whether the new powers will actually be responsive to the stated security concerns.

There are also positions articulated in the Green Paper documents that we think do not adequately summarize the law, or identify criticisms of it. And so in this assessment, we treat the Green Paper with caution and believe that it requires a critical and contextual examination. Understanding Bill C-51 is a necessary first step before considering what problematic aspects of it should be addressed.

Although the Green Paper helpfully raises the issues of accountability and the relationship between intelligence and evidence that was neglected during the debates about Bill C-51, it can still be criticized for one glaring omission. The Liberal Party's 2015 election program included a promise to incorporate warrants as a form of oversight for Canada's signals intelligence service, the Communications Security Establishment (CSE).[8] But CSE is absent from the Green Paper.

Our Approach

It is not possible to do justice to the entire Green Paper in the space available to us. We do not, therefore, attempt to simply summarize our book on Canada's current national security law and policy, post C-51.[9] Readers wishing a fuller treatment of our topics in this paper, and many more, are referred to that volume. And especially, they may also wish to consult the fuller list of recommendations for reform that we include in Chapter 14.

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4 Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).

5 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (2006), online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.arar-commission.ca/eng/EnglishReportDec122006.pdf. In the interest of disclosure, one of us (Roach) was a member of the Research Advisory Committee of this inquiry).

6 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Final Report*, vol. 1 (2010), online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/volume1.pdf. One of us (Roach) was Director of Research (Legal Studies) for this inquiry. In the interest of disclosure, one of us (Roach) was the director of research (legal studies) of this inquiry.

7 Privacy Commissioner of Canada, News Release (Sept 27 2016) online: https://www.priv.gc.ca/en/opc-news/news-and-announcements/2016/nr-c_160927/.

8 Liberal Party, *Platform: Bill C-51*, online: https://www.liberal.ca/realchange/bill-c-51/.

9 Forcese and Roach, above note4.

In this paper, we confine our remarks to some of the most contentious issues the Green Paper raises, adopting the order found in that document itself. Our topics are: accountability; CSIS's new threat reduction powers; information-sharing; the new "advocacy of terrorism offences in general" offence (what we call the "speech offence"); "investigative capabilities in a digital world"; and "intelligence and evidence". Within the latter category, we also make some comments about passenger protect (the "no fly" list), passport revocation and terror group listing (or proscription).

Like the Green Paper, we will examine these issues sequentially. Unlike the Green Paper, however, we include cross-references between the discrete topics. In our view, accountability and review issues are pervasive: they should permeate any discussion of information-sharing and enhanced investigative and disruption powers. But the Green Paper examines its discrete topics in a siloed manner, a consequence perhaps of different authors and expertise within the government.

In comparison, the effects of national security activities on both safety and rights arise in a much more holistic and cumulative manner. For example, the Green Paper places expanded digital investigative powers on the agenda, but without examining how enhanced information-sharing powers can aggravate the damage that these new investigative powers could cause to privacy, all the while unchecked by inadequate review and accountability structures (identified by the Arar Commission in 2006).

A contextual and critical approach that makes linkages between the Green Paper's discrete topics affects not simply the rights side of the *Our Security Our Rights* equation, but also the security side. For example, CSIS's new Bill C-51 threat reduction powers can only be understood in the context of Canada's struggle to make transitions from secret intelligence to public evidence. We continue to be concerned that the new CSIS powers of threat reduction, as well as the increased emphasis on peace bonds, no-fly listing and passport revocations, may be a band-aid for long standing structural problems of converting intelligence to evidence in fair, open-court prosecutions,[10] an issue emphasized by the Air India Commission in 2010.

II. ACCOUNTABILITY

In this paper, we will return to the question of accountability repeatedly. Existing security powers and new ones mooted in the Green Paper need to be examined in the light of Canada's long documented accountability gaps. Here, though, we focus on two issues: the current impoverished state of independent oversight of Communications Security Establishment (CSE) collection of Canadian private information; and the need to renovate Canada's system of expert review of national security and intelligence activities. Our discussion of CSE is an attempt to make up for the Green Paper's most glaring lacunae: its failure to address this agency at all.[11]

Oversight of CSE

In our view, the Communications Security Establishment's operations are not currently structured in a manner that complies with the Canadian constitution.[12] Under its so-called Mandate A,[13] CSE can collect "foreign intelligence" — that is, "information or intelligence about the capabilities, intentions or activities of a foreign individual, state, organization or terrorist group, as they relate to international affairs, defence or security."[14] Much (probably almost all) of this foreign intelligence is just that: foreign. There is no Canadian or person in Canada implicated in the intercepted communication.

Nevertheless, CSE's rules admonish that its Mandate A foreign intelligence activities (and also its Mandate B computer system security functions) shall "not be directed at Canadians or any person in Canada; and . . . shall be subject to measures to protect the privacy of Canadians in the use and retention of intercepted information."[15]

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10 On these topics, see ibid, ch. 8 and 9.

11 The paper was produced by Justice and Public Safety departments whereas CSE is under the department of National Defence. As discussed below, however, CSE assists agencies in the Public Safety ministry; most notably CSIS and the RCMP.

12 One of us, Craig Forcese, must disclose that he was a factual witness in the disclosure portion of the constitutional challenge being brought by the BC Civil Liberties Association in relation to CSE's metadata initiatives.

13 These "mandates" are reference to the items listed as paragraphs in the law establishing CSE, *National Defence Act (NDA)*, R.S.C., 1985, C. N-5, s 273.64 (a) – (c).

14 *Ibid*, s 273.61.

The reason for this proviso is simple: In a world whose telecommunications systems are networked together, even "foreign intelligence" may have a Canadian nexus — for instance, it may be that a telephone call sent to or originating in Canada might be intercepted. Similarly, CSE surveillance may capture the communication of a Canadian located overseas. As the government has acknowledged, "the complexity of the global information infrastructure is such that it is not possible for CSE to know ahead of time if a foreign target will communicate with a Canadian or person in Canada, or convey information about a Canadian."[16] Some Canadian material will incidentally be caught in CSE's broad net.

Accordingly, CSE's law does recognize that "there may be circumstances in which incidental interception of private communications or information about Canadians will occur."[17] The law permits the minister of national defence to issue a "ministerial authorization" authorizing CSE to collect "private communications" in performing its Mandate A and B functions where persuaded that satisfactory privacy protections are in place. "Private communications" in CSE's law is defined in the same way as it is in Part VI of the Criminal Code — basically, it is telecommunications originating from or directed at a person in Canada.[18]

In practice, ministerial authorizations have been issued on a just-in-case basis — that is, because one can never be sure that the communications intercepted will lack a Canadian nexus, authorizations are sought regularly to make sure that CSE remains on-side the law. Compared to warrants issued by judges in police investigations (and those in CSIS investigations), ministerial authorizations are general, relating to a class of activities rather than to specific individuals or targets.[19]

But even more critically, these activities are never authorized through a warrant issued by *someone able to act judicially*. Instead, the minister of national defence issues the authorization. The minister's exact statutory duty under the *National Defence Act* is to manage and direct "all matters relating to national defence."[20] As such, he or she is hardly the independent and disinterested reviewer of government search and seizure requests necessitated by the *Canadian Charter of Rights and Freedoms*. It is difficult to imagine a court viewing an executive actor as a proxy for the impartial judge promised by the established jurisprudence under section 8 of the *Charter*.

All of this is to say that CSE's current Mandate A and B regimes are vulnerable to ongoing court challenges — they are very hard to reconcile with section 8 case law. There is no evident reason why the CSE approval regime could not draw on CSIS precedent and have a judge, rather than a minister, issue the authorizations to CSE. Certainly, CSE collection is different than conventional warrants. It is directed at classes of information, not individuals. But even with that proviso, there is no reason why a judge could not step into the shoes currently occupied by the defence minister and offer independent oversight of what exactly CSE is proposing to do. This would have the welcome effect of preserving the promise and integrity of the *Charter*'s section 8 while still meeting the government's pressing objectives in relation to foreign intelligence.

Even then, though, the CSE authorization model would underinclusive as measured against the classic constitutional search and seizure rules. *Charter* section 8 protects all information where there is a reasonable expectation of privacy. And as the Supreme Court's decision in *Spencer* establishes,[21] that may include what is known as "metadata": the information that surrounds electronic communication, such as date and time stamps, addressing information, geo-locational tags and the like. CSE's ministerial authorization regime applies only to "private communications," a statutorily defined term that the government appears to have interpreted narrowly to *exclude* metadata.[22] Metadata collection has not fallen, in other words, within even the ministerial authorization system. This means that it is performed without mandatory, outside, advance oversight of any sort, and in practice

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15 Ibid, s 273.64.

16 *British Columbia Civil Liberties Association v AG of Canada* (20 January 2014), S137827 (AG's Response to Civil Claim) at para 5 (BCSC) [on file with authors] [AG's Response].

17 See *ibid* at para 5.

18 *Criminal Code*, RSC, 1985 c. C-46, s. 183, cross-referenced in *NDA*, s.273.61.

19 Commissioner of the Communications Security Establishment, *2011-2012 Annual Report*, online: http://www.ocsec-bccst.gc.ca/ann-rpt/2011-2012/5_e.php.

20 *NDA*, s 4.

21 2014 SCC 43. *Spencer* is discussed further below.

22 See Craig Forcese, "Law, Logarithms and Liberties: Legal Issues Arising from CSE's Metadata Program," Michael Geist (ed) *Law, Privacy and Surveillance in Canada in the Post-Snowden Era* (University of Ottawa Press, 2015) (relying on access to information disclosures). That article raises doubts about this government interpretation.

is instead done pursuant simply to general ministerial policy directives.

None of these issues are raised in the Green Paper. As discussed below, the Green Paper seems to ask Canadians to second guess the Supreme Court's *Spencer* ruling, something that does not seem particularly helpful or realistic. But this approach is perhaps consistent with the government's narrow definition of private communications in the CSE context.

What Should be Done?

Bill C-622,[23]a private member's bill sponsored in the last Parliament by Liberal MP Joyce Murray, would have updated the CSE oversight system to introduce a modified judicial warrant system for CSE activities implicating Canadian private information. This would have placed the CSE intercept process on sounder constitutional footing, and would also have kept pace with developments such as Spencer and reforms made in the Foreign Intelligence Surveillance Court process in the United States. Entrenching proper rule of law standards might also resuscitate the reputation of CSE within civil society – a reputation tarred in the aftermath of the Snowden leaks concerning the agency's activities in association with the US National Security Agency. We suspect that, as in the United States, reformed oversight would ease public relations, a necessary development if CSE is to become a lead agency on Canadian cyber-security in partnership with the public.

Unfortunately, the Tory government defeated C-622 in the last Parliament. It should be resuscitated as a government law project. Therefore, we recommend:

> Legislating a judicial authorization system similar to that proposed by bill C-622 to put CSE's operations on firmer constitutional ground.

Expert Review

A National Security and Intelligence Review and Complaints Commission

Presently, Parliament is considering Bill C-22. If enacted, this law will create a national security and intelligence committee of parliamentarians (CoP), with some access to secret information and a mandate to scrutinize Canada's national security activities. In this paper, we do not discuss this committee.[24]

Instead, we underscore our view that it would be an enormous mistake to proceed with a CoP without also repairing Canada's other serious review deficiency: the stove-piping and siloing of expert, propriety review. Notoriously, our expert review bodies are limited to a handful of agencies ("stove-piped"), and are prevented for conducting joint reviews even as the agencies they review conduct joint operations ("siloed"). The result is a system of gaps, a fact recognized most emphatically by the 2006 Arar Commission and noted periodically by review bodies themselves since that time.

Certainly, Canada needs a CoP with access to classified information, but such a committee will be limited by the other demands on parliamentarians. Enhanced expert review and audit of the day-to-day work of the security and intelligence (S&I) community is not duplicative of the review conducted by a CoP. The CoP should focus on the big picture and questions of efficacy while the expert review focuses on specific activities and questions of propriety. The two different forms of review will nourish each other.

In broad terms, there are essentially two options for repairing the shortcomings of our present expert review problem: first, the Arar Commission model where separate reviewers are used for CSIS, CSE and the RCMP (and some other agencies) linked by statutory gateways and a co-ordinating committee of some sort; or, second, a single "S&I community review body" or "super SIRC" (although such a body need not be simply an expanded SIRC).

As a member of the Arar Commission's research advisory committee, one of us (Roach) supported its 2006 recommendations. A decade later, however, we are of the view that an S&I community reviewer is now necessary to renovate Canada's antiquated review structure.

For one thing, the former government rejected the Arar Commission's recommendations for an RCMP review body with unrestricted access to secret information and statutory gateways with SIRC when it created the RCMP Civilian Review and Complaints

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23 Bill C-622, *An Act to amend the National Defence Act (transparency and accountability), to enact the Intelligence and Security Committee of Parliament Act and to make consequential amendments to other Acts*, 41st Parl, 2d Sess, 2014 (defeated at second reading 5 November 2014). In the interest of transparency, one of us (Forcese) was consulted on the drafting of this bill but takes no credit for its content.

24 For resources on the committee of parliamentarians, see Craig Forcese, Background Resources: Bill C-22 (National Security & Intelligence Committee of Parliamentarians) http://craigforcese.squarespace.com/national-security-law-blog/2016/9/27/background-resources-bill-c-22-national-security-intelligenc.html/.

Commission (CRCC). Ignoring the Arar Commission's recommendations that audit-based reviews are essential for effective review of secret national security activities, it also refused the CRCC power to conduct reviews if such reviews could not be resourced without detracting from the CRCC's ability to hear external complaints arising from the policing activities of almost 20,000 RCMP officers.[25] Put another way, the CRCC would need to be rebuilt anyway.

Nothing less than an S&I community reviewer could review information-sharing under Bill C-51's *Security of Canada Information Sharing Act*,[26] which allows 17 different departments (most subject to no independent, specialized review) to receive broadly defined security information from over 100 other entities in the federal government. Whatever reforms, if any, are made to this Act, it seems likely that enhanced information-sharing of some sort will remain, necessitating a matching of expanded S&I community activity with expanded review. Again we underline the critical linkages between review and information-sharing.

Likewise, we note that under the expanded powers accorded to CSIS by C-51, that agency may enlist operational support from other agencies. For example, we expect that CSIS may frequently work closely with CSE in the exercise of new disruption powers, at least when those disruptions are conducted with a warrant and have a digital aspect. Many of the bodies(such as CBSA) that may assist CSIS are currently subject to no review whatsoever, leading to substantial accountability gaps. Like many countries, Canada is taking a whole of government approach to security. This should be balanced by a whole of government approach to review and accountability.

An S&I community reviewer would take on the work of the Security Intelligence Review Committee (for CSIS), the CSE Commissioner and the still nascent national security review work done by the CRCC for the RCMP. The goal would be a body that has jurisdiction to examine all national security matters within the federal government. This would allow the body to follow the trail of intelligence, information-sharing, and other national security activities throughout the government without the need for complicated choreography between existing bodies, the creation of new bodies for each and every implicated agency or the discretionary appointment of public inquiries like the Arar, Iacobucci and Air India inquiries which had a whole-of-government mandate. Legislative reform would be required to create this entity.

What Should be Done?

We recommend, therefore:

> The creation of a single, security & intelligence community-wide expert review body that, by conducting detailed reviews and hearing complaints, can perform a review task that the National Security and Intelligence Committee of Parliamentarians, proposed in C-22, cannot realistically be expected to do. That said, the two bodies should work closely together.

Independent National Security Legislation Monitor

Both the United Kingdom and Australia have a third institution dedicated to national security accountability: independent monitors of national security law.

These independent monitors are non-government lawyers with a part-time, statutory mandate to issue reports on government performance under anti-terror law and who are entitled to see secret information. But even more notably, they have also examined the necessity and usefulness of existing anti-terror laws and respond to requests to examine law reform in particular areas, creating a considerable volume of independent, thorough, and public expert policy analysis. This material has then figured prominently in subsequent parliamentary deliberations on anti-terror law. Retaining a reviewer of this sort to perform a "special rapporteur" role in offering expert input would contribute subject-matter expertise to the CoP's work, and also that of regular parliamentary committees performing more classic legislative functions.

We are aware that some will criticize the addition of a monitor as duplicative of work done by a CoP and expert reviewers. But if the UK and Australia have seen the need for the three forms of distinct review, we do not think that Canada's security & intelligence apparatus somehow needs less review than those very similar democracies.

Moreover, one would think that Canada's existing review bodies would assist in policy deliberations by offering their views on the merits of law projects

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25 *Enhancing RCMP Accountability Act* S.C. 2013 c.18 Part VI. The CRCC is currently conducting its first national security review of the RCMP, with a focus on implementation of the Arar Commission reforms.

26 S.C. 2015 c.20.

or policy proposals. SIRC once did this in the 1980s, during the mandatory five-year review of CSIS. That tradition now seems to have waned. With the exception of the Privacy Commissioner, review bodies are extremely circumspect, even ambiguous, in opining on law projects. This may reflect the fact that because they hear complaints, they view themselves as quasi-judicial, and therefore are reluctant to participate in policy making. It may also reflect the effect of operating in a security intelligence community whose culture is not conducive to the open expression of dissent from government policy.

The net result is that a lot of expertise on policy matters is never communicated to executive government, let alone parliamentarians. Even if review bodies were able to discuss secret issues with a parliamentary committee empowered to hear such information, this would not necessarily translate into a more forthright discussion with review bodies on the legislative policy implications of these issues. Rather, the conversation might focus instead on the more micro-operational matters scrutinized by the reviewers.

A monitor would resolve, in other words, key deficiencies not fully addressed in any other way. First, this independent monitor may overcome problems of complexity and scope in national security law. With a wide-ranging mandate, an independent evaluator will identify lacunae and difficulties that might otherwise escape the attention of parliamentary committees, and place them on the official agenda. We are often struck by the independent legal expertise that is available to many of the UK parliamentary committees (although unfortunately not the specialized UK Intelligence and Security Committee).

Repeated annual or special reports by an independent monitor also militate against the gradual normalization of national security – and especially anti-terrorism -- laws and powers. In other words, it guards against the prospect that these laws will fade from media and public consciousness and lurk below the radar screen in Canada's statute books. Anti-terrorism provisions – especially those in C-51 -- are radical enough that they should not be under-scrutinized. This reporting may also galvanize more regular (and transparent) policy-thinking within executive government, as it appears to have done in the United Kingdom. UK government responses to its independent monitor have produced a corpus of documents and discussion papers, many of which are much more informative than the guarded government reaction in Canadian legislative proceedings. Reports by an independent monitor could also assist civil society groups in this legally complex area. We note that there are reasonable disagreements in many areas of national security and research has confirmed that there has been productive tension between the recommendations made by the first UK independent reviewer and those made by parliamentary bodies.[27]

An independent monitor might take some of the high (and low) politics out of parliamentary deliberations on anti-terrorism issues. If empowered to comment on proposed law reforms, a credible, independent evaluator should be difficult to ignore, or paint in a partisan light.

An independent monitor would have to be cognizant that his or her participation in policy debates did not detract from other duties. In this vein we note that the UK's current independent reviewer, David Anderson QC, has been able to comment on proposed investigatory powers bills and also commented on aspects of 2015 legislation and the British Prevent program for countering violent extremism, although we are also aware that neither the Australian or British legislation provides monitors with explicit powers to comment on bills. We recognize that there may be some risks of such comments, especially if they amount to pre-approval of laws the monitor might then assess. We consider, however, that the benefits of informed criticism outweigh these risks and that a monitor could still conclude that even properly worded legislation has nevertheless subsequently been administered improperly.

Moreover, a stable system of expert, parliamentary and independent monitor reporting, coupled with executive response and parliamentary examination, might generate a more generalized expertise in the area of national security law – so long as the government both promptly release and respond to reports from all three review bodies. Ideas would be tested and debated in public venues, potentially allowing rapid, but reasonably carefully-vetted, responses to crises that might emerge in the future. Policy actors (well-apprised on the legal and policy terrain by the expert policy review) might have the capacity to focus not simply on hot-button issues that arise in legislated responses to crises, but also on the more detailed and complex issues that may otherwise escape scrutiny. The result may be parliamentarians -- with their democratic legitimacy --- possessed of the expertise that is required to question executive-driven security policies.

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27 Jessie Blackbourn "Evaluating the Independent Reviewer of Terrorism Legislation" (2012) Parliamentary Affairs 1.

What Should be Done?

We recommend, therefore:

> The creation of an independent national security legislation monitor, capable of supporting the work of the Parliament, the National Security and Intelligence Committee of Parliamentarians and the expert review body.

III. CSIS THREAT REDUCTION POWERS

"Threat reduction" refers to the new powers Bill C-51 gave CSIS to take "measure" to reduce threats to the security of Canada. With Bill C-51, CSIS is now expressly authorized to "take measures, within or outside Canada, to reduce" very broadly defined "threats to the security of Canada."[28]

The only categorical restriction on CSIS's threat reduction powers is that such measures must not intentionally or by criminal negligence cause death or bodily harm, violate sexual integrity, or willfully obstruct justice.[29] CSIS must also believe that the measures are "reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat."[30]

Where authorized by Federal Court warrant, the CSIS "measures" may even "contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*" or may be "contrary to other Canadian law."[31] Judges must determine that such violations are reasonable and proportional when issuing the warrant.[32] The most recent SIRC report indicates that CSIS has used the powers about two dozen times, not once under an warrant. It concluded that the exercises were lawful, but provided no detail on what type of threat disruption was performed(including whether CSIS received assistance from others in carrying out such disruptions).[33]

What Problem Are These New Powers Attempting to Fix?

CSIS was designed specifically as an intelligence agency that could not act physically against people. In 1984, Parliament gave the service broad intelligence mandate, but only because it lacked what we can call "kinetic" or physical powers — the powers to do things to people in the physical world (except as necessary to, for example, install a wiretap or listening device). The McDonald commission of inquiry that preceded the *CSIS Act* was crystal clear that "noble cause" illegality should not be a feature of Canada's security intelligence. Parliament resisted a 1983 version of the CSIS bill because of widespread concern, including from all provincial attorney generals, that it would allow CSIS to violate the law.

The Green Paper urges that the world has changed since 1984, and that those constraints may be relaxed noting that: "during the development of the ATA, 2015 [Bill C-51], it was felt that there were situations where CSIS was best placed to take timely action to reduce threats."[34] It also points to the practices of other countries, noting that agencies there have threat disruption powers.

Put another way, the threat reduction powers are designed to enable CSIS to act against threats in a manner that makes us safer. If that is the objective, then there are clear criteria that should be embedded into these powers. If CSIS needs new powers to engage in discussions with people, that should be stated. If it needs new powers to disrupt Canadian citizens from leaving or returning to Canada than that should be stated and debated. The blank cheque approach (limited only by bars on the most extreme behaviour) used in C-51 was not acceptable when it was enacted. It is even more unacceptable now that CSIS has already exercised its new powers in over twenty times, with its review body not being able to provide even a general outline about what was involved in the CSIS disruptions.

Threat Reduction is a Tool to be Considered in the Broader Context

Our starting point is this: whether CSIS is "best placed" to take "timely action to reduce threats" depends entirely on the nature of the threat and the measure taken. The fact that CSIS may have earlier indication of the threat is not, in itself, a justification

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28 *Canadian Security Intelligence Service Act*, RSC, 1985, c C-23, s 2 and 12.1 [*CSIS Act*].

29 *CSIS Act*, s 12.2.

30 *Ibid*, s 12.1.

31 *Ibid*, s 12.1.

32 *Ibid*, s 21.1.

33 SIRC, *Annual Report 2015-2016*, online: http://www.sirc-csars.gc.ca/anrran/2015-2016/index-eng.html.

34 Background Document, above note 1at 21.

for CSIS then being an agency charged with physically acting against that threat. Two obvious questions are as follows:

- Does CSIS have the skills and aptitudes necessary to disrupt, effectively, the threat?
- Is there an "end-game"? That is, once a threat is disrupted, will that disruption make it more difficult thereafter to secure a conviction against, or otherwise diminish in a more permanent manner, the threat?

We return repeatedly to this issue below, and in our discussion on intelligence and evidence.

Lessons from Overseas

As during the debate over C-51, the government argues in its Green Paper that foreign agencies have similar powers to take "direct action" against threats.

As we have outlined in detail elsewhere, the comparison to foreign agencies amounts, in almost all instances, to a false analogy. One key issue is this: do allied countries authorize their intelligence service to break an indefinite number of domestic laws and breach unspecified human rights in acting physically against persons within their states? The answer, based on our inquiries with counterparts in countries that the government has used in the past to justify C-51, is that they do not.[35]There is no detail in the Green Paper to suggest that we are wrong in this conclusion.

But there are, in fact, lessons to be learned from the foreign experience. It is worth focusing specifically on the United Kingdom's Security Service (MI5), given how often that example is cited (including in the Green Paper). First, it is critical to note that "disruption" in the UK context is not coextensive with "threat reduction measures" in the CSIS Act.

MI5 uses the term "disruption" to describe "actions we take to manage risks posed by [Subjects of Interest] or networks."[36] These take the form of "short term tactical disruptions (e.g., prosecution for road tax evasion) to major covert operational activities aimed at arresting and imprisoning an individual".[37] Critically, therefore, disruption in the UK context is not like CSIS threat disruption powers – MI5 disruption is not a parallel system of state power, exercised outside the confines of the regular law by a clandestine agency. Instead, it is closely linked to law enforcement:

> MI5 and the police work closely together when considering potential disruption opportunities. Usually MI5 will request that the police provide support through a-pointing a Senior Investigating Officer (SIO) who will assist in the management of the investigation, lead the police interaction and develop a joint tactical strategy with MI5. This management process is then usually formalized through a Joint Operational Team (JOT), comprising of an MI5 lead, police SIO and specialists from MI5, the police or any other relevant agency.[38]

Put another way, disruption for MI5 means working closely with police and disrupting security threats through use of the law, especially criminal justice. It is misleading and distorting, therefore, to point to the UK experience to justify the Bill C-51 approach.

CSIS's threat reduction powers needs to be understood in the context of its awkward relationship with law enforcement and its tight control over what information it shares with the police, discussed at various points in this paper. This is another example where the Green Paper's siloed approach to discussing security powers is unhelpful. CSIS threat reduction under Bill C-51 preserves the historical distance between police and CSIS, allowing CSIS to exercise parallel powers outside the regular legal system, potentially in violation of the regular law and constitutionalized human rights.

We have argued repeatedly[39] that the logic of Bill C-51's threat reduction powers is driven by a steady unwillingness to web more closely police and CSIS anti-terrorism. We believe that this approach is both unsustainable, and potentially dangerous as it encourages the fallacy that Canada can disrupt – in the sense of temporarily interrupt – threats without skillful deployment of criminal justice tools. This raises the prospect that Canada will be drawn into a system

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35 Craig Forcese, "Bill C-51: Catching up on the 'Catching Up with Our Allies' Justification for new CSIS powers (April 16 2015), online: http://craigforcese.squarespace.com/national-security-law-blog/2015/4/16/bill-c-51-catching-up-on-the-catching-up-with-our-allies-jus.html/.

36 UK Intelligence and Security Committee, *Report on the intelligence related to the murder of Fusilier Lee Rigby* (25 November 2014) at 47, online: http://isc.independent.gov.uk/files/20141125_ISC_Woolwich_Report(website).pdf.

37 *Ibid*.

38 *Ibid*.

39 See in particular, Forcese and Roach, above note 4, chapters 8, 9 and 14.

of whack-a-mole disruption with no real end-game and potentially harmful effects on the reputation of the administration of justice.

We would be more willing to accepted specified and demonstrably justified new powers for CSIS if such powers drove CSIS towards facilitating criminal justice responses as the fairest and most transparent response to terrorist violence.

What Specifically Could CSIS do?

These operational shortcomings are compounded by the civil liberties overreach in the new CSIS powers. Careful legislative design could have increased the transparency and decreased the controversy over CSIS's new powers. Unfortunately, Bill C-51 was permissive of CSIS conduct, with limited restrictions confined only to the worst excesses and warrant requirements that only apply when CSIS concludes it is violating the law or the *Charter*.

The Green Paper proposes examples of measures that CSIS could now pursue. These include "interviews", "asking friends to intervene", "reporting extremist content to social media providers". These mild forms of intervention would breach no law or the *Charter*, and indeed it was these sorts of lawful interventions (and only these sorts of interventions) that were at issue in the 2010 Security and Intelligence Review Committee (SIRC) report referenced in the Green Paper documents.

Bill C-51, of course, went much further in permitting CSIS conduct that breaches the regular law and *Charter*, if authorized by warrant. Examples listed in the Green Paper include "disrupting financial transactions," "manipulating goods intended for terrorist use" and "interfering with terrorist communications".

These examples are also comparatively mild. The MI5 example discussed above suggests that such disruption powers could be used in close co-operation with the police in terrorism investigations. To be sure, such co-operation should be balanced by integrated watchdog review as proposed above. To the extent that such disruptions were part of an investigation that ended in a prosecution, they might also be reviewed by the courts, potentially raising intelligence/evidence discussed below in relation to Canada's cumbersome structure for protecting secrets from disclosure.

Critically, the above examples do not capture the full range of CSIS's new powers under C-51. For example, on a straight textual reading of bill C-51 and based on conclusions and statements made by the government's own representatives while C-51 was being enacted, CSIS could:

- Detain people.[40]
- Engage in extraordinary rendition.[41]

After Bill C-51, with judicial warrant, this treatment of Canadians (as well as non-Canadians) may now be legal (to the extent that Bill C-51 itself is constitutional). The one solace we take from Bill C-51's strictures is the prohibition against "bodily harm." In the *Criminal Code* context, courts have interpreted that term to include psychological harm.[42] We find it difficult to believe that in applying this standard, a careful and conscientious Federal Court judge familiar with the aftermath of past secret detentions and renditions would authorize such forms of extreme conduct.

This assumes, however, that CSIS even needs to seek a warrant. It is not clear in what circumstances CSIS might require a warrant for its overseas (as opposed to Canadian) activities of this (or any) sort of operation. Bill C-51 allows CSIS to exercise its new powers inside and outside Canada. Yet, a warrant is only required where a breach of Canadian law or the Charter is at issue. Canadian law is almost always confined to the territory of Canada. Likewise, the (confused) jurisprudence on when the *Charter* applies outside Canada suggests that it only applies where government action is in violation of Canada's international law obligations (itself a complex and

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40 *CSIS Act*, s. 12.1(4). Whether C-51 permits detentions has been a contested issue. In our view, the answer is straightforward: On a plain reading of the law, C-51 did not include detention as a precluded activity, and therefore it lies within the measures available to CSIS. The government did table, and Parliament duly enacted, a "greater certainty" amendment to the original Bill C-51, providing that CSIS has no "law enforcement powers." But this term provides little guidance on the question of whether and how CSIS might detain. This issue is discussed at length in *ibid*, at 255.

41 The provision denying CSIS "law enforcement powers" will not bar "rendition." In recent history, rendition is the process by which a person is kidnapped from one jurisdiction and taken to another, sometimes for trial and sometimes for abusive interrogation. Again, this issue is discussed at length in *ibid*, at 256.

42 In *R. v. McCraw*, [1991] 3 S.C.R. 72 at 81, albeit decided in a context in which the statutory provision read "serious" bodily harm. See also *R. v. Moquin* (2010) 253 C.C.C.(3d) 96 (Man.C.A.) holding that interference with comfort can constitute bodily harm so long as it is not trifling or transient.

contestable issue).[43] In other words, it may be that Canadian law and the Charter will be only rarely breached by international operations, and so a warrant will be only rarely sought by CSIS in the Federal Court. (We believe that such a view would, in fact, understate the reach of "Canadian law", but worry that it will be near impossible to track how the government is interpreting this legal language.)[44]

Could a Court Warrant Really Exonerate a Charter Breach?

Moreover, to the extent that Bill C-51 suggests that with warrant, CSIS could breach all and any *Charter* right, it presents a radical legal theory not widely shared outside of government, in our experience. We do not rehearse this complicated legal issue in full here, but summarize it as follows:

While legislation authorizing *Charter* breaches is not common, it does exist. In these laws, however, Parliament has "prescribed by law" a limitation, and in an intelligible fashion has alerted the public to a specific *Charter* infringement. A person can, therefore, challenge the measure, and its propriety can be openly adjudicated by a court, which can also decide whether a *Charter* breach should be forgiven by the *Charter*'s section 1 provision.

This is not, however, true of the new CSIS powers. Rather, Bill C-51 simply established an outer range on permissible CSIS conduct and allows it the power to do whatever it wishes within that range, subject to some prudential considerations that it must take into account. It is not possible to predict the full range of what CSIS might do, nor has the government offered up such a list. Nor is it possible to predict how that conduct might breach the *Charter* or, indeed, which of the *Charter*'s many rights might be infringed. In the new CSIS powers, the *only* statutory framework translates into: you can do anything to "reduce" broadly defined threats to the security of Canada, including violating every right in the *Charter*, so long as it does not do bodily harm, violate sexual integrity, or obstruct justice.

As a consequence, Bill C-51 has more section 1 "prescribed by law" shortcomings than those identified by the Supreme Court in "public interest" provisions that once allow bail to be denied.[45] It offers exactly the sort of vagueness and imprecision that disentitles the measure to a full section 1 inquiry.[46]

We are not aware of any circumstances in which the Supreme Court has concluded that such an open-textured invitation to violate the *Charter* can satisfy the requirements of section 1.[47] That is probably because we have never before seen such an open-textured invitation.

The bill did impose a judicial gatekeeper on CSIS's conduct, in a secret proceeding in which only the government side is represented and is not subject to appeal. The obvious analogy is to the judicial role in authorizing searches and arrests through warrants. However, this is a fundamentally false analogy.

Search and arrest warrants are part and parcel of *Charter* rights that have qualifying language in the right itself: section 8 of the *Charter* only guards against *unreasonable* searches and seizures. Section 9 only protects against *arbitrary* detention. A search or an arrest warrant satisfies this qualifying language, and therefore a government agency acting under such a warrant *does not breach the Charter*. It is the warrant that preserves the constitutionality of the action. The warrant does not authorize a breach.

Most other *Charter* rights *are not imbued* with built-in qualifying language. There is no concept of *permissible* free speech, or *arbitrary* cruel and unusual treatment, or *appropriate* mobility rights to enter or leave the country, or *limited* habeas corpus. And so there is simply no precedent (and no plausible legal theory) for these *Charter* rights being curbed by a warrant, pre-authorizing constraints.

This lack of precedent means the new Bill C-51 provision places judges in a radical new universe. Their task is no longer, as it is with search warrants, to

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43 See discussion in Craig Forcese, "Touching Torture with a Ten Foot Pole: The Legality of Canada's Approach to National Security Information Sharing with Human Rights-Abusing States" (2014) 52(1) *Osgoode Hall Law Journal* 263, online: http://digitalcommons.osgoode.yorku.ca/ohlj/vol52/iss1/7/; *R v Hape*, 2007 SCC 26 at para 90;*Canada (Justice) v Khadr*, 2008 SCC 28 at para 2.

44 Craig Forcese, "The Ugly Canadian? International Law and Canada's New Covert National Security Vision" (May 28 2015) online: http://craigforcese.squarespace.com/national-security-law-blog/2015/5/28/the-ugly-canadian-international-law-and-canadas-new-covert-n.html/

45 *R v Morales*, [1992] 3 SCR 711 at para 28 (raising the question of whether a discretion tied to "public interest" was precise enough to meet the "prescribed by law" standard).

46 *O'Neill v. Canada (AG)*, [2006] OJ No 4189 at para 87ff.

47 See discussion in Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* 5th ed (Toronto: Irwin Law, 2013) at 66.

define the limit of *Charter* protections and to prevent their breach -- rather they are asked to authorize violations of (any and all) *Charter* rights, in circumstances where, as noted, section 1's requirements are not satisfied. Judges risk becoming enablers of illegality, in other words. The harms of noble cause illegality denounced by the McDonald Commission in 1981 could now wash over, not just the security agencies, but the judiciary.

What Should be Done?

We do not, and have never, disputed the idea that some new CSIS threat reduction responsibilities might be appropriate. We have, however, disputed whether Bill C-51 constituted a viable, sustainable, responsible and constitutional approach to this issue. It is our hope that, having opted for an open-textured, poorly calibrated CSIS threat reduction mandate in Bill C-51, the government will reconsider and hone its approach. We recommend the following detailed changes to the CSIS Act, at minimum:

- Amend CSIS Act s. 12.1(3) to remove any reference to the *Charter* being contravened by a measure, thereby rejecting any (we believe, unconstitutional) interpretation that suggests CSIS has a standing, undefined competency to violate constitutional obligations.
- Re-craft the outer limits of illegal conduct to include, in addition to bars on bodily harm, obstruction of justice, and violation of sexual integrity, these additional prohibitions:
  - loss of or serious damage to property that endangers the health or safety of any person; and
  - detention of a person.
- Re-craft s. 12.2(2) to specify, "In subsection (1), 'bodily harm' has the same meaning as in section 2 of the *Criminal Code* and for greater certainty, includes torture within the meaning of s. 269.1 of the Criminal Code or cruel, inhuman, or degrading treatment or punishment within the meaning of the UN Convention Against Torture."
- Move from an open-ended concept of threat reduction measures to a more carefully calibrated closed-list of things CSIS can do. This would increase the prospect that such measures might be justified constitutionally – such a list gives clear notice at what rights might conceivably be at issue, and comes much closer to the "prescribed by law" standard required if section 1 is to be used to justify a *Charter* violation. It is also more democratically transparent: the public should have notice as to what powers we are authorizing a clandestine service to exercise on our behalf.(We suspect that the *Charter* rights most likely to be at issue in such a process would be the s.6 right of Canadian citizens to leave and enter the country and s. 2 freedom of expression).
- Strengthen the language in s.12.1(2) authorizing CSIS to take threat reduction measures after taking into consideration "the reasonable availability of other means to reduce the threat": the issue is not whether *CSIS itself* has other means; the issue is whether other government agencies – the police and perhaps nascent deliverers of countering violent extremism programs – are better positioned to reduce the threat. Language should be added that obliges CSIS to take close account and orient its efforts in support of the sort of criminal justice tools discussed by MI5 in described its powers of disruption. That lawful disruption approach should be the default, with any departures carefully circumscribed.
- Limit the new CSIS measures in s. 12.1 to counter-terror operations under s. 2(c) of the CSIS Act (if we must have "measures" for other sorts of security risks) limit them to s. 2(a) and (c) matters, excluding sedition and foreign-influenced activities. Alternatively, at least amend the foreign-influenced activities mandate in s. 2(b) of the *CSIS Act* in the manner proposed by SIRC in 1989.[48] This would limit the prospect that CSIS activities might reach many non-violent democratic protest movements, in some way done in conjunction with secret foreign influence (e.g., a foreign funder).
- Incorporate the statutory special advocate provisions from the *Immigration Refugee Protection Act* into the warrant proceedings and expressly provide these special advocates with standing to appeal warrant decisions. This extra level of scrutiny is appropriate since, by definition, at issue in these warrants is CSIS conduct in violation of the law and perhaps the Charter (if the amendment above is rejected). Such special advocates would have more powers, especially in relation to appeals, than *amici curiae* who may be appointed at the discretion of the presiding Federal Court judge.
- Amend the *CSIS Act* ss. 21 and 21.1 to specify that warrants are required prior to any CSIS foreign operation that might violate foreign or international law.

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[48] SIRC, Annual Report 1988–1989 at 56–57, online: http://www.sirc-csars.gc.ca/pdfs/ar_1988-1989-eng.pdf.

- Follow *Criminal Code* s. 25.3 (for the police) and require a *public* report with data on the use of CSIS illegal measures each year and general information on the nature of the CSIS's illegal (but judicially exonerated) conduct.
- Follow *Criminal Code* s. 25.4 (for the police) and require that a person affected by CSIS's illegal conduct under a warrant must be notified of the conduct within one year, subject to reasonable exceptions analogous to those enumerated in s. 25.4 of the *Criminal Code*.

We recognize that these disclosure requirements place the CSIS "measures" warrants on a different footing than CSIS surveillance warrants, which are not disclosed. We believe this fitting. First, the very purpose of a CSIS intelligence-gathering surveillance warrant may be defeated if disclosed — that is, the target will change behaviour in a manner that makes the intelligence irrelevant. The new "measures" warrants are said to be about disruption — here, the justifications for permanent secrecy are much less persuasive.

Operational concerns can be mitigated by provisos, analogous to those for police in the *Criminal Code*, which delay disclosure for legitimate security concerns, like ongoing investigations. Such concerns should be subject to periodic review in the courts to ensure they remain persuasive.

Second, even if there is a justification for secrecy, that justifications pales against the public interest in notice of CSIS conduct, that (by definition, given the very existence of the warrant) has violated the law, and under the existing law, perhaps the *Charter* rights of the target. There must be some manner in which a person subjected to this radical conduct can challenge it, since the prospects of any other form of accountability are remote. All of this is to say that if CSIS has *de facto* police powers of the sort found in *Criminal Code* s. 25.1, it also needs police-like levels of transparency.

IV. INFORMATION SHARING

Information is elemental in any effective security system, especially one that seeks to pre-empt terrorism. The Air India Commission recognized this, and urged that the CSIS Act "should be amended to require CSIS to report information that may be used in an investigation or prosecution of an offence either to the relevant policing or prosecutorial authorities or to the National Security Advisor."[49]

The government ignored this recommendation— and despite the occasional puzzling government claims to the contrary, Bill C-51 did not honour it. Instead, Bill C-51 responded to legitimate concerns about siloed information, evident in the Air India investigation, by throwing wide open the barn doors on information-sharing but in such a complex and unnuanced way that the only certain consequence will be less privacy for Canadians. The Privacy Commissioner has recently warned that "the scale of information sharing that could occur under this Act is unprecedented." It noted that in the first six months of its operation, Canada Border Services Agency, Immigration, Refugees and Citizenship Canada and Global Affairs Canada, three agencies all subject to no dedicated national security review had made 58 disclosures under the new act about individuals suspected of undermining Canadian security.[50]

The Privacy Question

Privacy issues loom large in the world of information sharing. The starting point is the federal *Privacy Act*. That instrument says that there is to be "no disclosure" of personal information collected by the government, without consent of the individual concerned.[51] But, as is so often the case, this opening premise is so riddled with exceptions that the exceptions in large measure swallow the rule, or at least complicate it to a considerable degree.

For instance, there is an important exception that basically subordinates the *Privacy Act*: information disclosure is permitted "for any purpose in accordance with any Act of Parliament or any regulation made there under that authorizes its disclosure."[52] Some *Privacy Act*–trumping laws were included in little-noticed amendments contained in the omnibus Bill C-51. (Although, as we discuss below, we think it is untrue that the *Security of Information Sharing Act* is itself a trumping statute.)

All of this would be awkward enough, but on top of these various statutory rules on information

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49 Air India Commission, above note 6 at 195 (Recommendation 10).

50 Privacy Commissioner, *Annual Report 2015- 2016*, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/reports-to-parliament/201516/ar_201516.

51 *Privacy Act*, RSC 1985, c P-21, s.8.

52 *Ibid*, s 8(2)(b).

sharing, there are also constitutional principles. Law enforcement agencies, for example, may not avoid constitutional search and seizure rules under section 8 of the Charter by receiving otherwise protected information from administrative or other bodies not subject to the same constitutional strictures.[53] Where law enforcement agencies propose obtaining private information that is protected by a reasonable expectation of privacy from other bodies, warrants must be obtained, even in circumstances where disclosure of personal information is permissible under the *Privacy Act*.

Likewise, after the Supreme Court's recent decision in *Wakeling*, information collected by warrant retains constitutional protections. If it is then shared without being governed by a clear law, with reasonable safeguards, and in a reasonable fashion, that behaviour too is unconstitutional.[54] *Wakeling* concerned the sharing of intercepted private communications by the RCMP with US authorities in a drug case. The intercepts were authorized under Part VI of the *Criminal Code*, the key wiretap provision in Canadian criminal law. But even so, the case was decided with an eye on Canada's largest post-9/11 scandal: Canada's sharing of false and unreliable information about Maher Arar. As one judge noted, "The torture of Maher Arar in Syria provides a particularly chilling example of the danger of unconditional information sharing."[55]

CSIS information-sharing, in particular, raises post-*Wakeling* concerns: even as compared with the somewhat sparse language of Part VI of the *Criminal Code*, CSIS information sharing is not governed by a clear law with reasonable safeguards. The *CSIS Act* is permissive without providing the level of safeguards that several of the Supreme Court judges saw as being met by Part VI (which other judges saw as actually insufficient). The exact same comment may be made about the provisions in the *National Defence Act* relating to the Communications Security Establishment (CSE).

And so the *CSIS Act* and *National Defence Act* are out of step with the constitutional standards discussed in *Wakeling*. The result is that these laws will eventually be challenged under the *Charter*, creating further uncertainty about the legality of these agencies' information-sharing activities.

Bill C-51's New Security of Canada Information Sharing Act

The government did not respond to the Air India commission's recommendations or fix the above-noted *Charter* issues with respect to CSIS and CSE information sharing. What it did do was unleash a convoluted new domestic information-sharing law. This law is motivated by a real problem. As correctly noted in an internal CSIS briefing note that pre-dates Bill C-51:

> Currently, departments and agencies rely on a patchwork of legislative authorities to guide information sharing . . . . Generally, enabling legislation of most departments and agencies does not unambiguously permit the effective sharing of information for national security purposes.[56]

The question is, however, what to do about this. As the CSIS briefing note goes on to state, "Existing legislative authorities and information sharing arrangements often allow for the sharing of information for national security purposes. With appropriate direction and framework in place, significant improvements are possible to encourage information sharing for national security purposes, *on the basis [of] existing legislative authorities*."[57]

Bill C-51 departs from this advice by superimposing over the existing legal regime a new security information-sharing umbrella law: *Security of Canada Information Sharing Act* (*SoCIS Act*). In doing so, it adds new uncertainty and complexity to the already muddled information-sharing system. New law articulates a series of generally laudable objectives in its (unenforceable) preamble and "purposes and principles" portions and then presents a series of legal principles that risk creating more problems than they cure.

Breathless Overbreadth

The Act allows those within the government of Canada to share information about the new and vast concept of "activities that undermine the security of Canada."[58] It is difficult to overstate how broad this new definition is, even as contrasted with existing broad national security definitions such as "threats to the security

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53 See, for example, R v Colarusso, [1994] 1 SCR 20 at para 93; R v Cole, 2012 SCC 53 at para 69.

54 2014 SCC 72 [*Wakeling*].

55 *Ibid* at para 104.

56 CSIS, "Memorandum to the Director, Deputy Minister Meeting on National Security Information Sharing" (5 February 2014), CSIS ATIP request 117-2014-393 at 2.

57 *Ibid* at 5 [emphasis added].

58 *SoCIS Act*, above note 7, s 2.

of Canada" in the *CSIS Act*[59] or the national security concept in the *Security of Information Act*,[60] Canada's official secrets law.

The only exemption in the *SoCIS Act*'s definition of "activities that undermine the security of Canada" is for "advocacy, protest, dissent and artistic expression."[61] This list was originally qualified by the word "lawful", but under pressure from civil society groups, the governing Conservative party amended the bill in the House of Commons to delete the word "lawful."

We were astonished by this change. We had proposed that "lawful" be dropped but then recommended the same compromise found in the definition of terrorist activity in the *Criminal Code*: we recommended excluding both lawful and unlawful protest and advocacy but *only* so long as it was not intended to cause death or bodily harm, endanger life, or cause serious risk to health.

We think that not all protest and advocacy should be exempted from the new information sharing regime. Violent protest or advocacy of a sufficient scale *can* be a national security issue justifying information sharing. After all, anyone dimly aware of the history of terrorism appreciates that terrorism can be a form of "protest" or "advocacy," depending on how you define those concepts. Terrorism is certainly a form of "dissent."

But by simply dropping the word "lawful," the new *SoCIS Act* seems to preclude new information sharing powers in relation to *any* sort of protest or advocacy or dissent, no matter how violent. Government lawyers will find a way to work around this carelessly drafted exception. Indeed, the government Green Paper has invented a solution: they say that the exception does not include "violent actions".[62] This is not, however, a standard set out in the actual law. It is a policy position – not something that is binding or in the least evident from the actual statute.[63]

Powers to Do What Exactly?

The overbreadth of both the concept of security and the carve-out from it is then compounded by the operative powers in the SoCIS Act. In its key operative provision, the Act contemplates that more than 100 government institutions may, unless other laws prohibit them from doing so, disclose information to 17 (and potentially more) federal institutions if "relevant" to the receiving body's "jurisdiction or responsibilities" in relation to "activities that undermine the security of Canada," including "in respect of their detection, identification, analysis, prevention, investigation or disruption."[64]All of these terms are not defined even though they are capable of definition. Without definition, whether by amending the Act or through regulation, there is a danger that many terms in the new Act will be inconsistently applied; a danger that the Privacy Commissioner has already raised.[65]

Relevance or Necessity?

The new act allows information sharing if it is "relevant" to the receiving body's jurisdiction or responsibilities. In plain language, "relevant" here means "having a sufficient bearing on" whatever lies within the agency's jurisdiction or responsibilities. As the Privacy Commissioner noted in his original critique of Bill C-51, much more falls within the orbit of "relevant" than would be captured by the more modest term "necessary." "Necessary" means "needed." The Privacy Commissioner has returned to this theme, critiquing the Green Paper for failing to ask the question whether the low relevance standard should be raised to the higher necessity standard.[66] We agree.

Trumping the Privacy Act?

In the absence of a "necessity" requirement, the only safeguard is that the new information sharing power is "[s]ubject to any provision of any other Act of Parliament, or of any regulation made under such an Act, that prohibits or restricts the disclosure of information."[67] We believe that this means that it must

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59 CSIS Act, above note 4, s 2.

60 RSC 1985, c O-5, s 3.

61 *SoCIS Act*, above note 7, s 2.

62 Green Paper, at 29.

63 This is not the only invented policy solution in the Green Paper that ignores what the law says. As discussed below the Green Paper seems to imply that the overbroad concept of "terrorism offences in general" can be interpreted as if it read "terrorism offences".

64 *SoCIS Act*, SC 2015, c. 20, s.2, s 5.

65 Privacy Commissioner, above note 7

66 *Ibid*.

67 *SoCIS Act*, s 5.

comply, among other things, with the *Privacy Act*. That is not an ideal safeguard given the many exceptions in the *Privacy Act*, but it is something.

But we are not sure how to read the government's recent Green Paper documents. They say that because the *SoCIS Act* "authorizes disclosure," it satisfies the "lawful authority" exception to the *Privacy Act*, effectively trumping it.[68] This statement is hard to understand, given that the *SoCIS Act* itself says it is subject to other Acts that "prohibit or restrict" the disclosure of information (and that would include the *Privacy Act*). At the same time, the Paper acknowledges (correctly in our view) that the *SoCIS Act* "cannot be used to bypass other laws prohibiting or limiting disclosure."[69]

Bottom line: the *SoCIS Act*'s entire architecture creates confusion and uncertainty. And in so doing it rejects the lessons from the Arar Commission, Air India inquiry, and the earlier US 9/11 Commission. It threatens privacy as the government seems to want to include almost everything under its radical and novel definition of security interests. At the same time, the *SoCIS Act*'s overbreadth threatens security by making it difficult to focus on terrorism. The Act allows the government to share just about everything while it rejects the Air India Commission's recommendation that CSIS *must* share intelligence about terrorist offences, if not to the police then to someone who is in charge and who can take responsibility for the proper use of the information.

If the *SoCIS Act* "works" it will be in spite of its poor and hurried drafting and the short shrift it received as it was rushed through Parliament and its committees in a highly partisan environment. The Green Paper raises another alarm bell. Much will depend on how the *SoCIS Act* is interpreted by the government and the Green Paper suggests that the government is taking an unclear approach in interpreting the Act in its relationship with the *Privacy Act*.[70]

What Should Be Done?

It is past time to fix definitively information flows between the CSIS and the police. No government is serious about security until it applies itself to this task. This is an issue tied to the intelligence-to-evidence conundrum discussed below, and follows from the Air India Commission's recommendations.

In addition, the government could reduce the complexity (and subjectivity) of its information sharing regime by standardizing national security information-sharing rules throughout the statute books, rather than simply papering over an overly messy system with an even messier umbrella "undermine" concept and a sloppy set of operative rules on disclosure.

Weeding the statute books of conflicting, variable and confusing rules on information-sharing is a worthy task, but it is a task. It will require time and nuance. It is not clear to us that the government will willingly undertake this labour. And so our more minimalist recommendations are these:

- Replace the overbroad definition of "activities that undermine the security of Canada" with the more limited and established definition of "threats to the security of Canada" from s.2 of the *CSIS Act*. This would avoid the radical expansion of security interests currently encompassed by the "undermining the security of Canada" concept.
- As recommended by Privacy Commissioner, amend s.5 to require shared information to be "necessary" or "proportionate" and not simply "relevant"[71] to the receiving institution's security jurisdiction
- Amend s.5 to make crystal clear that receiving recipients must operate within their existing mandates and legal authorities and that agencies put in place protocols for ensuring the reliability of shared information, as per the Arar Commission recommendations.
- Match information-sharing powers with amendments that give independent review body(s) review over all of the government of Canada's information sharing activities under the new Act. As suggested by the Privacy Commissioner, review should be facilitated by agreements between governmental entities that share information.[72] Especially, ensure that this body has the power to compel deletion of unreliable information from all the agencies to which it has been distributed.

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68 Background Document, above note 1, at 27.

69 *Ibid* at 30.

70 Forcese and Roach, above note 4, ch. 5.

71 Privacy Commissioner Submission to the Standing Committee on Public Safety and National Security March 5, 2015 at https://www.priv.gc.ca/parl/2015/parl_sub_150305_e.asp Recommendation 1.

72 Privacy Commissioner Submission to the Standing Committee on Public Safety and National Security March 5, 2015 at https://www.priv.gc.ca/parl/2015/parl_sub_150305_e.asp Recommendation 4.

- Mirror the exemption to the information-sharing regime on s.83.01(b)(ii) (E) of the *Criminal Code*, thereby exempting "advocacy, protest, dissent, or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses A to C." (i.e., essentially that it is not intended to endanger life, health or safety)
- Implement Recommendation 10 of the Air India inquiry[73] to establish legislated rules in the *CSIS Act* requiring CSIS to "report information that may be used in an investigation or prosecution of an offence either to the relevant policing or prosecutorial authorities or to the National Security Advisor."
- Update CSIS Act s.19 and the *National Defence Act* provisions related to CSE so that they comply with the requirements of the Supreme Court of Canada's decision in *Wakeling*.

V. TERRORIST SPEECH CRIME AND PROPAGANDA

The New Speech Offence

The C-51 speech crime imposes a punishment of up to five years on anyone who "by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general ... while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication...".[74]

The Green Paper argues that this offence "is modelled on the existing law of counselling. It extends the concept of counselling to cases where no specific terrorism offence is being counselled, but where it is evident nonetheless that terrorism offences are being counselled".[75] The government discussion paper uses as a concrete example the statement: "Do not wait for us to tell you what to do. From now on, you have permission to do whatever you want, do whatever is in your capability. Just act."[76] This is a troubling example given that the call to "just act" could be a call to arms, but it also could be a call to send money or simply to engage in protest. Put another way, the link between the speech and violence may be attenuated, raising clear constitutional free speech implications.

The lack of definition of "terrorism offences in general" in the new speech offence also increases the chill of the offence on freedom of expression. The issue is not just that potential speakers may be deterred from expression, but that the new offence can now provide a ground for criminal investigation including enhanced use of electronic surveillance under the *Criminal Code*.[77]

The Need to Examine the New Speech Offence in its Broader Context

This last point raises another: As suggested in the introduction, the Green Paper is admirably comprehensive, but it often lacks critical linkages between its discrete topics and fails to examine the powers in their broader institutional and legal context. And so, the links between the new and overbroad speech offence and electronic surveillance are not explored. The same is true with respect to the links between the overbroad definition of "terrorist propaganda", tied to the new speech crime, that can be seized by the Canadian Border Services Agency, and the continued and oft-criticized lack of independent review of that agency. There is also no discussion of how the new speech offence could affect the government's new and still undefined countering violent extremism activities, and whether it will make engaging with extremists more difficult or simply drive extremist speech underground. If it is a crime to say the wrong things in the wrong context, then most people with strongly polemical or ideological views would be advised to say nothing in the potential presence of the government. This may make it difficult to engage in counter-violent extremist initiatives with the people most in need of them. And yet, this issue is not raised in the Green Paper's discussion of the counter-violent extremism agenda.

What Does Terrorism Offences in General Mean?

We turn to specific criticisms. The background document seems to assume that "terrorism offences in general" means terrorism offences as defined in s.2 of the *Criminal Code*.[78] This is another example where the Green Paper lays a policy gloss on an indefinitely

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73 Air India Commission, above note 6 at Recommendation 1 and 10, online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/vol1-chapt7.pdf.

74 *Criminal Code*, s.83.221.

75 Background Document, above note 1, at 42.

76 *Ibid*.

77 Forcese and Roach, above note 4, at 127.

78 Background Document, above note 1, at 42.

drafted law, in order to blunt the inadequacies of that law. In this case, such an interpretation would narrow the scope of the new offence. Nevertheless, it raises the question of why the new offence includes the words "in general". Courts interpret statutes including the *Criminal Code* as if each word used by Parliament actually means something. The Green Paper essentially treats the words "in general" as meaningless surplus.

Although reading down (or better still amending "terrorism offences in general") to mean "terrorism offences" as defined in the *Criminal Code* would remove some uncertainty about the phrase "terrorism offences in general", it would still leave in place a very broad concept as the anchor for the new speech crime.

And that speech may still be several steps removed from actual violence. The discussion paper states that the new offence is not intended to criminalize "praise of terrorism" or "expressions of opinion about the acceptability of terrorism". But as the discussion paper acknowledges even "the definition of 'terrorism offence' in the *Criminal Code* includes a broad range of conduct – from violence against people and destruction of property to providing financial and material support and recruitment". [79]

And so even if C-51's speech crime were amended to remove "in general" as a qualifier on "terrorism offences", it would reach speech supporting many different forms of violence, many possibly notionally connected to violence. Indeed, we are not being mischievous in noting that a staple of many political science educations -- Franz Fanon's famous call for violent resistance in his anti-colonial tract, *Wretched of the Earth*–amounts to "knowingly promoting or advocating terrorism offences".[80] And even if no prosecutor was foolish enough to charge someone with writing polemical political science treatises, police could surely obtain a surveillance warrant on the basis of investigating this speech crime. And the book could be stopped at the border by the CBSA.

Put another way, the Green Paper describes the narrower crime that the government wishes to deploy. But that is not the crime that Parliament enacted. We make the following, additional technical points:

1. The Background Document stresses that the new advocacy offence is a form of counselling offence, but then somewhat inconsistently asks whether this should be clarified through amendments.[81] The analogy to counselling is in our view strained. Counselling requires an incitement or procuring of a specific crime while "terrorism offences in general" in the new offence is not defined.
2. The new advocacy offence does not require that speakers intend that a terrorism offence will be committed as a result of their speech. It has a lower form of fault that simply requires that speakers know that they are advocating or promoting terrorism offences in general while being recklessness that someone might commit a terrorism offence as a result of their speech.[82]This follows some recent developments in the law of counselling, but those developments have themselves been criticized for excessively infringing on the freedom of expression. The new offence only requires recklessness or subjective advertence to the possibility that someone, anyone (including a person with a mental illness), might commit a terrorist offence as a result of the speech. This is far, far away from the idea that there must be a clear and present or imminent danger of someone acting on the speech. To return to the Green Paper's hypothetical of the speaker or writer who says "just act", that person might be guilty if he or she is aware of even the possibility that anyone might take their speech as inspiration to commit a terrorism offence "in general".
3. A case that is unfortunately ignored in the Green Paper background document is the Supreme Court's 1990 decision in *R. v. Keegstra*[83] where the Court stressed that the higher fault level

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79 Ibid.

80 For a fuller discussion on this point, see Forcese and Roach, above note 4 at 339.

81 Background Document, above note 1 at 46

82 The leading case on counselling is the Supreme Court's 2005 decision in *R. v. Hamilton* [2005] 2 SCR 432 at para 29. There, the Supreme Court in a 6:3 decision lowered the traditional fault requirements of counselling from an intent to commit to knowingly saying something while aware of an unjustified risk that someone would commit an offence as a result of the inciting speech. Justice Charron issued a strong dissent that the traditional intent standard should be retained in order not to place disproportionate limits on freedom of expression. She expressed concerns that Shakespeare's famous statement about killing all the lawyers could run afoul of the new and somewhat unclear standard.*Ibid* at para 76 (in dissent). She also relied on an Ontario Court of Appeal decision written by Justice Moldaver before his elevation to the Supreme Court that rejected recklessness as an insufficient form of fault for counselling as a form of inchoate liability for crimes that have not been committed. *R. v. Janeteas* (2003) 172 C.C.C.(3d) 97 (Ont.C.A.) Indeed the Supreme Court in another case decided in 2005 seemed to contemplate a traditional approach to counselling namely "that the counsellor intend the commission of the offence counseled". *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para 64.

83 [1990] 3 SCR 697

of "wilful" was key in justifying the offence of "wilful promotion of hatred" as a reasonable and proportionate limit on the freedom of expression.[84]

4. The Green Paper analogizes the new speech offence with the offence of advocating or promoting genocide in s.318 of the *Criminal Code*. But that is comparing apples and oranges. Genocide is explicitly and narrowly defined in the Code whereas "terrorism offences in general" is undefined. Even if read down to only include actual "terrorism offences", it includes a broad array of conduct. There is simply a world of difference between advocating genocide -- the destruction of a religious or ethnic group -- and writing *Wretched of the Earth* or advocating sending money to a listed terrorist group with the intent that the money be used for humanitarian purposes[85] (both possibly captured by the speech crime).
5.

More Proportionate Alternatives to "Terrorism Offences in General"?

Are there more proportionate alternatives to the reference to "terrorism offences in general"?

One possibility is to acknowledge that the *Criminal Code* includes a vast number of other crimes that do (and have) already penalize terrorist speech.[86] There has already been at least one conviction in 2010 of someone who acted as a propagandist for a terrorist organization.[87] To the extent that existing terrorism offences incorporate the definition of "terrorist activity" in s.83.01 of the *Criminal Code*, they also include the speech acts of counselling and threatening. In addition, Canada has not explored the outer reaches of two important existing offences of instructing a terrorist activity[88]or instructing any activity for a terrorist group.[89]

Both during the Bill C-51 debates and in the Green Paper, the government has suggested that the existing offences will not capture advocacy of indefinitely-specified acts of terrorism. But this ignores the interpretative clauses in many of the existing terrorism offences. These clauses[90] often have the effect of relieving the government of having to prove that those who instructed or facilitated a terrorist activity knew all of the specifics of the terrorist activity. For example, s.83.21(2)(g) of the Code provides that a person may be guilty of knowingly instructing directly or indirectly any person to carry out any activity for the benefit of a terrorist group to enhance its ability to carry out terrorist activities whether or not "the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group." The lack of use of existing offences also must be understood in the context of Canada's below average record of terrorism prosecutions: we haven't explored the scope of these offences yet.[91] To be sure, these existing offences may not reach as far as the Green Paper discussion paper hypothetical of "do something", but that is more because that ambiguous instruction may not be advocating any act of terrorism. It could simply be advocating protest or dissent.

The issue for the courts and the government should be how much value added is there in the new and uncertain advocacy offence as measured against its costs to freedom of expression and perhaps to community outreach. Put another way, we do not think the new speech crime fills a necessary gap, even as it does violence to free speech rights.

What Should be Done?

We recommend that: the offence of "advocating or promoting terrorism offences in general" be repealed. If the government insists on retaining this offence, it should model the elements of the offence, and its defences, on s.319(2) of the *Criminal Code* that prohibits the wilful promotion of hated and contains

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84 For further discussion, see Forcese and Roach "Criminalizing Terrorist Babble: Canada's Dubious New Terrorist Speech Crime" (2015) 53 Alberta L.Rev.35.

85 Although the Supreme Court rejected a freedom of expression challenge to various terrorism offences and the definition of terrorist activity in *R. v. Khawaja* [2012] SCC 69 at paras 42-44, it stressed that in addition to knowledge, accused were protected by requirement that they have the subjective purpose of assisting a terrorist group. By contrast, the new advocacy offence does not require a clear terrorist purpose and its lack of a specific offence makes it akin to some American material support offences which have been interpreted to apply to those who support the humanitarian activities of a listed terrorist group. See *Holder v. Humanitarian Law Project* 130 S.Ct. 2705 (2010). Note that one of us (Roach) represented an intervener in *Khawaja* that unsuccessfully argued that the definition of "terrorist activities" was an unjustified restriction on freedom of expression.

86 For a full discussion, see supra note 83.

87 *R. v. Namouh*, 2010 QCCQ 943

88 *Criminal Code*, s.83.22

89 *Criminal Code*, s.83.21

90 See for example ss.83.18(2), 83.19(2), 83.21 (2) and 83.22(2).

91 Forcese and Roach, above note 4,ch. 9.

a number of truth and fair comment defences. In addition, if the offence is retained, the vague, overbroad and undefined reference to "terrorism offences in general" should be replaced by the more restrained concept of "terrorist activity"(which has a closer connection to violence than "terrorism offences in general" or even "terrorism offences" as defined in s.2 of the *Criminal Code*).

Terrorist Propaganda

Bill C-51 added a new provision to the *Criminal Code* for court-ordered deletion of terrorist propaganda from the internet modeled after similar provisions enacted after 9/11 with respect to hate propaganda. The requirement of judicial authorization is an important safeguard. At the same time, it raises practical questions about the inability of Canadian courts to make extra-territorial warrants as well as extensive reliance on private social media companies who act as front-line censors in a much less transparent and accountable process than the new deletion orders.

Still, court ordered deletion of material from the internet that threatens, counsels and instructs terrorism is a good idea, if it can be implemented. To this extent, we would support an expansion of the new deletion orders to include such types of propaganda.[92]This would also build on what we have argued is the extensive speech reach of the 14 terrorism offences that existed before Bill C-51 added the "advocacy" speech offences as a 15th crime. It would allow for court ordered removal of "how to" instructions or threats of terrorism. To this extent, the deletion procedures should in our view be expanded.

But as crafted at present, the same concerns about over-breadth that arise with the new speech offence apply to the definition of terrorist propaganda: it includes material that advocates or promotes "terrorism offences in general". This aspect of the deletion procedure should either be deleted or amended to include the higher fault requirement and good faith discussion defences modeled on the wilful promotion of hatred offences and the narrower and defined concept of "terrorist activity" that we have proposed above with respect to the new speech offence.

Such an amendment of the terrorist propaganda provision is a specific question raised by the Green Paper. This should be done, but it is not where the action has been or is likely to be. Removing material that "advocates or promotes terrorism offences in general" from the deletion procedure without repealing or fundamentally reforming the speech offence itself would be an illusory "smoke and mirrors" reform. The deletion procedures have to our knowledge not been used and are unlikely to be used given that material can easily be posted from outside of Canada on the internet. In contrast, the speech offence could apply to all public or private conversations in Canada – and risk chilling that speech and also impairing counter-violent extremism programs.

The Green Paper notes that amendments to the *Customs Tariff* in Bill C-51 allows CBSA border services officers to seize terrorist propaganda being imported into Canada without a warrant, as they would other contraband. This power ignores the troubled history of censorship at the border which relies on front line decisions by officials who must apply intricate definitions of obscenity and now terrorist propaganda. This also implicates questions of accountability because the CBSA is not subject to any designated review despite the recommendations made by the commission of inquiry into the Maher Arar affair.[93] This is another example of how the Green Paper's topic-by-topic, siloed approach misses some important cumulative effects of the national security landscape it examines.

VI. DIGITAL INVESTIGATIONS

Metadata and Subscriber Information

Lawful access rules – the capacity of the state to intercept and collect electronic communications – are chaotic in Canada, and in need of a clean-up: different standards are applicable to different agencies, and the law in this area is a patchwork quilt. But whether they need to be more aggressive, or just more coherent and predictable is a critical question.

The Green Paper examines the issue of access to subscriber or metadata in light of the Supreme Court's 2014 *Spencer*[94]decision. As discussed above, the Supreme Court in *Spencer* recognized privacy and anonymity interests in access to basic subscriber data used for the internet which the Green Paper notes can include name, home address, email or IP address and phone numbers.

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92 Forcese and Roach above note 84 at 79-83.

93 Arar Commission, above note 5, Recommendation 10.

94 2014 SCC 43

The Green Paper is quite assertive in advancing the need for a legislative reply to the *Spencer* decision – a judgment that is quite unpopular with the police. It poses a hypothetical of an officer seeking the basic subscriber information "in the early stages of the investigation and does not have enough information to meet the threshold for obtaining this court order, since getting an order requires more than suspicion that the activities are taking place."[95]

This may leave the impression that digital data generally is in a difficult to access gray zone for police and that the law has ignored "the rapid advancements of digital technology in the last 20 years and the role technology plays in the lives of Canadians today."[96]

The 2014*Protecting Canadians from Online Crime Act*[97]already provides a wide array of preservation and production orders for various forms of digital data that seems to overlap with at least some (although perhaps not all) basic subscriber data. Specifically, preservation demands and orders for computer, transmission and tracking data can be made under ss.487.012, s.487.013, s.487.015,s. 487.016 and s.487.017of the *Criminal Code*. All of these new powers only require the police to have reasonable suspicion to trigger their application – this is the lowest evidentiary standard known to Canadian law. To be sure, these new powers are subsequently briefly mentioned in the background paper[98] but unfortunately there is no real discussion of their precise scope, to balance the Green Paper's insistent tone that *Spencer* is a problem that needs to be fixed.

As the federal Privacy Commissioner has noted,[99] the Green Paper documents on the practical problems faced by investigators if private telecommunications companies decide to destroy data. That may be an issue, but the proportionality of any new powers stemming from the current consultation process must be measured by the adequacy of existing powers: and the Green Paper falls short in not fully exploring the new powers added to the *Criminal Code* in 2014. This issue also needs to be joined with concerns about the adequacy of review, and specifically the adequacy of the Privacy Commissioner's powers and resources.

One troubling feature in this regard is that the preservation and production orders added to the *Criminal Code* in 2014 could be subject to gag orders[100] that may make near impossible review and challenge by subscribers whose privacy is directly affected. We will therefore be very dependent on independent review bodies.

It is also perplexing and rather unhelpful that the Green Paper appears to second guess the *Spencer* decision by posing questions about whether expectations of privacy in the digital world are different from the physical world. It asks if particular basic subscriber information is considered "to be as private as the contents of your emails? your personal diary? Your financial records? Your medical records?"[101] Whatever the government view, the Court in Spencer has already held that there is a reasonable expectation of privacy with regards to basis subscriber data. Again this underscores the somewhat aggressive tone of the Green Paper both on privacy and related information-sharing issues, including those related to terrorist financing.[102]

In the result, what was originally expected to be a first step in the repeal of the problematic aspects of C-51 has morphed into a consultation about potentially dramatic expansion of the government's lawful access powers. Here it should be noted that the Green Paper seems not to limit itself to national security, but expands its concerns to include "child pornography, cyberbullying, and the 'Dark Web' and its associated criminal marketplace"[103] raising concerns about the oft-noted drift from expanded state powers to combat terrorism to fight all serious crimes. We do not dispute that lawful access is a necessary conversation – but it must be a balanced one and it may be that some powers could be justified with respect to terrorism

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95 *Ibid* at 57.

96 Background Paper, above note 1 at 55.

97 SC 2014 c.31

98 Background Paper, above note 1 at 62.

99 Privacy Commission, Appearance before the Standing Committee on Public Safety and National Security (SECU) on Public Safety's Green Paper (Oct 4 2016), online: https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2016/parl_20161004/.

100 *Criminal Code*, s.487.0191

101 Background Paper, above note 1 at 63-4.

102 The background paper examines terrorist financing and raises the issue of increased reporting requirements but without noting the Arar Commission's 2006 recommendation that SIRC review FINTRAC, the financial intelligence unit and the Air India Commission's 2010 recommendations that financial intelligence be better integrated into terrorism prosecutions.

103 Background Paper, above note 1 at 55.

investigations that could not be justified with respect to investigations of other crimes. And again we must stress that this issue must be linked with close consideration of the inadequacy of Canada's executive watchdog review.

What Should be Done?

The government should simply accept the need to respect privacy interests in subscriber data (and more generally, metadata). It should bear the onus of justifying why the new preservation and production orders added to the *Criminal Code* in 2014 are inadequate. It should not be assumed that powers that could be justified for counter-terrorism investigations can be justified for all criminal investigations.

It should also balance any legislation expanding digital investigations -- including any mandatory data retention and decryption requirements -- with enhanced forms of accountability including, as recommended above, a security and intelligence community reviewer and an anti-terrorism monitor. In addition, and in keeping with evolving international best practices, there should be enhanced accountability measures with respect to the use and sharing of information. We have discussed at length the need to superimpose independent oversight regimes, not just when private information is collected, but also when it is subsequently shared, redeployed and processed through Big Data within the government.[104]There are lessons to be learned from the reforms the United States has undertaken over the last decade with the Foreign Intelligence Surveillance Court process.

At the very least, the digital issues flagged in the Green Paper are intimately linked with the need to improve review and to tighten the overbroad information-sharing provisions of Bill C-51. They cannot be treated in isolation.

VII. INTELLIGENCE AND EVIDENCE AND RELATED SECRECY ISSUES

The government deserves credit for placing Canada's troubled relationship between secret intelligence and public evidence on the Green Paper's list of topics for consultation. The discussion paper neatly frames the complex debate between the competing interests of secrecy and disclosure as follows:

> National security information needs to be protected from unnecessary public disclosure. At the same time, there is a need to facilitate its use in legal proceedings, when appropriate, while maintaining the fairness of the proceedings and the integrity of the justice system. [105]

Intelligence to evidence, in other words, is about disclosure of intelligence secrets in court proceedings, which are almost always in open court and in many instances oblige disclosure to the other party. At core, this is about CSIS (and possibly CSE) information becoming evidence in criminal proceedings. And so this is also about CSIS and CSE and other agencies sharing information with police, who are charged with investigating crimes and collecting evidence in support of prosecutions. It is also about Canada's oft-noted status as a net importer of intelligence and the danger of disclosing secrets that foreign agencies have shared with us.

One of our major concerns about Bill C-51 (when combined with the 2015 legislation creating a broad CSIS human source privilege subject only to a narrow innocence at stake exception) was that it could have the unintended effect of making the relationship between CSIS and police and prosecutions even worse.[106] We discussed the awkward nature of the police/CSIS interface above.

Even more awkward relations is an alarming prospect given the very low marks that the Air India Commission gave in 2010 to a *status quo* in which CSIS was happy to receive intelligence from the police and other parts of the governments, but tightly controlled the information it would share with the police (and others).

The need to revisit the complex topic of intelligence and evidence is especially important given that the previous government rejected the fixes that the Air India Commission recommended. The commission did not deny that the choice between secrecy and disclosure would often be extremely difficult and context specific. It warned, however, that the status quo too often allowed these choices to be made as a result of bureaucratic routine in which CSIS only disclosed carefully vetted pieces of information to the police. It concluded that radical and holistic reform was needed, designed to place responsibility on

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[104] Forcese and Roach, above note 4, at 171 (discussing the concept of "firewall warrants").

[105] Background Paper, above note 1 at 65.

[106] Forcese and Roach, above note 4, chs 8 and 9.

balancing the need for secrecy and disclosure on a few responsible officials: namely, a new and specialized terrorist prosecution service, the Prime Minister's National Security Advisor and ultimately by criminal trial judges who it recommended should, as is the case in the US, Australia and the UK, be able to balance the competing interests between secrecy and disclosure, and if necessary revise non-disclosure orders.[107]These recommendations went exactly nowhere, but the problems they were designed to remedy remain.

Non-Legislative Changes and the Need for Culture Change at CSIS

The Green Paper astutely asks about non-legislative changes that can improve the use and protection of security-related information in court proceedings. At some level, we are persuaded that institutional culture and history are the most entrenched problems in the intelligence to evidence conundrum. While CSIS is clearly preoccupied with the expansive disclosure rules in criminal proceedings, such disclosure is most damaging in circumstances where information is collected without forward thinking: if one accepts that information may be disclosed in the future, it may be possible to minimize the risk that details on sensitive sources, means or methods are embedded throughout the information that then becomes disclosable.

After that, any *bona fide* concern about excessive disclosure would depend on an aberrant judge ordering disclosure of something truly prejudicial to national security. We are not sure how founded this fear really is, as an empirical matter as opposed to an article of faith within the intelligence services. In any event, the government holds the trump card when it comes to the disclosure of the "crown jewels" of CSIS or an allied foreign agency: it can issue an executive certificate under s.38.13 of the *Canada Evidence Act* overriding a judicial disclosure order.

And so we would suggest that the most important non-legislative change would be cultural and organizational change at CSIS: if terrorism is the leading security threat, then much of the intelligence that CSIS collects now may have evidentiary significance. As mentioned above, we also view this as relevant to the debate about CSIS threat reduction powers. One Vision 2.0 – the protocol between the RCMP and CSIS – seems aimed at ensuring that CSIS disruption efforts do not also disrupt ongoing criminal investigations. This is a good and necessary start, but we would urge CSIS in its counter-terrorism investigations to embrace the challenges of supporting and not simply de-conflicting with criminal investigations.

In our discussion on threat reduction, we have already discussed how such an approach works in the United Kingdom, and urged changes that force threat reduction in a direction that facilitates criminal justice outcomes. And, in our discussion of information-sharing, we have urged changes that would put the decision on whether information should be prioritized for intelligence or evidence in the hands of an official outside of CSIS or the other security agencies. We believe that both of these changes would be a driver of a cultural shift in CSIS, much as decisions from the Supreme Court in the immigration security certificate context have compelled a different modus operandi.

Section 38 of the Canada Evidence Act and Canada's Continued and Dangerous Game of Constitutional Chicken

There are also other changes that would streamline the intelligence to evidence issue. National security secrecy questions in criminal (and some civil) proceedings are handled by a bifurcated, "two court" system, described in the Green Paper: a trial court, which adjudicates the criminal matter, and the Federal Court, which decides whether government secrets can be disclosed, after balancing the interests at stake under s. 38 of the *Canada Evidence Act*.

In a case stemming from the Toronto 18 prosecutions, the Supreme Court decided that this bifurcated approach was constitutional, while at the same time stressing that it was not pronouncing on the wisdom of the approach. It also warned criminal trial judges that if they were left in doubt that Federal Court non-disclosure orders threatened the fairness of the trial, they should not hesitate to stay the criminal proceedings under s.38.14 of the *Canada Evidence Act*.[108]

Although the Green Paper recognizes some of the criticisms of Canada's bifurcated approach, it does not mention how a s.38 application was made but abandoned in the course of the Victoria Canada Day plot[109] or outline the Air India Commission's major

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[107] Commission of Inquiry into the Bombing of Air India Flight 182 Final Report Volume 3 *The Relation Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions* (Ottawa: Government Services, 2010).

[108] *R. v. Ahmad*, [2011] 1 SCR 111

[109] *Canada (Attorney General) v. Nuttall*, 2016 FC 850. The trial judge's stay of proceedings in that case also underlines the risk that trial judges may use their powers under s.38.14 to stay proceedings. The subsequent attempts to impose a peace bond on the two accused also underlines how alternatives to the criminal sanction, especially when used in "a heads we on tails you lose" fashion after a collapsed prosecution may have less legitimacy than criminal proceedings. The issue of legitimacy is not abstract given the desire of Daesh to promote a narrative that sees western counter-terrorism efforts as an indiscriminate attack on all true Muslims.

recommendations. This may suggest little appetite for change in government in remedying Canada's unwieldy two-court approach. We would add that in our view, the Air India recommendations should not be seen as a criticism of the Federal Court. They are simply a recognition that s.38 places both the Federal Court and the criminal trial judges in unnecessarily difficult positions when conducting terrorism prosecutions.

The Green Paper does ask whether improvements could be made to s.38 of the *Canada Evidence Act*. We would recommend that at least some provincial superior court trial judges should be given powers under s.38 to balance the competing interests of secrecy and disclosure in criminal trials and to revise non-disclosure orders during the course of a criminal trial. This would minimize Canada's current game of constitutional chicken: the Federal Court makes a decision on the appropriate disclosure balance (typically at a pre-trial stage before all the trial issues have crystallized); the criminal trial judge (perhaps years later) must abide by the non-disclosure order but he or she also must decide whether to stay proceedings because the Federal Court's non-disclosure orders make it impossible to have a fair criminal trial.

The criminal trial judge's decision in the Victoria Day plot underlines that criminal trial judges may not hesitate to pull the plug on terror trials when there are doubts about their fairness. Giving trial judges powers under s.38 would give them more tools, and less blunt ones than terminating trials, to reconcile the competing interests between disclosure and secrecy.

The Use of Secret Evidence in Civil Proceedings?

The Green Paper also raises the role of s.38 in civil proceedings such as those conducted by three Canadians alleging that the government was complicit in their torture in Syria. We would hope that the government did not authorize the use of secret evidence to defend itself in such lawsuits, as is allowed under the UK's *Justice and Security Act*, 2013.[110] This law has been severely criticized as decreasing fairness and transparency both by the UK Joint Committee on Human Rights and in a European Parliamentary report.[111] At the same time we note that s.38 is not proving to be particularly workable or expeditious in the ongoing lawsuits brought by three Canadians tortured in Syria in part because of information sharing by Canada. How much of that is the fault of law and how much a litigation strategy by the government we leave to others to debate.

Broader Secrecy Protections in No-Fly Listing, Passport Revocation and Proscription Decisions

The Green Paper's discussion of s.38 raises the need to reform other laws governing secrecy. Unlike s.38, these other laws contemplate *no balancing* between fairness and security, and instruct reviewing judges that they must order non-disclosure if the disclosure of information would cause any harm to broadly defined national security interests. These laws include those for immigration law security certificates,[112] terrorist group proscription decisions[113] and also new laws concerning no fly listing[114] and passport denials[115] enacted in 2015.

The government should have to justify why these statutes do not allow the reviewing tribunal to conduct the same case-specific balance between disclosure and secrecy that is contemplated under s.38 of the *Canada Evidence Act*.

Another problem with these broader secrecy provisions is that (except in immigration proceedings)

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110 UK, c. 19

111 Citizens Rights and Constitutional Affairs Department *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges* Sept 2014 at http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%29509991_EN.pdf.

112 The Green Paper also discussed little-noticed but problematic provisions in Bill C-51 that reduced the information that security cleared special advocates would receive in controversial security certificates. The changes restrict the amount of information that the special advocate receives as relating to the grounds of inadmissibility that the Minister relies upon. There are also provisions that allow the government to apply for additional non-disclosure to special advocates that are only qualified by the requirement that increased non-disclosure should not compromise the affected person's right to be reasonably informed of the state's case. IRPA s.83.1(c.1) as amended by Bill C-51. We do not believe these provisions are necessary, and see them as an effort to roll back the successful role special advocates have played, guaranteeing future constitutional challenges: these provisions aggravate the considerable legitimacy problems of security certificates and perhaps even unsettle the Supreme Court's ruling in *Harkat v. Canada* 2014 SCC 37 that the pre-C-51 security certificate regime was consistent with the Charter.

113 These are discussed Background Paper, above note 1 at 50, but without reference to the potentially mitigating role that special advocates could play to the extent that a listing decision relied upon secret evidence. We would note that there has been no successful challenges to proscription decisions. One factor may be the lack of protections analogous to those found in s.10 of the UK's *Terrorism Act*, ensuring that those challenging a proscription decision not be prosecuted simply on that basis for a terrorist offence.

114 *Secure Air Travel Act*, SC 2015, c. 20, s.11.

115 *Prevention of Terrorist Travel Act*, SC 2015, c. 36, s.42.

there is no explicit provisions ensuring that there is an adversarial challenge to broadly-defined secret evidence. It is possible that the Federal Court might, as a matter of discretion, appoint security-cleared amicus to play a challenge function. But what is arguably a constitutional right[116] to some effective sort of special advocate playing this role should be explicitly written into the legislation governing no fly lists, passport revocation and terrorist group proscription, as is the case under immigration law security certificates.

Our concerns for increasing the fairness and legitimacy of executive decisions made on the basis of secret evidence is motivated not simply by an inherent preference for the greatest fairness and transparency feasible, or even our belief that fair proceedings produce better outcomes and minimize the risk of "false positives". They are also grounded in specific concerns that the Daesh narrative (and that of other terror groups) seeks to promote and exploit perceptions that Western counter-terrorism is an indiscriminate and unfair attack on true Muslims. Enhanced fairness is, in other words, its own form of counter-narrative. At the same time, we would stress that allowing special advocates into no-fly and passport revocation judicial review proceedings only mitigates the unfairness of using secret evidence against persons. It is an imperfect proxy, but one that would constitute a significant improvement over the status quo.

What Should Be Done?

The government should:

- Revisit the major recommendations of the Air India Commission aimed at facilitating the conversion of intelligence to evidence. These include giving designated provincial superior court judges the ability to make and revise non-disclosure orders under s.38 of the *Canada Evidence Act* in the course of terrorism trials.
- Recognize a formal role for special advocates in s.38 and other provisions where secret evidence is used – including on appeals or judicial reviews of no-fly listing and passport revocations. This can help minimize false positives as well as governmental overclaiming of secrecy.
- Section 38 should not be amended to allow the government to use secret evidence to defend itself in civil lawsuits.
- CSIS should not be left with the power to unilaterally decide whether it will share intelligence that is evidence of terrorism conduct with police. We have addressed this issue in a recommendation in our section on information-sharing.

VIII. CONCLUSION

The Green Paper raises many discrete issues. Careful consideration of each of them is long overdue and the only major omission is the failure to discuss CSE. Nevertheless, there is a danger of losing the forest for the trees. In this article, we have argued that the adequacy of the accountability process is a central thread that runs throughout the discussion of information-sharing and enhanced investigative capabilities. It is regrettable that the government did not add the very necessary renovation of expert watchdog review structure to its otherwise (largely) praiseworthy Bill C-22 initiative, giving a committee of Parliament access to secret national security information.

It is unrealistic to think that parliamentarians (even assisted by a secretariat) can conduct the type of audits of increased information-sharing and investigative powers. It would be wrong to suggest that the new parliamentary committee can conduct this work, or that review by parliamentarians and executive watchdogs is duplicative. It is particularly concerning that the Green Paper offers both an aggressive interpretation of the information-sharing provisions of C-51 and explores an expansion of digital investigative capabilities without first getting the accountability house in order.

Another thread that runs through many of the discrete topics in the Green Paper is the need to work towards a more manageable relationship between secret intelligence (including when it is used as secret evidence in administrative proceedings relating to no fly listing, passport revocation and proscription decisions) and public evidence. Not only CSIS threat reduction powers, but also peace bonds, no fly listing, passport revocations and even enhanced information-sharing about terrorist suspects all should be structured so that they are both fair and whenever possible facilitate, rather than foreclose, criminal prosecutions. It may be that these other alternatives offer a chance to "scare straight" potential security threats. But in truth, all of these alternatives to the criminal sanction likely offer less viable solutions than successful criminal prosecutions, if at issue are truly dangerous people.

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[116] At least to the extent that s.7 interests in life, liberty or security of the person are engaged. See *Charkaoui v. Canada* [2007] 1 SCR 350.

CSIS'S NEW DISRUPTIVE POWERS, GREY HOLES, AND THE RULE OF LAW IN CANADA

Michael Nesbit

Abstract: Section 12.1 of the *Canadian Security Intelligence Service Act (CSIS Act)* formally came into force with Parliament's enactment of Bill C-51. Section 12.1 has taken *CSIS* from its traditional role as an information collection and analysis agency to one that is empowered to exercise disruptive powers against potential terrorist threats – a task long performed by Canada's police services. Parliament relied on a system of pre-emptive judicial warrants to justify *CSIS's* new powers. In particular, this scheme was held out as a meaningful check on *CSIS* activity just as judicial warrants are used daily as a check on police power, particularly in the area of search and seizure law. But the term "judicial warrant" is where the meaningful similarities between the system that disciplines police conduct and section 12.1's scheme governing *CSIS* activities begins and ends, not least because the section 12.1 scheme contemplates that a judge may authorize *Charter*-infringing or unlawful activities the likes of which has never been seen in Canadian law. Seen in this light, section 12.1 is supported by a "rule of law trope" – a reference to a well-worn legal norm or standard that serves to obfuscate the fact that the standard, as legislated in the new scheme, offers little to meaningfully constrain state activity. The result is that Parliament has created a very subtle "legal grey hole"; that is, it has created a scheme that is nominally prescribed by law – there is formal law in place authorizing the exercise of new *CSIS* powers – and that appears on first blush to be governed by a well-worn system of legal checks and balances, but that in practice offers little in the way of oversight or legal protections for individuals. In the end, the façade of legality exists where the substance of legality should govern.

L'article 12.1 de la Loi sur le Service canadien du renseignement de sécurité (loi sur le SCRS) est officiellement entré en vigueur après l'adoption par le Parlement du projet de loi C-51. En vertu de cet article, le SCRS, traditionnellement chargé de recueillir et d'analyser des informations, a maintenant le pouvoir de « perturber » les menaces terroristes potentielles — une tâche longtemps effectuée par les services de police canadiens. Le Parlement s'est appuyé sur un système de mandats judiciaires préventifs pour justifier les nouveaux pouvoirs du SCRS. Plus précisément, ce système a été présenté comme un moyen de contrôle efficace des activités du SCRS, selon le même principe que les mandats judiciaires utilisés quotidiennement pour contrôler les activités de la police, notamment en matière de perquisition et de saisie. Cependant, le terme « mandat judiciaire » est le seul point important qu'ont en commun le système de contrôle de la conduite policière et le mécanisme régissant les activités du SCRS, notamment parce que l'article 12.1 prévoit qu'un juge peut autoriser des mesures contraires à la Charte des droits et libertés ou à d'autres lois canadiennes, ce qui constitue un précédent en droit canadien. Vu sous cet angle, l'article 12.1 s'appuie sur un « trope de la règle de droit » — par référence à une norme juridique connue dont on se sert pour cacher le fait que la norme imposée par le nouveau mécanisme est peu contraignante pour l'État. En d'autres termes, le Parlement a créé une très subtile « zone grise » juridique, soit un mécanisme nommément prescrit par la loi — en effet, une loi confère explicitement au SCRS le droit d'exercer ses nouveaux pouvoirs — qui semble à première vue régi par un système bien établi de freins et de contrepoids juridiques, mais qui, dans la pratique, offre peu des possibilités aux individus en matière de surveillance et de protection juridique. En fin de compte, une façade existe là où devrait régner la légalité.

INTRODUCTION

One of the most controversial aspects of Bill C-51[1] was its empowering of the *Canadian Security Intelligence*

1 Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2d Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, C 20.

2 CSIS and others described the power generally as "disruption" or "threat disruption" throughout the debates on Bill C-51. See for example: Government of Canada, "Backgrounder: Amending the Canadian Security Intelligence Service Act to Give CSIS the Mandate to Intervene to Disrupt Terror Plots While They Are in the Planning Stages" (30 January 2015), archived online: news.gc.ca/web/article-en.do?nid=926869; Craig Forcese and Kent Roach, *False Security: The radicalization of Canadian anti-terrorism* (Toronto: Irwin law, 2015) at page 245 [Forcese & Roach, *False Security*].

Service (CSIS) to "disrupt" terrorist activity,[2] which has now been codified in section 12.1 of the *Canadian Security Intelligence Service Act (CSIS Act)*.[3]CSIS went from being an information collection and analysis agency to exercising what Professors Craig Forcese and Kent Roach have called "kinetic" powers to disrupt potential terrorist plots,[4] a function previously reserved largely for traditional law enforcement agencies, led by the Royal Canadian Mounted Police (RCMP).

Fortunately, a proposed Parliamentary review of and public consultations on Bill C-51 provides for the opportunity to rethink the necessity, efficaciousness and legality of section 12.1 of the *CSIS Act*– and indeed other controversial aspects of Bill C-51 – in a way that was not possible at the time due to the rapid passing of the Bill and limited public consultations.[5]The questions to be asked now include, but are not limited to: (1) is section 12.1 actually necessary?; (2) does it suit the needs it was drafted to meet in a way that makes Canadians safer?; (3)does it offend the Canadian *Charter of Rights and Freedoms*?;[6] and, (4) are the new provisions consistent with the rule of law in Canada? I will leave the first two questions for security experts, while the third question has been convincingly and thoroughly discussed,[7] though I will come back to it in part at the end of this paper. That leaves for the majority of this paper to pick-up on the fourth and final question, that being whether section 12.1 of the *CSIS Act* complies with the rule of law. I will focus my discussion on the particularly controversial authorization of *Charter*-infringing CSIS activity that section 12.1 of the *CSIS Act* seeks to legalize primarily by its resort to a pre-emptive scheme of judicial warrants. By holding section 12.1's scheme to account to a substantive conception of the rule of law, that is one that sees the rule of law as necessarily endowed with substantive (legal-moral) principles, one can see that Bill C-51 created a legal grey hole. Put another way, it can be seen that section 12.1's judicial warrant process offers the trappings of the rule of law without the requisite substance.

CSIS's DISRUPTIVE POWERS: A (BRIEF) LEGAL PRIMER

A history of the separation of duties between CSIS and the RCMP is beyond the scope of this article, but suffice to say that because of a series of widespread and systematic illegalities perpetrated by the RCMP in the 1970s, when enacted in 1984 the *CSIS Act* intentionally created a separation of powers – or perhaps better a separation of duties – as between the RCMP and CSIS. Whereby policing powers, including powers to act "kinetically" to arrest or prevent harm, were assigned to the former.[8]This division of authority changed with Bill C-51, which added section 12.1, 12.2 and 21.1to the *CSIS Act*. In particular, these sections provide the rather indeterminate scheme for when and how CSIS might exercise its *Charter*-infringing kinetic powers.

Section 12.1 formally endows CSIS with the authority to "reduce threats to the security of Canada." It states: "If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat."[9]A "threat to national security" is then defined in section 2 of the *CSIS Act* to include espionage, sabotage, "foreign influenced activities...detrimental to the interests of Canada", or undermining the constitutional system of Canada. So if CSIS has reasonable grounds to believe that there is a broadly defined threat to national security, CSIS can now clearly act to "reduce the threat."

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3 RSC 1985, c C-23 [*CSIS Act*].

4 See Forcese & Roach, *False Security*, *supra* note 2 at 245. This paper will refer to the power as either disruptive or kinetic depending on the circumstances.

5 Note that Craig Forcese and Kent Roach undertook an unprecedented academic endeavor at the time of the passage of Bill C-51 to remedy the problems associated with the quick passage of a Bill that allowed for little public consultation or expert input. The result was a website with a series of "backgrounders" and blog posts, as well as a book. See Craig Forcese, "Canada's Proposed Anti-Terrorism Act: An Assessment", online: http://www.antiterrorlaw.ca; Forcese & Roach, *False Security*, *supra* note 2.

6 *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 [*the Charter*].

7 See Forcese & Roach, *False Security*, *supra* note 2 at Chapter 8; Forcese & Roach, "Bill C-51 Backgrounder #2: The Canadian Security Intelligence Service's Proposed Power to 'Reduce' Security Threats Through Conduct that May Violate the Law and the Charter," (February 12, 2015), online at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564272 [Forcese & Roach, "Backgrounder"].

8 For an overview of the history, see the McDonald Commission: Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981); Forcese & Roach, *False Security*, *supra* note 2 at Chapter 2 and Chapter 8, page 248.Now to some extent CSIS had seemingly been engaged in some threat reduction activities for some time, though the extent of which, and what precisely section 12.1's authority was intended to add to that, was never particularly clear during the Bill C-51 debates. See discussion in Roach & Forcese, *False Security*, *ibid* at 245-246. For confirmation that some low-level kinetic activity had been taking place within what CSIS viewed as legal, see Standing Senate Committee on National Defence and Security, 42st Parl, 2nd Sess, No 35 (20 April 2015).

9 *CSIS Act*, *supra* note 3 at section 12.1.

There are then very few legal limitations to CSIS's kinetic powers to be found in the new scheme. First, section 12.1(2) states: "The measures shall be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat." Second, section 12.1(3) states: "The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1."Third, section 12.2 adds: "In taking measures to reduce the threat to the security of Canada" CSIS "shall not" through intention or negligence cause death or bodily harm;[10] "willfully" obstruct or "pervert" justice; or "violate the sexual integrity of an individual."[11]Combined, these sections place an internal – and largely self-regulating – limit on CSIS not to act in a disproportionate or unreasonable manner, not to intentionally cause death or bodily harm, obstruct justice, or violate the sexual integrity of a person. Section 12.1(3) does not spell-out any substantive limitations on CSIS's actions, but rather provides for the oversight mechanism – that CSIS seek a judicial authorization in the form of a warrant from "designated judge" of the Federal Court[12]– but only if it intends to conduct unlawful or *Charter*-infringing activities.

The warrant procedure is then found in the other new provision of the *CSIS Act*, section 21.1. Its procedural checks function as follows. First, the Minister of Public Safety must approve CSIS's decision to seek a warrant. Second, section 21.1(2) sets-out the procedural requirements for the warrant, mostly content-based, including that CSIS must provide: (a) the factual basis for the assertion that there are reasonable grounds for a warrant; (b) an explanation of the proposed measures; (c) the reasonableness and proportionality of the proposed measures as per section 12.1(2); (d)-(f) a description of the person or place that will be affected; and, (g) the timeline, not to exceed one year or 60-days if the warrant is directed towards undermining unlawful activity or the violent overthrow of the constitutional order of Canada.[13] Provided that the procedural elements are adequately presented in the warrant and the authorizing judge and CSIS are satisfied that the nominal restrictions found in sections 12.1(2) and 12.2 are met, CSIS may then act to reduce threats – broadly defined – even if those actions will violate the *Charter*.

Before moving on to discuss the implications of this scheme for the rule of law, let us return for a moment to section 12.1, particularly subsection 4, which states that: "For greater certainty, nothing in subsection (1) confers on the Service any law enforcement power." The importance of this provision will become apparent shortly, but for now it suffices to say that section 12.1(4) serves as a reminder that the type of kinetic activities undertaken by CSIS will not be arrests, that is, unlike with the RCMP the intervening action does not serve as a likely prelude to criminal charges, arrest, and trial.

THE RULE OF LAW AND CSIC's NEW DISRUPTIVE POWERS

Professor David Dyzenhaus has observed that executive responses to national security matters can create both "black holes" and "grey holes" in the law. Black holes are easily analyzed from a rule of law perspective: they are a "lawless void…in which the state acts unconstrained by law"[14] and are thus easily seen as anathema to legality. If state action is not governed by law – if there is a legal black hole – then the state action is not ruled by law. By contrast, Dyzenhaus describes grey holes as those that offer "some procedural rights but not rights sufficient [to] effectively…contest the executive's case…"[15] Dyzenhaus suggests that though black holes are more readily apparent, clarity itself has a value. One knows precisely what the law is and is not, and courts can engage with the transparent decision to create legal black holes. Grey holes are similarly lacking when it comes to the substance of their legal protections but, in contrast to black holes, offer a "façade of legality".[16]

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10 As per subsection 12.2(2) of the *CSIS Act*, *supra* note 3, bodily harm is defined in the same way as it is in section 2 of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*], which is harm to an individual that is neither trivial nor transient.

11 See *CSIS Act*, *supra* note 3 at subsections 12.2(1)(a)-(c).

12 See *CSIS Act*, *ibid* at section 21.1.

13 In a rather convoluted piece of drafting, section 21.2(g) sets the standard of 60-days or one year for the warrant timeline, while section 21.1(6) explains that the one year timeline applies unless the CSIS is directed to activities found in section 2(d) of the CSIS Act, which defines threats to national security. It is section 2(d) which ultimately confirms that the 60-day timeline applies to CSIS activities targeting unlawful activities or activities contemplating the violent overthrow of the constitutional order of Canada.

14 David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27 Cardozo L. Rev. 2006 at 2006.

15 *Ibid* at 2026.

16 *Ibid* at 2038.

It is this façade of legality – the failure to be transparent about the lack of governing legal principles and oversight – that can ultimately make them more dangerous.[17]

Professor Shirin Sinnar incorporates this distinction into her analysis of troubling national security laws in the US context in her paper on *Rule of Law Tropes in National Security*.[18]What is interesting for present purposes is her general approach: she identifies and discusses instances where the executive power purports to rely on pre-existing 'legal' norms or standards, but ultimately legislates or acts in a manner that leaves the state largely unconstrained by those norms or standards.[19] In this way, the legal provision is supported by a rule of law trope rather than the rule of law proper. As Sinnar explains: "Such tropes lead observers to draw false equivalences across legal contexts, thus obscuring hard questions surrounding national security constraints, and mask the lack of oversight over…national security practices."[20]CSIS's new disruptive powers found in Bill C-51 – and now entrenched in section 12.1 of the *CSIS Act* – offer a Canadian example of a national security grey hole, whereby a 'rule of law trope' – the very type of justificatory allusions to legality that Sinnar warns of–is used as justificatory support for the legality of a provision that in reality offers little in the way of oversight or legal protections for individuals. The result is state authority to exercise a power that is, in practice, largely unconstrained by law. This is no small claim to make, so let us now examine it in detail.

In enacting Bill C-51, Parliament rightfully understood that prior legal authorization was required to justify CSIS's new disruptive activities, particularly where, as contemplated by section 12.1 of the *CSIS Act*, that action could affect the rights of individuals.[21] As such, there is no legal black hole to be found – the new powers are prescribed by law, which is to say that the legal authority is written in a public act and certain limitations on state action are contemplated. During Parliamentary hearings, section 12.1 was then justified by repeated references to a national security imperative. To the fact that the process would be overseen by what was implicitly asserted to be a well-worn judicial warrant process, and obscure official assurances that the undefined kinetic activities contemplated in Bill C-51 would be largely benign[22] – for example, proponents of the new CSIS powers tended to cite the need for CSIS to 'intervene' to talk to the friends, families and co-workers of presumptive terrorist threats.[23]Seen in this light – and taken no further – section 12.1 is a seemingly inoffensive law made pursuant to an understanding that legality governs state actions even in cases of national security.[24]

But the law on the books does not reflect such a benign intention, or at least it is not so narrowly defined as to limit CSIS's actions to such benign acts. As we have seen, the law on the books contemplates the authority to go well beyond interrogating acquaintances of at-risk persons; indeed, it supposes the possibility of unlawful kinetic activities that could

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17 *Ibid*.See generally David Dyzenhaus, "The Rule of Law Project" (2015-2016) 129 Harv. L. Rev. F. 268, esp. at 268 [Dyzenhaus, "The Rule of Law Project"]. For a different description of the contrast between black and grey holes, and the dangers inherent in both, see Dyzenhaus, "Preventive Justice and the Rule of Law Project", in Andrew Ashworth, Lucia Zedner,and Patrick Tomlin, eds., *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 91 [Dyzenhaus, "Preventive Justice"] at 99: "[With legal grey holes] there are legal controls, but these are not substantive enough to give the affected individuals any real protection. There is just enough legality to provide government with a basis to claim that it is still governing in accordance with the rule of law, and thus to garner some legitimacy. Since these holes are in substance black, their existence…is even more dangerous for the rule of law than black holes."

18 See Shirin Sinnar, "Rule of Law Tropes in National Security" (2015-2016) 129 Harv. L. Rev. 1566.

19 See *ibid*. For an excellent overview, see Dyzenhaus, "The Rule of Law Project", *supra* note 17, esp. at 268.

20 Sinnar, ibid at 1569.

21 The Supreme Court of Canada has made this point clear, for example in stating that warrants are presumptively required to search and seize. See *Hunter v Southam Inc*., [1984] 2 SCR 145.

22 Further, "Minister Blaney cited the RCMP *Criminal Code* law-breaking justification…as precedents for the CSIS threat reduction power." Forcese & Roach, *False Security, supra* note 2 at 260; see discussion at 260-261. Though there is not the space available to go into that justification here, there is a strong case to be made that the reference to section 25.1 police powers represents another rule of law trope that was rolled out to justify the CSIS authority to conduct unlawful activity. That is, Minister Blaney relied on a (controversial) provision in section 25.1 of the *Criminal Code, supra* note 10, which allows for police officers to conduct unlawful activity in certain prescribed situations. Think for example of an undercover officer embedded in a gang that has to smoke marijuana to be accepted; that officer would need authority to break the law in his or her undercover capacity. However, the oversight and legal restrictions as between the two regimes – police and CSIS – are, in practice, very different, with significantly less oversight and procedural protections in place in the *CSIS Act* scheme.

23 For an overview, see Forcese & Roach, *False Security, supra* note 2 at 245-246.

24 David Dyzenhaus has called this tendency of democratic governments to recognize that state action must be governed by law the "compulsion of legality" See Dyzenhaus, "The Compulsion of Legality", in Victor V Ramraj, ed, *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2005) 33. He elaborates: "compliance with legality is seen as a necessary if not sufficient condition for state action." See Dyzenhaus, "Preventive Justice", *supra* note 17 at 94.

violate the *Charter*, with the limitations only that it be in pursuit of national security, not violate bodily or sexual integrity, not be intended to obstruct justice, that the act be "proportional" in the circumstances, and most importantly that CSIS obtain an authorized warrant.[25]In practice, it is the judicial warrant that does virtually all of the legal work here: it is the authorization of the warrant by a judge that ultimately determines when and how CSIS can exercise its new-found power to effect otherwise unlawful or *Charter*-infringing action, and it is through this process that the checks on state action are independently maintained. But while the warrant process that exists with respect to Canadian search and seizure law, or to arrest warrants, is well-entrenched and its legality clear, the warrant process contemplated by section 12.1 of the *CSIS Act* is a rule of law trope that draws on the illusion of legality by virtue of the association with the 'usual' search and seizure warrant process. Unlike the 'usual' warrant process in Canadian law, the warrant process contemplated under section 12.1 fails satisfactorily to discipline the state action, or at least there is no way for the public to be confident that the judicial warrant is effectively disciplining state action. This failure is evident as follows.

First, the secrecy – or lack of transparency[26]and accountability[27]– built into each stage of the warrant process produces an outcome that cannot ensure that state action is disciplined by law. The request for the warrant is made by CSIS in secret and the warrant is authorized – or refused – in secret proceedings, without the normal multi-party challenge function thought so fundamental to Western legal trials. No "special advocate" system is contemplated, as exists with other secret proceedings in Canada, to ensure that the evidence presented by the state is challenged.[28]Moreover, as Professors Forcese and Roach have said, "Bill C-51 is silent on whether CSIS has to report back to the judge on what was done when executing the threat reduction warrant."[29] Thus, even where the warrant application is properly disciplined by the judge authorizing the warrant, there is little opportunity for that judge to keep abreast of whether the actual execution of the warrant is consistent with the warrant issued.[30]

On its own, this is not necessarily such a troubling development since police officers regularly obtain warrants in private proceedings with a judge or Justice of the Peace, for example before executing a search for drugs.[31] What is troubling is that a police warrant can – and usually does – eventually become public, at least in part,[32] when it is used for example at a criminal trial to justify a police search and, usually, seizure that forms the basis of criminal charges.[33] In contrast, CSIS's activities are unlikely to end up before the courts: remember that section 12.1(4) explicitly says that section 12.1 does not confer "any law enforcement power", meaning in practice that CSIS's actions – if acting alone under section 12.1 – are not intended to lead to an arrest and criminal charges.

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25 For an example of activities that would not be constrained by the scheme, see Forcese & Roach, *False Security, supra* note 2 at 249-257. The most extreme examples that could theoretically be permitted by the scheme include rendition and detention of individuals. For a discussion see *ibid* at 255-257.

26 Transparency is widely seen as a foundational principle of the rule of law. It is why we have the principle of open courts, why laws must be written, accessible and known or knowable to the public, why criminals must be made known of the charges against them and why they are entitled to reasons for any decisions that affect them.

27 Much like transparency, accountability is widely regarded as a fundamental principle of the rule of law. At its most basic level the principle dates back to the *Magna Carta* and the assertion that nobody is above the law – the law applies equally to us all, and in turn all members of society regardless of their position in government or a Monarchy are accountable to the law.The law provides a bulwark against arbitrary or capricious rule by ensuring that it is knowable and applicable to all, equally. For a nice introduction to the Magna Carta and the rule of law, see the British Library, "Why the Magna Carta still matters today," online: http://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today.

28 For an overview of the special advocate system see: Canadian Department of Justice, "Special Advocates Program: Overview", online: http://www.justice.gc.ca/eng/fund-fina/jsp-sjp/sa-es.html.

29 Forcese & Roach, *False Security, supra* note 2 at 248.

30 This is not just a theoretical problem. It has happened in the past that what was authorized, and what was undertaken, did not mesh. The court only learned of the disconnect between the actions and the warrant by accident. See the case of Re X, 2014 FCA 249.

31 The general search warrant provision in the *Criminal Code, supra* note 10,can be found at section 487, while the limitations can be found at 487.01. See generally Part XV of the *Criminal Code*.

32 For example, if the police justification for the warrant is based on information obtained from a confidential informant, then the name or identifying information associated with said informant will be redacted, though defence counsel can too challenge this redaction.

33 It is not just abusive behavior one should be worried about here; that is, even strong oversight by a warrant-issuing judge is insufficient by itself without the possibility of review of the warrant or the activity subsequently executed by the state actor. Anyone with experience in the normal process of search and seizure warrants for police offices will know that it is inevitable that mistakes will be made, either with respect to the issuance of the warrant or its execution; for this reason, the warrant-issuing process demands the meaningful possibility of review. See discussion at the end of the paper under the heading "A Final Note on the Rule of Law and Warrants Authorizing Charter Infringements", *infra* pages 9-11.

The combined result is that the warrant, once authorized by the single judge, is unlikely to be overseen, challenged or perhaps even reviewed after the fact by any independent party in the justice system. Judicial review of the disruptive activities would come only by virtue of legal proceedings initiated by an individual subjected to such activities.[34] But there are limited situations in which one can imagine an individual challenging CSIS's disruptive powers, and many constraints exist to individual action, including that: (1) individuals targeted by the disruptive activities would have to know about said activities; (2) they would have to have the financial, intellectual and emotional means to proactively challenge the activities, that is, challenge the disruptive activities in court likely after the disruption has already taken place and without the usual incentive to resort to legal action that comes from being charged criminally; and, (3) to reasonably suspect that an individual would bother with a court challenge, the subject of the disruptive activity would likely have to have a claim in court worth litigating – that is, something would have to be seized, an unlawful detention would have to be ongoing, or the search and seizure by CSIS would have to form part of a subsequent justification for criminal charges by the RCMP. Combined, one imagines that most if not all of CSIS's disruptive activities would never see the inside of a courtroom. CSIS's kinetic activity is, as a result, constrained more by a trope, an allusion to a well-established system of warrants and oversight ordinarily associated with search and seizure law, than any robust rule of law discipline.

Likewise, because of the lack of transparency and accountability that is sure to result from most cases of disruptive activity, and the fact that CSIS's activities are highly unlikely to be challenged during or after the warrant process, neither the warrant judge nor CSIS is disciplined by the meaningful *threat of oversight*– either by courts, Parliament[35] or the Canadian media and public. The one body that will provide oversight of CSIS activities is the *Security Intelligence Review Committee*(SIRC),which generally does an excellent job exercising its departmental review function.[36] However, the SIRC cannot compensate for proper judicial oversight, particularly where CSIS is seeking authorization to conduct unlawful and/or *Charter*-infringing activities. First, the SIRC *reviews CSIS* activity, it does not provide *oversight*. That is, the SIRC will not oversee disruptive activities in real time, which could allow for intervention to cancel or amend operations; rather, the best it can do is report on disruptive activities after they have taken place – and then not necessarily after each disruptive activity, as a court might do. Second, the SIRC has no enforcement power over CSIS; it can only report on its activities and make recommendations. Unlike a court, it cannot overturn a warrant and prevent continued *Charter* infringements from taking place. It likewise cannot give advice to judges who might authorize future warrants about what has or has not been acceptable in the past. Third, the SIRC is limited in terms of the details it can make public; for good reason it cannot include all details of CSIS operations in its public yearly reports.[37]Finally, the SIRC is notoriously underfunded and understaffed. While it nevertheless manages its functions effectively, relying on a single underfunded, understaffed, after-the-fact review body with no coercive or legal powers and a restrained ability to provide informational details to the public is no replacement for judicial oversight and review of the warrant process, particularly where section 12.1(3)

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34 There is always the possibility that the Federal Court warrant authorizing judges will "read-in" requirements to the process – such as requirements to report back on activities – in an attempt to remedy it. However, whether they will take this route is yet to be determined and there will certainly be obstacles, the most obvious of which is that there are so many deep structural problems that would need addressing to ensure adequate legal oversight that judges may not be able to "read-in" sufficient safeguards, or they may not want to do so. In other words, judges might not feel they can read-in provisions without creating law and indeed processes, as contrasted with filling-in holes with interpretations based on well-defined legal principles.

35 There is an obligation in section 21(1) of the *CSIS Act*, *supra* note 3, that the Minister of Public Safety sign off on all warrants, meaning that there is at least one Member of Parliament who would, while sworn to secrecy, at least have seen the request for authorization.

36 It is unclear at this time what role the newly-proposed *National Security and Intelligence Committee of Parliamentarians* might have, though it is likely to suffer from most of the same pratfalls as the SIRC when it comes to effectively overseeing and holding CSIS to account for its kinetic activities, the most prominent of which is that it is outside the justice system and may have limited access to information on the details of kinetic activity.

37 In its 2014-2015 annual report, the SIRC had the following to say about its new obligations with respect to CSIS's disruptive activities: "The new legislation will require the CSIS Director to include in his annual report to the Minister specific information concerning *a general description of the threat reduction measures that were taken*; the number of warrants issued and the number of applications for warrants that were refused; and, *a general description of the measures that were taken under the warrants*...SIRC will need to broaden its review sample to include threat reduction warrants, to examine whether the information underlying the warrant is accurate and whether the activities carried out under the authority of the Federal Court followed the parameters set out in the warrant. By the same stroke, SIRC will be largely involved in determining the legality of those threat reduction activities where CSIS did not seek a warrant from the Federal Court. This assessment of constitutionality and *Charter* rights will add an expansive element of legal support to research activities." Security Intelligence Review Committee, Broader Horizons: Preparing the Groundwork for Change in Security Intelligence Review, 30 September 2015, online: http://www.sirc-csars.gc.ca/pdfs/ar_2014-2015-eng.pdf.

provides such a broad and vague authority for proposed unlawful or *Charter*-infringing activity.[38]

In the end, the problem is thus not just that the whole process is likely to take place in complete secrecy where the public cannot be sure that state actions are properly constrained by the law, but that the relevant actors will *know* that their actions are unlikely to be challenged in public or ever made known to the public in any detail. It is thus not simply the lack of legal oversight of the process, but the fact that the threat of oversight or being called to account is largely absent from the entirety of the prescribed process. Reason-giving will be stronger when the reason-giver is forced to articulate her thoughts and knows that those reasons will be challenged by others. In the result, state accountability to the law, a fundamental tenet of the rule of law in Canada,[39] is highly attenuated: holding the state to account is completely dependent on the good graces of a single judge under the pressure that comes with decision-making in the national security context, who is presented with unchallenged evidence, and has little capacity to remedy mistakes, or have any mistakes in the warrant process remedied by a reviewing court.[40]

In this way section 12.1 lacks both the requisite transparency and the checks and balances necessary to hold state actors to account for their actions – including their mistakes. Law formally prescribes the process under section 12.1, but law does not meaningfully discipline that process. A rule of law trope – in this case a modified version of a well-established legal tool, a search warrant (or arrest warrant) – stands as a façade to the legality of the provision, which lacks the necessary substance to offer meaningful legal oversight and protection in practice. Seen in this light, we would be better off with a legal black hole, something Parliament knew it had to fill, as opposed to a legal grey hole. Hopefully, in its review of Bill C-51, this time around Parliament will see section 12.1 as currently constructed for what it is.

A FINAL NOTE ON THE RULE OF LAW AND WARRANTS AUTHORIZING CHARTER INFRINGEMENTS

There remains an open question, one too complicated to discuss in detail in the space allotted here, as to whether Parliament can outsource authority to judges to create exceptions to the *Charter*, that is, to invest judges with the power to authorize *breaches* of the *Charter*. Briefly, the problem goes as follows.

Judicial warrants in the usual sense, in search and seizure law or arrest warrants, are designed to *prevent rather than authorize Charter* violations. Search warrants are prepared by police and authorized by a judge or Justice of the Peace and operate with respect to section 8 of the *Charter*, which protects against "unreasonable" search and seizure.[41] The warrant-authorization process is then a check on the "reasonableness" of the proposed search and seizure: it either denies authority to search or offers independent judicial confirmation that the search will in fact, if executed in conformity with the warrant, be reasonable and thus *Charter*-compliant. Put another way, the judicial actor is confirming legality by confirming the reasonableness of the proposed search and seizure, not authorizing illegality. Arrest warrants work in much the same way. Section 9 of the *Charter* protects against being "arbitrarily detained or imprisoned."[42] An arrest warrant does not allow for otherwise arbitrary detention or imprisonment; rather, it confirms that the police justification for the arrest or detention is not arbitrary. Section 9 thus acts as a check on state power and is not permissive in terms of allowing for the breach of Canadian law. By contrast, section 12.1(3) of the *CSIS Act* authorizes a judge in turn to authorize a warrant to *breach* seemingly any *Charter* right – and the non-section 8 or 9 rights are not couched in the terms of arbitrariness or (un) reasonableness. As Forcese and Roach say, "there is no concept of 'unreasonable' cruel and unusual punishment."[43]The end result is a provision – section 12.1 – that vests in judges of the Federal Court the unprecedented power to preemptively authorize the

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38 In contrast, section 487 of the *Criminal Code*, *supra* note 10 – indeed much of Part XV of the *Criminal Code* – provides very specific and circumscribed circumstances where a warrant authorization is required and how it is to be obtained.

39 See *supra* notes 26 and 27 and the discussion on transparency and accountability.

40 As legal philosopher Lon L. Fuller noted: "A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his firsts, but for his elbows as well" for it is the case that "most of the world's injustices are inflicted, not with the fists, but with the elbows." See Fuller, The Morality of Law, revised ed (New Haven and London: Yale University Press, 1964) at 159.

41 See *the Charter*, supra note 6 at section 8: "everyone has the right to be secure against unreasonable search and seizure."

42 See *ibid* at section 9: "Everyone has the right not to be arbitrarily detained or imprisoned."

43 See Forcese & Roach, "Backgrounder", *supra* note 7 at page 2; see also *ibid* pages 23-26 for a more robust discussion of this issue.

state (CSIS) to infringe the *Charter*– and any right found in the *Charter* at that.

Now, it is normally the case that judges can *retrospectively* authorize *legislation* – as contrasted to authorizing a warrant – that breaches a *Charter* provision because, according to section 1 of the Charter, all rights are subject to certain reasonable limitations.[44] But this too is different from the section 12.1 process because the authorization under section 1 is done after Parliament has legislated in a clear and specific manner,[45]and it is accomplished with a robust "section 1" legal analysis concerning the necessity, proportionality, impairment, etc. of the provision as weighed against the specific right infringed and the harm.[46]In the result, as Professors Forcese & Roach have said: "To imagine that a court can pre-authorize a violation of a right in response to an open-textured invitation to do so is to misunderstand entirely the way our constitution works, on a fundamental level."[47]

So how does this relate to the rule of law discussion above? Well, if the provision attempts to – and does – circumvent the *Charter* then it will necessarily offend the rule of law. But independent of the technical *Charter* compliance, the rule of law would be seriously stretched were judges to exercise the power to pre-authorize a non-section 8 or 9 *Charter* breach through a judicial warrant. At a most fundamental level, in order to uphold the law judges should not participate in a scheme that does not require Parliament to clearly and specifically state – through legislation or other enactments – when and how it intends to derogate from the fundamental rights of its citizens.[48]To do otherwise is to act as the creator (legislator) or at least facilitator of a very black looking grey hole – to fill in the scope and limits of an indeterminate legal void that proposes nothing more than to empower the state to breach the most fundamental rights of its citizens. It is the primary job of judges to be a check on arbitrary state power, to assure that the rule of law informs legal practices and not to participate in a government's creation of legal grey holes from which neither legality nor the judges themselves can escape.[49]In the result, a statutory regime that places judges in the place of Parliament and requires them to legislate authority for Charter-infringing activity in the absence of clear and specific constitutional or legislative instructions from Parliament would surely offend the rule of law – not to mention Canada's *Charter*.

CONCLUSION

As Professor Dyzenhaus has said, "there is value and substance to the idea that the rule of law disciplines executive action."[50] Secret hearings that ultimately allow for unlawful or unprecedented *Charter*-infringing state action, presided over by a single judge with only a CSIS-agent present, and unlikely ever to be challenged in open court or made known in meaningful detail to the public, offer little to assure that covert CSIS activities will be properly constrained. In this sense, not only does section 12.1 of the *CSIS Act*, as currently constructed, fail to properly discipline the (possible)rights-infringing execution of state power, it undermines the values and substance of Canada's legal order. If indeed there is practical value in imbuing CSIS with kinetic powers for the first time, it should be governed by a statutory regime that upholds the substance of the rule of law rather than one that creates a grey hole filled largely with the façade of legality.

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44 See *the Charter*, *supra* note 6 at section 1: "The [*Charter*] sets out the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be justified in a free and democratic society". See generally *R v Oakes*, [1986] 1 SCR 103 [*R v Oakes*].

45 TheCharter, ibid section 1 language says that the specific limit must be "prescribed by law", see *ibid*.

46 See generally *R v Oakes*, *supra* note 43.

47 See Forcese & Roach, "Backgrounder", *supra* note 7 at 2.

48 This is why in Canada the *Charter*, *supra* note 6 has both section 1, which requires the government to prescribe its limits openly and clearly and then justify them to the court, and section 33, the so-called "notwithstanding clause", which says that if the government is to derogate from constitutional rights – those it cannot justify as reasonable in a free and democratic society – then it must explicitly invoke section 33 in stating that it intends to derogate from the Constitution.

49 To quote Professor Dyzenhaus, *The Rule of Law Project*, *supra* note 17 at 273: "[Judges who find themselves operating in a legal grey hole] must take the legal regime provided and read into it whatever legal protections they can. To the extent they cannot, it is incumbent on them to point out the problems that have been created for the rule of law. In this way they can prompt the legislature to design ever more effective means of disciplining the executive..." Section 12.1 of the *CSIS* Actstrikes me as an instance where the latter is required, that is, where it is incumbent on judges to make known the legality problems and not rubber stamp the state action or put a Band-Aid on it by reading-in requirements under the existing process.

50 See David Dyzenhaus, "The Rule of Law Project", *supra* note 17 at 268.

KEEPING ENEMIES CLOSE? ON LOCATING, CONTAINING AND EXPELLING RISK

Carmen K. Cheung[1]

Abstract: Counter-terrorism strategies such as citizenship revocation, passport revocations and no-fly lists are designed to dislocate risk by controlling mobility of high-risk individuals and establishing zones of exclusion – geographies and spaces that dangerous persons cannot access. This essay considers what these strategies are thought to accomplish; what risk is meant to be mitigated; and the inherent contradiction in trying to alternately prevent terrorism suspects from leaving *and* returning to Canada.

Les stratégies contre-terroristes comme l'annulation de citoyenneté, la révocation de passeport et la liste d'interdiction de vol visent à éliminer le risque en contrôlant la mobilité des personnes à haut risque et en établissant des zones d'exclusion — soit des régions géographiques et espaces auxquels les personnes dangereuses ne peuvent pas accéder. Cet essai s'intéresse aux résultats attendus de ces stratégies; au risque qu'on souhaite diminuer; et à la contradiction inhérente au fait d'essayer tour à tour d'empêcher les personnes suspectées de terrorisme de quitter le Canada *et* d'y retourner.

INTRODUCTION

A theory of location runs through certain counter-terrorism strategies. We see it in justifications for citizenship revocation, in the logic of no-fly lists and passport revocations, and in the mechanism of the immigration security certificate. The theory goes something like this: Risk can be identified as attaching to individuals. If these dangerous individuals can be located away from the place where they might cause harm, then risk is mitigated. These are strategies focused on controlling mobility and establishing zones of exclusion – geographies and spaces that dangerous persons cannot access.

This short essay canvasses some of the mechanisms in play in 2015 designed to dislocate "risk": citizenship revocation, passport revocation, and no-fly lists. I will touch briefly on some of the legal controversies relating to these mechanisms, but I also hope to provoke consideration of what these mechanisms are thought to – and actually do – accomplish. What risk is meant to be mitigated by these measures? How well do they work singularly and in combination?

CITIZENSHIP REVOCATION

In 2015, the *Citizenship Act* was amended to allow for denaturalization of Canadian citizens found to be disloyal. Prior to these amendments, denaturalization was permitted only in circumstances where an application for citizenship was found to be fraudulent. In those cases, the granting of citizenship was considered a nullity because it was grounded in fraud.

The amended *Act* permitted the revocation of citizenship lawfully obtained, either by birth or naturalization, for conduct committed *after* becoming a Canadian citizen. Specifically, dual citizens (or Canadian citizens who, in the government's assessment, were entitled to citizenship in another country) could be subject to Canadian citizenship revocation if:

- convicted of a terrorism offence and sentenced to five years imprisonment[2];
- convicted of a treason or spying offence and sentenced to imprisonment for life[3];
- convicted of certain offences under the *Security of Information Act*[4]; or
- found to have "served as a member of an armed force of a country or as a member of an organized armed group and that country was engaged in an armed conflict with Canada"[5].

Once citizenship was revoked, the individual would become a foreign national and vulnerable to expulsion from Canada. This mechanism, in effect, reintroduced

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2 *Citizenship Act*, R.S.C. 1985, c. C-29, s. 10(2).

3 *Ibid*.

4 *Ibid*.

5 *Citizenship Act*, *supra* note 1 at s. 10.1(2).

exile as a punishment for misconduct, and as a mode of containing risk to the nation by expelling the dangerous individual from the state and polity entirely.

When these amendments to the *Citizenship Act* were being debated in Parliament, civil society groups[6] and legal scholars[7] shared their concerns over the legality of the provisions, their potential for creating effective statelessness, and the morality of citizenship stripping – depriving an individual of "the right to have rights"[8]. Shortly after the amendments came into force, the British Columbia Civil Liberties Association and the Canadian Association of Refugee Lawyers filed a constitutional challenge[9] to citizenship revocation on national security grounds, claiming violations of the following sections of the *Charter of Rights and Freedoms ("the Charter")*:

- Section 12 (right to be free from cruel and unusual treatment and/or punishment);
- Section 7 (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);
- Section 11(h) (right to be free from double punishment for the same offence);
- Section 11(i) (protection against ex post facto imposition of greater punishment for previously-committed offences);
- Section 15(1) (equality and non-discrimination).

During the 2015 election, the Liberal party made repeal of the citizenship revocation amendments a key campaign promise, with party leader (and eventual Prime Minister) Justin Trudeau declaring at a debate between party leaders that "a Canadian is a Canadian is a Canadian"[10]. Shortly after coming into power, the Liberal government tabled Bill C-6[11], which proposes to undo 2015's citizenship stripping amendments. As of this essay's writing, Bill C-6 has yet to be passed.

To the extent that citizenship revocation is conceived of as a counter-terrorism strategy as opposed to a mechanism for protecting the "value" of Canadian citizenship, the risk being managed appears to be the threat of terrorist activity within Canadian borders. Citizenship revocation permits the state to expel dangerous individuals, thereby limiting their ability to engage in violence locally. It can be seen as a way to export risk, though in the case of transnational terrorism, physically removing the individual may not necessarily result in elimination of the risk. As the example of Anwar al-Awlaki illustrates, national security threats living in exile can still do harm at home.[12] Moreover, strategies aimed at expelling risk also seemingly work at cross-purposes with attempts to contain and localize potentially dangerous individuals through mechanisms such as passport revocation and no-fly lists, as discussed below.

PASSPORT REVOCATION, REFUSAL, AND CANCELLATION

The authority to issue passports is granted to the executive through royal prerogatives exercised by the Governor in Council, and is set out in the *Canadian Passport Order* (CPO), S1/81-86. The *Order* creates ministerial discretion to refuse or revoke a passport for reasons of national or international security, or where "the decision is necessary to prevent the commission of a terrorism offence." Likewise, passports may be cancelled in order to prevent the commission of a

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6 *See, e.g.*, Canadian Association of Refugee Lawyers, "Brief of the Canadian Association of Refugee Lawyers: Bill C-24, An Act to amend the Citizenship act and to make consequential amendments to other Acts" (May 5, 2014), available at: http://carl-acaadr.ca/sites/default/files/CARL%20C-24%20Brief%20to%20CIMM.pdf; Canadian Bar Association, "Bill C-24, *Strengthening Canadian Citizenship Act*" (April 2014), available at: https://www.cba.org/CMSPages/GetFile.aspx?guid=101fdebf-5af8-4ab4-acc7-154959d32876; Amnesty International Canada, "Bill C-24: Amnesty International's concerns regarding proposed changes to the Canadian Citizenship Act" (June 9, 2014), available at: https://www.amnesty.ca/sites/amnesty/files/c24_brief_amnesty_international_canada.pdf.

7 Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (December 4, 2014). Queen's Law Journal, Vol. 40, No. 1, 2014; Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists'" (August 30, 2013). Queen's Law Journal, Vol. 39, No. 2, 2014.

8 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and Company, 1951) at 294.

9 *The British Columbia Civil Liberties Association, The Canadian Association of Refugee Lawyers, and Asad Ansari v. The Attorney General of Canada*, Federal Court File No. T-1380-15, Statement of Claim (August 20, 2015), available at: https://bccla.org/wp-content/uploads/2015/08/20150819-Statement-of-Claim.pdf

10 The Globe and Mail, "'A Canadian is a Canadian is a Canadian': Harper, Trudeau spar over right to revoke citizenship'" (September 28, 2015), available at: http://www.theglobeandmail.com/news/news-video/a-canadian-is-a-canadian-is-a-canadian-harper-trudeau-spar-over-right-to-revoke-citizenship/article26580135/

11 Bill C-6, *An Act to amend the Citizenship Act and to make consequential amendments to another Act*, 1st Sess., 42nd Parl. 2016 (first reading in the Senate June 17, 2016).

12 Scott Shane, "The Lessons of Anwar al-Awlaki", *The New York Times Magazine* (August 27, 2015), available at: http://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html?_r=0

terrorism offence. Passport Canada may also refuse to issue a passport on national security grounds. Passport revocation, refusal, or cancellation can be used to keep individuals from travelling to commit terrorism offences abroad, or to attend terrorism "training" overseas. In cases where the passport holder may have already left Canada, passport revocation[13] can serve to limit the individual's ability to travel or temporarily restrict their ability to return to Canada.

In May 2015, the Federal government introduced changes to the CPO, to permit the Minister of Public Safety and Emergency Preparedness to:

- revoke or refuse to issue a passport upon reasonable *belief* that the decision is necessary to prevent commission of a terrorism offence, "or for the national security of Canada or a foreign country or state"; or
- cancel a passport upon reasonable *suspicion* that cancellation decision is necessary to prevent commission of a terrorism offence, "or for the national security of Canada or a foreign country or state".[14]

Passport revocation on national security grounds was already an option prior to these changes in the CPO and had previously been deployed with respect to suspected returning foreign fighters.[15] However, the government claimed the new evidentiary thresholds would "strengthen" its ability to take "preventative measure against high-risk travellers."[16] At the same time the CPO was being modified, the government introduced in Parliament the 167-page Bill C-59, "an Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures". These "other measures" included the *Prevention of Terrorist Travel Act*, which, despite its rather expansive title, deals almost exclusively with the appeals process for passport revocations, refusals and cancellations.

Specifically, the Act introduces closed hearings and secret evidence into appeals where the Minister's decision to revoke, refuse or cancel a passport is based on national security or terrorism grounds. For example, a judge hearing the appeal of the Minister's decision may receive submissions in the absence of the appellant and their counsel if the judge is of the opinion that disclosure of evidence or information would be injurious to national security or endanger personal safety. The appellant may be provided with only a summary of the information before the judge; however, the judge is free to rely on information or evidence that has been withheld from the appellant. In the case of passport cancellations, which are designed to be a temporary measure, the judge hearing the appeal of the cancellation may admit into "evidence" information that may not necessarily be admissible in a court of law and may base their decision on that "evidence".[17]

The government does not regularly publish statistics on how many passports have been revoked based on national security or terrorism grounds, and whether these revocations have largely taken place in Canada as preventative measures to keep Canadian citizens from joining terrorist organizations overseas, or if these revocations have primarily been used to frustrate travel for Canadians who have already left the country. However, media reports suggest that passports have been revoked under both scenarios, and in 2014, the government stated that there have been "multiple" cases of passport revocation for Canadians who have left to join terrorist organizations in Syria and Iraq.[18]

As administrative mechanisms, passport cancellations, refusals and revocations will require lower burdens of proof in justifying their application. Citizens who are overseas at the time their passports are revoked will have to seek judicial review while abroad, which can pose significant practical challenges. The availability of closed hearings and secret evidence in the appeals process adds to the complexity. Yet challenging the

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13 Here, I use "passport revocation" as shorthand for passport revocation, refusal and cancellation. It is important to note, however, that passport cancellation is meant to be a temporary measure used to prevent travel while the government investigates to determine whether full revocation of the passport is warranted. If there are ultimately insufficient grounds to revoke the passport, it will be reissued.

14 Canada Gazette, Order Amending the Passport Order (May 7, 2015), Vol. 149, No. 10, SI/2015-33 (May 20, 2015).

15 See, e.g., Kristen Everson, Evan Solomon, "RCMP has intervened 28 times against people tied to foreign militant groups", CBC News (Oct. 10, 2014), available at: http://www.cbc.ca/news/politics/rcmp-has-intervened-28-times-against-people-tied-to-foreign-militant-groups-1.2795901.

16 Government of Canada, "Harper Government Introduced Measures for Passport Cancellation, Refusal and Revocation of High-Risk Travellers", News Release (May 7, 2015), available at: http://news.gc.ca/web/article-en.do?nid=972189.

17 Prevention of Terrorist Travel Act (S.C. 2015, c. 36, s. 42).

18 See Stewart Bell, "Canadian government begins invalidating passports of citizens who have left to join extremist groups", *National Post* (Sept. 20, 2014), available at: http://news.nationalpost.com/news/canada/canadian-government-revoking-passports-of-citizens-trying-to-join-extremist-groups; Laura Payton, "Martin Couture-Rouleau case underscores passport seizure dilemma", CBC News (Oct. 21, 2014), available at: http://www.cbc.ca/news/politics/martin-couture-rouleau-case-underscores-passport-seizure-dilemma-1.2807239.

procedural fairness of revocation and appeal may be difficult. Even where the *Charter's* section 6 mobility rights are implicated, the interest at stake is "merely" the ability to obtain a passport; such a deprivation may not necessarily warrant constitutional due process protections.[19]

While the ability to obtain a passport is tied to citizenship, revoking citizenship and revoking a passport may have contradictory outcomes when it comes to mitigating risk. Whereas citizenship revocation attempts to export national security risks, passport revocation serves as an export control. Revoking passports to keep individuals from becoming "foreign fighters" or to engage in terrorism training seeks to contain risk by disrupting potential terrorist activity overseas and confining potential terrorists within Canada's borders. Passport revocation is potentially less useful as an externalization of risk: While it is possible to revoke, refuse or cancel a passport while a citizen is abroad, the displacement of risk may only be temporary. As a constitutional matter, Canadian citizens have a right to enter Canada and the government has been ordered in the past to provide an emergency travel document to a Canadian on the UN Security Council's terrorist blacklist so that he can return home to Montreal.[20] Nonetheless, practical difficulties in obtaining an emergency document may delay or even ultimately frustrate the realization of this right.

If passport revocation works to mitigate the risk of Canadians engaging in terrorism overseas by "containing" the risk locally, what effect does it have on risk at home? Do grounded would-be foreign fighters simply look for ways to engage in terrorism in Canada? Certainly, that is one explanation being offered in recent cases of "home-grown terror" – Aaron Driver and Martin Couture-Rouleau both had restrictions placed on their ability to access passports. The extent to which passport revocation actually plays a role in provoking violence at home, however, remains relatively understudied. Passport revocation is sometimes invoked as a "preventative" measure, to mitigate against the dangers posed by *returning* foreign fighters.[21] But whether passport revocation is, on balance, an effective domestic counter-terrorism measure would require an assessment of the relative threat of jihadists returning to Canada to engage in terrorism[22], and whether passport revocation simply creates a different sort of risk.

NO-FLY LISTS

As with passport revocation, no-fly lists attempt to mitigate risk by controlling mobility. If the high-risk traveler is in Canada when the listing occurs, they can be prevented from either committing a violent act aboard a plane or leaving Canada to engage in terrorist activity overseas. If an individual is placed on the no-fly list while outside of Canada, then it can limit their ability to return to Canada. Depending on where the traveler is at the time of the listing, the no-fly list can operate to contain risk within Canada or displace it beyond Canada's borders.

The *Secure Air Travel Act*, S.C. 2015, c. 20, s. 11 ("SATA"), was enacted in 2015 as part of Bill C-51, the *Anti-Terrorism Act, 2015*. While Canada has utilized a "no-fly" scheme known as the Passenger Protect Program since 2007, the regime existed primarily as an amalgamation of regulation and guideline under the *Aeronautics Act*. The *SATA* is meant to create a legislative framework, and empowers the Minister of Public Safety to establish a no-fly list. Under the *SATA*, an individual can be listed if the Minister has reasonable grounds to suspect that he or she will

- engage or attempt to engage in an act that would threaten transportation security; or
- travel by air for the purpose of committing terrorism offences as outlined in the *Criminal Code*.[23]

There are two consequences to listing. Listed persons may either be prohibited from flying, or they may

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19 *See Kamel v. Canada (Attorney General)*, 2013 FCA 103.

20 *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267. See, however, *Kamel v. Canada (Attorney General)*, 2009 FCA 21 (holding that while section 10.1 of the CPO infringed on section 6 mobility rights under the *Charter*, the legislation was saved under section 1 of the *Charter*). The court in *Abdelrazik* found the Minister's decision to refuse an emergency travel document in order to allow Mr. Abdelrazik to return home to Canada to be unconstitutional.

21 Government of Canada, "Harper Government Introduced Measures for Passport Cancellation, Refusal and Revocation of High-Risk Travellers", News Release (May 7, 2015), available at: http://news.gc.ca/web/article-en.do?nid=972189.

22 *See, e.g.*, Daniel Byman and Jeremy Shapiro, "Homeward Bound? Don't Hype the Threat of Returning Jihadists", The Brookings Institution (September 30, 2014), available at: https://www.brookings.edu/articles/homeward-bounddont-hype-the-threat-of-returning-jihadists/.

23 Specifically, section 8(1) of the SATA provides as follows:
8(1) The Minister may establish a list on which is placed the given name, the surname, any known alias, the date of birth and the gender of any person who the Minister has reasonable grounds to suspect will
(a) engage or attempt to engage in an act that would threaten transportation security; or
(b) travel by air for the purpose of committing an act or omission that
(i) is an offence under section 83.18, 83.19 or 83.2 of the *Criminal Code* or an offence referred to in paragraph (c) of the definition *terrorism offence* in section 2 of that Act, or
(ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i).

be subject to additional security screening before boarding flights. The *SATA* makes it illegal for anyone to disclose whether an individual is on the list, though travelers who have been denied the ability to board an aircraft can reasonably assume that they are on the no-fly list and seek delisting.[24] As with passport revocation appeals, the delisting process can take place largely behind closed doors based on secret evidence. The procedural deficiencies with the delisting process have been subject to criticism[25]; I have previously described it as "Kafkaesque"[26]. In July 2015, the Canadian Civil Liberties Association and the Canadian Journalists for Free Expression filed an omnibus challenge to multiple components of the *Anti-Terrorism Act, 2015*, including the *SATA*. The notice of application claims that the processes for listing and delisting under the *SATA* "impair the mobility interest of individuals placed on the no-fly list in violation of section 6 of the *Charter* and violate the liberty and security of the person interests protected by section 7 in a manner that does not accord with the principles of fundamental justice."[27]

The constitutionality of the *SATA* is yet to be litigated. However, as with citizenship and passport revocation, the question remains: What is the risk that is being mitigated? Is it the threat of transnational terrorism? The flow of foreign fighters to join the ranks of terrorist organizations? Or is it about keeping the threat of terrorism out – of making sure that dangerous individuals remain outside Canadian borders? The mechanisms canvassed here variously keep risk inside and out, and it is unclear as a matter of policy and practice how it is decided which high-risk individuals are kept close and which are expelled, and whether the potential for these mechanisms to work in contradiction and at cross purposes with one another plays any part in that decision-making.

CONCLUSION

What works in counter-terrorism strategy? Increasing attention to evaluation research on counter-terrorism interventions is helping fill a critical gap in public debates around national security policy, and assisting in focusing not only on "what works", but also on "what harms". Policymakers are beginning to recognize that counter-terrorism interventions, if applied (or seen to be applied) in a discriminatory fashion, may actually fuel ideological radicalization. Similar attention should be given to the unintended consequences and adverse interactions that might arise from scattershot interventions.

The seemingly inconsistent and potentially contradictory strategies of variously keeping terrorism suspects in *and* out reflect a basic challenge in countering transnational terrorism: borders may not always provide the security that governments hope for, and while the high-risk individual might be physically displaced, the threat they pose may simply take a new form or evolve to suit new geographies. The strategies discussed here also embody an approach to counter-terrorism, which sees as its aim "preventing terror", without clearly or precisely identifying the risks thought to be mitigated. Terrorism offences in the *Criminal Code* serve as the basis for triggering application of citizenship and passport revocation, and placement on the no-fly list. The conduct at issue can range from acts of violence to preparatory acts to criminalized speech. These are different types of harms, posing different types of risks, and likely require different strategies for prevention and mitigation. Discussions on "what works" in counter-terrorism should start with conceptual clarity on the harm to be avoided – and that harm should not be simply "terrorism". Clearer articulation of desired outcomes can help guide the choice of intervention, and avoid perverse results.

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24 Travelers who are only subject to additional screening have no ability to either know whether they are on the list or seek delisting.

25 *See, e.g.*, "Submission to the Senate Committee on National Security and Defence regarding *Bill C-51*", Canadian Civil Liberties Association (April 20, 2015), available at: https://ccla.org/cclanewsite/wp-content/uploads/2015/05/CCLA-Senate-Committee-20-04-15.pdf.

26 Carmen Cheung, "Wait … there's more!", British Columbia Civil Liberties Association (March 19, 2015), available at: https://bccla.org/2015/03/wait-theres-more/.

27 *The Corporation of the Canadian Civil Liberties Association, et al. v. Attorney General of Canada*, Ontario Superior Court of Justice Court File No. CV-15-532810, Notice of Application (July 21, 2015) at para. 22, available at: https://ccla.org/cclanewsite/wp-content/uploads/2015/08/Issued-Notice-of-Application-Bill-C-51-C1383715xA0E3A.pdf.

SECRET HEARINGS AND THE RIGHT TO A FAIR TRIAL: 2015 AND BEYOND

Graham Hudson

Abstract: In this short essay, I review major legislative and jurisprudential developments (2015-2016) in the context of secret hearings. Developments of note include Bills C-51 and C-44, which sharply limit disclosure and adversarial challenge in legal proceedings concerned with substantive rights. Less conspicuous developments include a timely evaluation of the Special Advocate Program (SAP), changes to no-fly and passport revocation appeals, and a secret finding, by the Immigration and Refugee Board (IRB), that Manickavasagam Suresh is inadmissible to Canada. I relate these developments to the slow process through which secret hearings have been normalized, suggesting that some of the more audacious legislative changes of 2015 invite our courts to reconsider forgotten issues.

Ce court essai porte sur les changements législatifs et jurisprudentiels importants en 2015-2016 dans le contexte des audiences secrètes. Ces changements comprennent les projets de loi C-51 et C-44, qui ont grandement limité la divulgation des renseignements et les possibilités d'opposition lors des procédures judiciaires touchant aux droits fondamentaux. Parmi les modifications plus discrètes, mentionnons l'évaluation ponctuelle du Programme des avocats spéciaux (PAS), les changements dans la procédure d'appel en cas d'interdiction de vol et de révocation de passeport, et la décision secrète de la Commission de l'immigration et du statut de réfugié (CISR) d'interdire de territoire Manickavasagam Suresh au Canada. Ces changements sont liés à un lent processus de normalisation des audiences secrètes, ce qui laisse à penser que certains des changements législatifs parmi les plus audacieux effectués en 2015 invitent nos tribunaux à reconsidérer des questions oubliées.

INTRODUCTION

2015 was a busy year. It saw the passages of Bills C-51 and C-44, which made it easier for the government to gather and share information in the name of security, while limiting disclosure and adversarial challenges in legal proceedings concerned with substantive rights. Less conspicuous developments included a timely evaluation of the Special Advocate Program (SAP) and a finding, by the Immigration and Refugee Board (IRB), that Manickavasagam Suresh is inadmissible to Canada - presumably for reasons relating to national security. I say "presumably" because the finding rested on secret evidence and has not yet been reported.[1] Readers may be familiar with Mr. Suresh by virtue of the famous 2002 case *Suresh v. Canada*, where the Supreme Court of Canada (SCC) ruled that Canada may deport persons to face the substantial risk of torture under "exceptional" circumstances.[2]

The term "exceptional" is a useful frame for a review of 2015, given that it describes all that is constitutionally wrong with securitization. In one sense, exceptionality describes measures and practices that do not cohere with constitutional principles or autonomous legal values such as rights and the rule of law. Initially justified as temporary, these measures tend to harden into unalterable form – people just seem to get used to them. Courts and parliament each play a role in normalizing exceptionality, whose imprimaturs provide the illusion of legality. This short review will highlight areas where rather audacious securitizing moves have unsettled constitutional waters, inviting a reconsideration of recurring issues.

A BRIEF BACKGROUNDER ON SECRET HEARINGS AND THE RIGHT TO A FAIR TRIAL

The right to a fair trial is protected through s. 7 of the *Charter of Rights and Freedoms*. It requires that one be tried before an independent and impartial adjudicator, that the decision of the adjudicator be based on the facts and the law, and that one knows and is able to meet the case against her.[3] A precondition of a fair trial is adequate disclosure and adversarial challenge. In the context of criminal law, the government is obligated to disclose all information in its possession that is relevant to the defence.[4] Exceptions to disclosure include "privileged" material,

1 Records of proceedings before the Federal Court are listed under Court No. IMM-4483-15 at: http://cas-cdc-www02.cas satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=IMM-4483-15&select_court=T.

2 *Suresh v. Canada*, [2002] 1 S.C.R. 3 at para. 78.

3 *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 ("*Charkaoui I*") at para. 29.

4 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

such as information that would identify a confidential informant or place the safety of a person at risk (e.g. a spy or undercover agent). Modified disclosure obligations apply in administrative law settings as well as when the government is named as a defendant in a civil trial. An example of the latter is the civil suit launched by Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, who are claiming damages from the Government of Canada for its role in their detention and torture in Syria.[5]

Secret hearings allow for decisions to be based on material that has not been disclosed to the affected party. In Canada, they almost always occur before a designated Federal Court judge, who has been provided with special training on the use of secret evidence.[6] Security certificates are the most conspicuous example of a secret hearing. Governed through Division 9 of the *Immigration and Refugee Protection Act* (IRPA),[7] certificate proceedings lead to the detention and deportation of a non-citizen alleged to be inadmissible to Canada on the grounds of security, serious criminality, organized criminality, or the violation of human or international rights.

Through s. 38 of the *Canada Evidence Act* (CEA),[8] the government may apply to the Federal Court to prevent the disclosure of sensitive information during a criminal or civil trial. In the absence of the defendant or plaintiff respectively, a Federal Court judge will review the information and decide whether the public interest in non-disclosure outweigh the public interest in disclosure. Unlike in certificate proceedings, s. 38 proceedings are concerned with whether sensitive information can be *excluded* from the evidentiary record. This compromises the fairness of a trial, as decisions cannot be based on all of the facts that are relevant to the issue at hand, nor is an affected party provided with all information relevant to her case. It also means, however, that the information cannot be used to support the government's case.

Courts have decided that these legislative frameworks comply with the *Charter*. In *Charkaoui I*, *Charkaoui II,* and the 2014 case of *Canada v. Harkat*,[9] the Supreme Court of Canada (SCC) ruled that certificate legislation coheres with the right to a fair trial if and only if persons named in certificates have a "substantial substitute" for disclosure. This substitute has come in the form of special advocates (SAs), who attend closed hearings in order to challenge the Ministers' claims that certain information cannot be disclosed and to challenge the relevance, reliability, and sufficiency of secret evidence. The efficacy of this system depends on the disclosure "of all information in its possession regarding the person named in a security certificate" to the Federal Court and SAs.[10]

Similarly, the SCC approved of s. 38 of the CEA in *R. v. Ahmad*.[11] Objections to this provision relate the fact that decisions about disclosure are made by a Federal Court judge and not the trial judge, who is in a comparatively better position to assess the global relevance of bits and pieces of information, and to remedy any breaches of procedural fairness caused by non-disclosure. The SCC ruled that this bifurcated system passes constitutional muster, since the Federal Court can provide trial judges with "conditional, partial and restricted disclosure", or even all the sensitive information "for the sole purpose of determining the impact of non-disclosure on the fairness of the trial".[12]

WE'VE BEEN HERE BEFORE: BILL C-51 AND SECURITY CERTIFICATES

Bill C-51 includes rather troublesome changes to secret hearings under the IRPA. As noted, the SCC has required the disclosure of sensitive information to SAs and designated judges by the Canadian Security Intelligence Service (CSIS) and the Ministers of Public Safety and Emergency Preparedness and Immigration, Refugees and Citizenship ("the Minsters"). The government has resisted this obligation – not always subtly. In the case of Re *Almrei*,[13] for instance,

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5 For background information, see Canada. House of Commons. Internal *Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Queens Printer, 2008).

6 Graham Hudson, As Good as it Gets? Security, Asylum and the Rule of Law After the Certificate Trilogy"Graham HudsonOsgoode Hall Law Journal 905.

7 R.S.C. 2001, c. 27.

8 R.S.C. 2001, c. 41.

9 Charkaoui I, supra note 3; *Charkaoui v. Canada (Citizenship and Immigration) (.Charkaoui I*Ilarkaoui I(Citizenship a*Canada (Citizenship and Immigration) v. Harkat, (kHarkat"*ar2014] S.C.R. 33.

10 *Charkaoui II supra* note 9, at para. 2, 62.

11 ("*Ahmad"*hmad001] 1 S.C.R. 110

12 *Ahmad*, *supra* note 11 at para. 45.

13 (2009) FC 1263.

it surfaced that CSIS and the Ministers failed to disclose exculpatory information as well as material unfavourable to their case. This included information casting doubt on the credibility and reliability of CSIS human sources. Court orders for subsequent disclosure revealed a consistent failure to explore, assess, or share new information that challenged the original basis for the certificate. In their defence, the Ministers insisted there is "no requirement" for the government to "advance a case against a finding of inadmissibility".[14] That is, it does not have to seriously consider that its allegations may be false.

Mosley J. of the Federal Court rightly rejected this position. He went so far as to find that the Minsters and CSIS breached their duty of candour to the court, and, that the failure to present a complete case undermined the reasonableness of the certificate against Mr. Almrei. He quashed the certificate, releasing Mr. Almrei in December, 2009.

Parliament used Bill C-51 to effectively undo *Re Almrei* and, arguably, *Charkaoui II*. Section 77(2) of the IRPA now states that the Minsters must only disclose to designated judges information and other evidence "that is relevant to the ground of inadmissibility stated in the certificate and on which the certificate is based". Further, s. 85.4(1)(a) states that the Minister only has to share with SAs information that the Minister consider to be relevant to the named person. This runs counter to *Charkaoui II*, which required the Minister to share all information regarding a named person with SAs, who would then decide what is relevant based on their prior communications with named persons and other considerations. Now, the Ministers can choose to withhold information on the basis of irrelevance, with no effective oversight by outside parties. Even more concerning is s. 85.4(1)(b), which states the Minster does not even have to share "relevant" information that it has not filed with designated judge, unless s/he is ordered to do so. Notice that this section expressly states that SAs may be denied access to *relevant* information in the possession of the government. This includes information that is exculpatory or unfavourable to the Minster's case.

Parliament's justification for this provision is unpersuasive. Section 83(1)(c.1) suggests that judges may "exempt" the Minister from disclosing relevant information under s. 85.4(1)(b) because it "does not enable the permanent resident or foreign national to be reasonably informed of the case made by the Minister". This is a confusing provision. It seems to relate to the SCC's judgment in *Harkat*, which required that named persons receive an incompressible minimum amount of disclosure; s. 83(1)(c.1) in this sense makes this minimum standard a maximum standard for disclosure. But whether or not a named person is reasonably informed of a case, a trial will be unfair if SAs are unable to effectively advocate on their behalf. It is clear that the effectiveness of SAs will be seriously impeded if they are denied relevant and especially exculpatory information; we already saw how important such information was in *Almrei*. To make matters worse, s. 83(1)(c.2) seeks to cut SAs out of the process for deciding whether the Ministers should disclose relevant information, stating that a judge "may" allow SAs to make submissions on exemptions under s. 83(1)(c.1) if "fairness and natural justice require it".

These amendments are at best mischievous and at worse an example of parliament abdicating its responsibilities in a constitutional democracy. The Supreme Court has clearly outlined the conditions under which the certificates will be tolerated. The Federal Court and Federal Court of Appeal have consistently upheld this jurisprudence. Unless Parliament excises these ill-advised provisions, we can expect costly constitutional litigation about such matters as whether there is a constitutional obligation to disclose relevant (and especially exculpatory) information to SAs.

BILL C-44 AND CSIS HUMAN SOURCE PRIVILEGE

Bill C-44 further destabilizes constitutional terrain by providing CSIS human sources with class privilege. Section 18.1(2) of the *CSIS Act* prohibits the disclosure of "the identity of a human source or any information from which the identity of a human source could be inferred". One exception to privilege is if *both* the human source and the Director of CSIS consent. The other is if disclosure is necessary to demonstrate innocence. This latter exception seems to be restricted to criminal trials, since neither certificate proceedings (or any related IRPA proceeding) nor civil trials are concerned with guilt or innocence *per se*.

Kent Roach has argued that s. 18.1 invites a *Charter* challenge[15] – I agree. The core issue is that the provision allows judges to unilaterally lift privilege only to avert the unjust outcome of a wrongful conviction. This is problematic because it excludes from consideration other, equally serious substantive

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14 *Ibid*. at para. 501.

15 Kent Roach, ent Problems with the New CSIS Human Source Privilege in Bill C-44 to Abdullah ▯▯▯inal Law Quarterly 451.

injustices. The cost of getting it wrong in a certificate hearing means a person may be deported to face torture or similar abuse. Civil redress for prior wrongful detentions or treatment, such as torture, may also be impeded. Finally, s. 18.1 prevents judges from lifting privilege to avert procedural unfairness, even when doing so may not place the safety of a human source or the integrity of an ongoing operation at risk.

The constitutionality of secret trials has always depended on designated judges having the flexibility needed to avert both substantive and procedural injustices. They have developed customary practices allowing for the effective balancing of the safety of human sources/integrity of ongoing operations and the interests of the affected party. In *Re Harkat*,[16] for instance, Noel J. was faced with a series of troubling credibility and reliability issues regarding CSIS human sources. Although willing to extend common law privilege to such sources, he would have qualified this privilege owing to differences in how CSIS and police recruit informants, the fact that secret evidence forms part of the basis of final judgments, and, because security-cleared SAs and designated judges can be trusted with identifying information. Noel J. was of the view that lifting privilege may be necessary to prevent a "flagrant breach of procedural fairness", such as when "there is no other way to test the reliability of critical information" provided by a source.[17] The SCC was somewhat divided on this issue on appeal. The dissent would have upheld Noel J.'s ruling, but the majority decided that CSIS human sources are not protected by common law class privilege. However, it stated that, in "rare cases", it may be appropriate to lift privilege in certificate proceedings.[18] Since such proceedings are not, strictly speaking, concerned with guilt or innocence, this suggests that the SCC is open to a broader set of exceptions than provided under s. 18.1.

More recently, Mosley J. issued a direct criticism of s. 18.1 *in Canada (AG) v. Almalki*[19] - a civil law case concerned with Canada's involvement in the detention and torture of three Canadian citizens in Syria. The constitutionality of s. 18.1 was not at issue, but Mosley J. commented, in *obiter*, that s. 18.1 provides courts with "no role" in determining whether it was "necessary" for CSIS to promise confidentiality or whether "the source's reasons for providing information ....may, in the light of other facts, be proven to be false".[20] The problem is that there have been instances, such as in *Harkat* and *Almrei*, where judges have been concerned about the credibility, reliability, and incentives of human sources. While other remedies were effective in these cases, Bill C-44 enables CSIS to shield human sources by claiming that promises of confidentiality were offered "without any oversight by the Court".[21] Mosley J. also stated that s. 18.1 is "constitutionally underinclusive given that it does not recognize the role that human sources play in security certificate or other administrative law applications".[22] Finally, he noted that s. 18.1 is practically unnecessary, given that "prior to the recent amendments, the Court would have exercised great care before it authorized the disclosure of source information".[23] Many of these problems could be remedied by allowing judges to lift privilege to avert procedural injustices and substantive injustices other than wrongful convictions.

Section 18.1 has also had an impact on s. 38 CEA proceedings. The real issue in *Almalki* was whether s. 18.1 applies retrospectively to civil proceedings initiated prior to the entry into force of Bill C-44. The plaintiffs had sought disclosure of, among other things, information relating to the identities of CSIS human sources in support of their civil suit. The Attorney General (AG) moved for the non-disclosure of the material under s. 38 of the CEA. While this proceeding was underway, Bill C-44 was enacted. Section 18.1 ordinarily would trump s. 38 of the CEA, because it prohibits absolute disclosure of identifying information subject to few exceptions. But the question was whether s. 18.1 changes the current legal status of ongoing s. 38 proceedings initiated in the past. Mosley J. decided the plaintiffs are entitled to continue seeking disclosure through s. 38 proceedings. He premised his judgment on the view that Bill C-44 creates and affects "substantive" rights, including those *Charter* rights the plaintiffs seek to vindicate through their civil action; legislation may not (lightly) be given retrospective effect if it affects substantive rights.

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16 [2009] 4 F.C.R. 370.

17 *Ibid*. at para. 46.

18 *Harkat supra* note 9 at para. 90.

19 (2015), F.C. 1278.

20 *Ibid*. at para. 74.

21 *Ibid*. at paras. 74, 80

22 *Ibid*. at para. 80.

23 *Ibid*. at para. 76.

The Federal Court of Appeal overturned this decision in the summer of 2016, deciding that the presumption against retrospectivity was not "in play" and that the language of s. 18.1 rebutted the presumption against interfering with any vested right in the continuation of s. 38 proceedings.[24] It is also worth mentioning that Kane J. of the Federal Court declined a s. 18.1 disclosure request in the context of a criminal case in, owing to "lack of jurisdiction based on principles regarding the retroactive and retrospective application" of the provision.[25] The reasons of the judgment are not publicly available, and are on appeal.

WHY WE NEED THE SPECIAL ADVOCATE PROGRAM (MORE THAN EVER)

In February, 2015, the Department of Justice released a timely evaluation on the relevance and effectiveness of the Special Advocate Program (SAP).[26] The SAP is a rather small group of legal and administrative professionals who work within, but independently of, the Department of Justice. It has been an indispensable component of the SA system. Among other things, it: solicits and selects SAs; provides SAs access to sensitive information; helps solve recurring legal, professional, logistical, and administrative problems; liaises with the Courts Administration Service (CAS) and the Immigration and Refugee Board (IRB); and provides on-going professional development and training to SAs. The latter occurs through annual group meetings among SAs, who discuss legal, policy, and other developments. The SAP also organizes presentations and other exchanges between SAs and public counsel, government lawyers, academics, and legal professionals from foreign jurisdictions, most notably the UK.

The report was released amidst a seeming decline in the relevance and effectiveness of the SA system as a whole. No new certificates have been issued since 2008, while only one issued on the basis of national security since 9/11 has been upheld as reasonable. Total hours billed by SAs have steadily decreased; there were 5,485 hours billed in 2010–11, and only 551 hours billed in 2014-2015.[27] However, 11 interviewees, including SAs, public counsel, and government lawyers, responded that the SAP is both relevant and effective, although a number of recommended improvements were suggested. The precise views of the respondents were not published. The authors of the report summarized the relevance of the SAP to the "firm" constitutional ground established by SCC jurisprudence, and, the impact of expanded security measures ushered in through Bill C-51.[28]

Generally favourable views of the SAP should not be confused with an endorsement of the SA system or secret hearings under the IRPA. To the contrary, the effectiveness of the SA system has always depended on the capacities of SAs and of designated judges to work well together in avoiding the flagrantly unjust procedures and outcomes that are all too easily permitted by legislative language. The institutional culture, knowledge, and relationships cultivated by the SAP are an important piece of the puzzle, as are its mostly sound working relationships with the CAS and the Federal Court in general. To the extent that the certificate regime is functional, it is despite legislative language - not because of it. Through Bills C-51 and C-44, parliament has tried to disrupt this system, hobbling SAs and, to a lesser degree, designated judges.

But Bills C-51 and C-44 are just the tip of the iceberg. In the past few years, there has been a perceptible shift away from certificates and the Federal Court towards other, more ordinary immigration-based measures held before the IRB – a separate institutional body that has little experience with secret hearings. Under s. 86 of the IRPA, the Ministers may move to conduct admissibility hearings, detention reviews, and judicial reviews in secret, subject to the same legislative provisions that govern certificates. The move away from certificates and, therefore, from the Federal Court complements legislative attempts to dilute court-imposed constraints on executive power. I question whether IRB adjudicators will display a similar commitment to guarding the rule of law as many Federal Court judges have. Will they challenge the tendency of CSIS and the Minsters to over-claim NSC? How will they handle Charter challenges to the IRPA or the practices of CSIS or the Ministers? How seriously will they take issues about the credibility and reliability of human sources? Will they relieve the Minsters of the need to disclose relevant information pursuant to s. 85.4(1)(b)? I also have reservations about the administrative capacity of the IRB to handle high volumes of closed material and to provide SAs with suitable

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24 *Canada (Attorney General) v. Almalki* (2016), F.C.A. 195.

25 Canada *(Attorney General) v. Nuttall* (2016), F.C. 850 at para. 4.

26 Canada. Department of Justice. *Special Advocates Program Evaluation: Final Report* (February, 2015) (rSAP Report"A

27 *SAP Report, supra* note 25 pp. 11-12

28 Ibid. at pp. 10-11.

resource support. As problematic as certificates are, I prefer them to what we will see when recent legislative amendments are applied in ordinary admissibility and detention review hearings.

Some of these issues may well come to a head when details are released about the secret October, 2015 finding, by the IRB, that Mr. Suresh is inadmissible to Canada. Federal Court records indicate that a judicial review of the IRB judgment is underway, and that a SA (Anil Kapoor) has been appointed. The return of Mr. Suresh as a subject of law serves as a symbolic reminder that the constitutionality of deportation to torture needs to be revisited. I have argued elsewhere that the procedures for determining whether one is at risk of torture are woefully inadequate.[29] Deportation to torture is constitutionally, but not internationally, permitted when the public interest in the protection of Canadian security heavily outweighs the moral and legal obligation not to be complicit in torture. The decision to deport to torture is made by the Minister of Immigration, Refugees and Citizenship, partly on the basis of secret evidence. In one instance, a judge of the Federal Court, Michel Shore, upheld a decision to deport to torture.[30]

As a final note, 2015 also saw the expansion of IRPA-style secret hearings to no-fly list and passport revocation appeals through Bills C-51 and C-59 respectively. Previously, appellants could apply for disclosure of relevant information through s. 38 of the CEA. The new provisions prevent the disclosure of any material whatsoever, even if relevant, if the reviewing judge believes its disclosure would be injurious to national security or endanger the safety of any person. There are no provisions for SAs to be appointed. It is hard to tell whether these provisions are constitutional. On the one hand, constitutionality may yet again hinge on the use of the SA system, although this will depend on whether courts consider the interests at stake to be sufficiently serious. On the other, to even suggest that the solution is to rely on SAs rather than jettison the proceedings altogether is surely evidence of how normalized secret hearings have become.

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29 Hudson, *supra* note 6 .

30 *Nlandu-Nsoki v. Canada (Minister of Citizenship and Immigration)* (2005), F.C. 17 at para. 22.

THE REFORM OF NATIONAL SECURITY ACCOUNTABILITY IN CANADA

Patrick F. Baud[1]

Abstract: Government's broad powers and the important ends for which they are used require that government be held accountable to ensure that its activities are both effective and proper. Nowhere is this truer than the government of Canada's national security activities. Yet the intense secrecy surrounding the collection and use of intelligence means that the ordinary system of accountability, both within the executive and through the executive's relationships with Parliament and the courts, function in an attenuated manner. As a result, a parallel system of accountability within the executive exists to replicate some of the accountability that the ordinary system would normally provide. Proposed reforms would strengthen the parallel system in welcome ways, but too little thought has so far been given to the future of the relationship between the parallel and ordinary systems.

Compte tenu des pouvoirs étendus du gouvernement et des fins importantes auxquelles il les utilise, il est essentiel qu'il soit tenu responsable de ses activités pour veiller à leur efficacité et à leur pertinence. Cela est particulièrement vrai pour les activités du gouvernement du Canada dans le domaine de la sécurité nationale. Cependant, en raison du grand secret entourant la collecte et l'utilisation des renseignements, le système de responsabilité ordinaire fonctionne dans ce domaine d'une manière atténuée, à la fois au sein de l'exécutif et dans les relations entre l'exécutif et le Parlement et les tribunaux. Par conséquent, un système parallèle de responsabilité existe au sein de l'exécutif qui reproduit certains mécanismes de la responsabilité normalement offerts par le système ordinaire. Les réformes proposées permettraient un renforcement bienvenu du système parallèle; toutefois, on s'est jusqu'à maintenant trop peu attardé sur l'avenir des rapports entre le système parallèle et le système ordinaire.

INTRODUCTION

The executive government of Canada has broad powers at its disposal. Its powers are arguably at their broadest when it comes to collecting intelligence and using it to defend Canada against security threats.[2] The executive's broad powers undoubtedly allow it to do much good, but they also mean that there is significant risk of wrongdoing. Although government's failures can certainly take myriad forms, there are two that should cause the greatest concern. First, the executive may exercise its powers, but fail to achieve its objectives, wasting time and money and leaving the problem it sought to address unresolved. Second, the executive may exercise its powers in such a way as to cause a person or a group of people great harm.

These risks are magnified in the national security context. The powers that Canada's intelligence services and law enforcement agencies exercise to collect and act on intelligence are extensive, including electronic and physical surveillance, undercover investigations and even measures aimed directly at disrupting security threats.[3] The abuse of any of these powers can come at a high cost to individuals, infringing the fundamental rights that Canada guarantees to all and putting a chill on lawful activities for fear that they may draw the state's ire. For their part, the objectives the executive seeks to achieve by collecting and acting on intelligence are often of such importance that failure could lead to catastrophic consequences for Canada. Both forms of wrongdoing risk undermining public confidence in the intelligence services.[4]

Recognizing the risk of wrongdoing inherent in the executive's exercise of broad powers, Canada's system of government holds the executive to account in several ways. These formal and informal means

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2 The general literature on executive power in Canada is almost nonexistent, but an important start on filling this gap is made in Irvin Studin, *The Strategic Constitution: Understanding Canadian Power in the World* (Vancouver: University of British Columbia Press, 2014).

3 See e.g. *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, ss 12–12.2 [CSIS Act]; *National Defence Act*, RSC 1985, c N-5, ss 273.64–273.65 [*National Defence Act*].

4 Christopher Andrew, "Governments and Secret Services: A Historical Overview" (1979) 34(2) International Journal 167 at 186.

of accountability, which make up what I will call the "ordinary system" of accountability, serve both to prevent wrongdoing and repair for wrongdoing when it occurs. This ordinary system of accountability is by no means perfect and could very likely be improved, but on the whole, they have served Canadians well.

Since the executive's powers when it comes to national security matters are particularly extensive and the risk of wrongdoing is especially great, so too is the need for the executive to be held to account for its security activities. Before the creation of the Canadian Security Intelligence Service (CSIS) by Parliament in 1984, the government of Canada's national security activities were all but exempt from the ordinary system of accountability.[5] Although CSIS (and later, the Communications Security Establishment (CSE), Canada's signals intelligence agency) have, in principle, been brought into the fold of accountability. I will argue that the profound secrecy surrounding their work means that, in practice, the ordinary system functions in an attenuated way when it comes to the intelligence services. The same is largely true of national security activities carried on by other federal departments and agencies.

Although Parliament might perhaps have done more to hold the executive to account on national security matters through the ordinary system, it chose instead to create what I will call the "parallel system" of accountability. The parallel system, which consists of expert review bodies, has gradually been expanded to cover not only CSIS, but also CSE and, to some degree, the Royal Canadian Mounted Police (RCMP). They enjoy a degree of independence, a mandate to review national security activities to prevent wrongdoing, and broad access to secret information.[6]

Many have rightly pointed out the limits of the parallel system, which I will examine,[7] and proposed certain reforms, some of which are being contemplated by the Trudeau government.[8] Too few, however, have grappled with the question of the appropriate balance between the parallel and ordinary systems and how concerns raised by the former, the details of which are secret, are taken up by the latter. Failing to take into account this enduring dilemma of national security accountability, I argue, risks undercutting the benefits of any improvements to the parallel system.

NATIONAL SECURITY AND THE ORDINARY SYSTEM OF ACCOUNTABILITY

The executive and by extension, the departments and agencies that support it, is subject to by the ordinary system of accountability. I use "accountability" here in the sense of preventing wrongdoing both in the forms of inefficacy and impropriety and accounting for such wrongdoing when it happens. As I conceive it, the ordinary system consists primarily of formal means within the executive branch, as well as those that are based in legislative and judicial branches of government. It also consists of informal means, notably the press and public interest organizations, that create pressure for the formal means of accountability to be used in various ways. The secrecy that surrounds national security matters means that the formal and informal means of accountability that exist outside the executive branch play a much more limited role than they normally do, placing a heavier burden on internal executive accountability.

A. Executive and Public Service

In Canada's system of government, the executive is headed by the prime minister and other ministers, who form the Cabinet.[9] Together, the prime minister and ministers deliberate and make policy decisions, which individual ministers then implement.[10] Cabinet may delegate the power to make decisions to committees of ministers or indeed, individual ministers.

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5 Jean-Jacques Blais, "The Political Accountability of Intelligence Agencies in Canada" (1989) 4(1) Intelligence and National Security 108; Reg Whitaker, "The Politics of Security Intelligence Policymaking in Canada, 1970–84" (1991) 6(4) Intelligence and National Security 649.

6 *CSIS* Act, *supra* note 2 s 34 *et seq*; *National Defence Act*, *supra* note 2 s 273.63; *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 45.29 *et seq*.

7 See e.g. Craig Forcese & Kent Roach, "Bridging the National Security Accountability Gap: A Three-Part System to Modernize Canada's Inadequate Review of National Security" (2016) University of Ottawa Faculty of Law Working Paper, No 2016-05, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714498.

8 Bill C-22, *An Act to establish the National Security Committee of Parliamentarians and to make consequential amendments to certain Acts*, 1st Sess, 41st Parl, 2016 (referred to the Standing Committee on Public Safety and National Security 4 October 2016) [Bill C-22]; Canada, Department of Public Safety, *Our Security, Our Rights: National Security Green Paper*, 2016 (Ottawa: Public Works and Government Services Canada, 2016).

9 The executive is, in a constitutional sense, headed by the Queen by virtue of the *Constitution Act, 1867*, s 9, who is represented in Canada by the Governor General, who exercises the Queen's powers according to the terms of the *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada*. Although these details are significant in other areas, where there is a distinction between the Governor General's powers and the prime minister and other ministers' advice about their exercise, as contemplated by the *Constitution Act, 1867*, ss 11–12, they have no direct relevance to national security matters.

10 Craig Forcese & Aaron Freeman, *The Law of Government: The Legal Foundations of Canadian Democracy*, 2nd ed (Toronto: Irwin Law, 2011) at 350.

In either case, Cabinet is collectively responsible for its decisions, and individual ministers are responsible for the implementation of those decisions and the general management of their departments.[11] Cabinet's decision-making process and its holding responsible of individual ministers for their failures are both means of accountability because they allow ministers to challenge one another's policy proposals and monitor one another's results.

As elegant a system as this may sound, neither the principles of collective decision-making nor individual ministerial responsibility are assiduously followed in practice.[12] This is especially so when it comes to national security matters, where the prime minister and ministers responsible, primarily those of Public Safety, National Defence, Foreign Affairs and Justice, make most decisions. Although all ministers go through the sort of vetting required to obtain high security clearances, unless their portfolio requires it, neither they nor their political staff likely have access to "compartmented information", a category which includes at least geospatial and signals intelligence, but may well also include other classified programs.[13] As a result, the possibility of extensive Cabinet deliberation on certain national security matters will necessarily be curtailed.

The public service, led by the Clerk of the Privy Council and the other deputy ministers, supports the Cabinet decision-making process and helps implement the decisions it reaches. By structuring the process that leads to decisions being made and implemented, the public service reduces the risk of wrongdoing. In particular, the "central agencies" – the Privy Council Office (PCO), the Treasury Board Secretariat and the Departments of Finance and Justice – manage risk by imposing a range of legal, financial and performance requirements on other federal departments and agencies.[14] Like ministers, the deputy ministers and heads of agencies are individually responsible for the implementation of decisions made by Cabinet or their minister, and the general management of their departments.[15]

The public service largely plays its usual role when it comes to national security matters. Since the prime minister has more direct involvement with national security matters than other policy areas, PCO plays a more significant role than it would otherwise, especially with the creation of the position of National Security Advisor to the Prime Minister, a deputy minister-level official in PCO charged with coordinating national security policy and operations.[16] The other central agencies and the departments responsible for national security impose and administer various legal, financial and other requirements on those responsible for carrying out intelligence and security activities.[17]

The degree of secrecy surrounding those activities and the security clearances required to know about them likely means that there are fewer public servants involved in internal accountability for such activities. As a result, informal consultations among public servants are likely to be curtailed. For instance, a legal opinion on a national security matter prepared by Department of Justice lawyers may be protected not only by solicitor-client privilege, but also security requirements, so cannot be informally circulated for review to other Justice lawyers.[18]

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11 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed (Oxford: Oxford University Press, 2014) at 90–102, 106–113.

12 Heard, *supra* note 10. See also Donald Savoie, *Governing From the Centre: The Concentration of Power in Canadian Politics* (Toronto, University of Toronto Press, 1999) at 81–87.

13 Karina Roman, "Trudeau hopefuls must pass extensive background check: Candidates for cabinet are vetted by RCMP, CSIS and others before getting the call", CBC News (30 October 2015); Privy Council Office, *Open and Accountable Government* (Ottawa: Privy Council Office, 2015) at 29–31 (noting that ministers are bound the *Security of Information Act* and that their political staff must have, at minimum, a Secret clearance); Treasury Board Secretariat, *Standard on Security Screening* (Ottawa: Treasury Board Secretariat, 2014) (describing "compartmented information", including that which bears signals intelligence and TALENT KEYHOLE designations, the latter an American codeword referring to geospatial intelligence).

14 Savoie, *supra* note 11 at 109–238 (describing the roles played by the Privy Council Office, the Treasury Board Secretariat and the Department of Finance). There is no satisfactory equivalent for the Department of Justice, but see James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: University of British Columbia Press, 2005) at 42–44.

15 *Financial Administration* Act, RSC 1985, c F-11, ss 16.3–16.4 (designating deputy ministers as "accounting officers" responsible for their department's use of public money). See also *Department of Foreign Affairs, Trade and Development Act*, SC 2013, c 33, s 7 (providing that the Deputy Minister of Foreign Affairs, like all other deputy ministers, holds office during pleasure, and can therefore be removed for failing to implement ministerial or Cabinet decisions).

16 Craig Forcese, *National Security: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008) at 73.

17 See Philip HJ Davies, "Britain's Machinery of Intelligence Accountability: Realistic Oversight in the Absence of Moral Panic" in Daniel Baldino, ed, *Democratic Oversight of Intelligence Services* (Annandale, NSW: Federation Press, 2010) 133 at 154–155 (describing the financial and administrative control of the United Kingdom's intelligence services). There is unfortunately no equivalent in the Canadian context.

18 See Dakota S Rudesill, "Coming to Terms with Secret Law" (2015) 7 Harvard National Security Law Journal 241 at 357–359 (describing this problem, albeit in the American context, and recommending the creation of a "secret law legal corps" to improve quality of legal advice on national security matters). Again, there is unfortunately no Canadian equivalent.

B. Parliament and its Officers

Most of the executive's powers and by extension, most of the public service's powers are not inherent, but have instead been delegated by Parliament through statutes. The executive exercises the powers granted by statute in a manner subject to constitutional and common law limits, as well as the limits set out by the statute itself. The executive also depends on Parliament for the money it needs to run the government of Canada, which allows Parliament to limit the means by which the executive raises and more importantly for our purposes, the ends to which it spends money.[19] The public service, particularly the central agencies, ensure that the government of Canada complies with legal and funding limits set out by Parliament.

With the exception of certain police powers, which exist at common law, the powers the executive and public service exercises when it comes to intelligence and security matters flow from and are therefore limited by, statute.[20] The intelligence services' enabling legislation allows them to collect and act on intelligence in various general ways, and subjects them to various broad limits.[21]

Parliament has delegated the power to define the specific ways and limits on the intelligence services to the ministers responsible.[22] Of course, Parliament regularly delegates the power to make regulations to Cabinet or an individual minister. However, unlike regulations, the ministerial "directions" that govern CSIS and CSE are secret instruments and unlike regulations, they are not subject to review by the Standing Joint Committee on Regulations nor can they be revoked by Parliament.[23] As a result, important aspects of the legal framework regulating the activities carried by the intelligence services are set out only in secret instruments largely immune from scrutiny.[24]

Parliament scrutinizes the executive's exercise of its powers and use of public money. The prime minister and other ministers are not only responsible for decisions and their implementation. They are also responsible to Parliament, which means they are required to explain and justify the decisions they make and the way in which those decisions have been implemented.[25] Scrutiny takes many forms, perhaps the most important of which is committee business.[26] Parliament requires detailed financial and performance reporting from departments and agencies.[27] Senate and House of Commons committees charged with scrutinizing particular departments and agencies examine their activities and in the case of the Commons, their projected spending.[28] For its part, the Public Accounts committee, with the assistance of the Auditor General, examines departments' actual spending and resulting performance.[29]

As with Cabinet government, the principles of parliamentary scrutiny are far from assiduously followed in practice.[30] But what is striking is that the intelligence services and national security activities in other departments and agencies are subject to little,

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19 *Constitution Act, 1867*, ss 53–54, 102, 106.

20 Blais, *supra* note 4 at 111.

21 See e.g. CSIS Act, *supra* note 2, s 12.2 (prohibiting CSIS from using its power to disrupt security threats to cause death or bodily harm, pervert the course of justice or violate a person's sexual integrity); *National Defence Act*, *supra* note 2 s 273.64(2)(3) (prohibiting CSE from directing certain of its intelligence collection activities at Canadians and requiring CSE to abide by the law when assisting other agencies).

22 *CSIS Act*, *supra* note 2, s 6(2); *National Defence Act*, *supra* note 2, s 273.62(3).

23 *CSIS Act*, *supra* note 2, s 6(3); N*ational Defence Act*, *supra* note 2, s 273.62(4). See also *Statutory Instruments Act*, RSC 1985, c S-22 (providing for the publication and scrutiny by Parliament of regulations).

24 See e.g. Security Intelligence Review Committee, *Security Intelligence Review Committee Annual Report, 2015-2016: Maintaining Momentum* (Ottawa: Public Works and Government Services Canada, 2016) at 19–20 (describing how many aspects of CSIS' foreign activities are dealt with in a ministerial direction); Communications Security Establishment Commissioner, *Communications Security Establishment Commissioner Annual Report, 2015-2016: 20 Years of Review* (Ottawa: Public Works and Government Services Canada, 2016) at 44 (noting that, in the past, the Commissioner has recommended that aspects of CSE's activities related to metadata should be moved from ministerial direction to the *National Defence Act*).

25 CES Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987) at 11.

26 David C Docherty, *Legislatures* (Vancouver: University of British Columbia Press, 2005) at 118–119, 130–133.

27 *Financial Administration Act*, *supra* note 14, ss 64–65.1.

28 Standing Orders of the House of Commons of Canada, 81, 108(2); Rules of the Senate of Canada, 12–7.

29 Standing Orders of the House of Commons of Canada, 108(3)(g). See also David A Good, *The Politics of Public Money* (Toronto: University of Toronto Press, 2014) at 263–265.

30 See e.g. John A Chenier, Michael Dewing & Jack Stilborn, "Does Parliament Care? Parliamentary Committees and the Estimates" in G Bruce Doern, ed, *How Ottawa Spends, 2005–2006: Managing the Minority* (Kingston and Montreal: McGill-Queen's University Press, 2005) 200 at 205.

31 Nicholas A MacDonald, "Parliamentarians and National Security" (2011) 34(4) Canadian Parliamentary Review 33.

if any, consistent scrutiny.[31] They are exempt from most public financial and performance reporting requirements.[32] Although there are Senate and House of Commons committees responsible for scrutinizing national security activities, the committees lack the access to secret information and the security-cleared staff that they consider necessary to inquire into national security matters.[33] As a result, the intelligence services and the intelligence and security programs carried on by other departments and agencies are subject to virtually no parliamentary scrutiny. This sets Canada apart from many other democracies, including its closest intelligence allies in the United States, the United Kingdom and Australia.[34]

As the business of government has grown in scale and scope, Parliament has created several "officers of Parliament" to assist its scrutiny of government.[35] These officers, who enjoy a degree of independence from both the executive and Parliament, scrutinize the executive's activities according to certain criteria, and report their findings publicly to Parliament.[36] Perhaps the most prominent officer is the Auditor General who conducts both financial and performance audits of federal departments and agencies.[37] Although officers generally cannot remedy wrongdoing when they find it, their reports often put significant pressure on the executive and Parliament to change policy and amend legislation to address problems that officers identify.[38]

Officers of Parliament, notably the Auditor General, but also the Privacy Commissioner, have mandates that, at least in principle, cover the intelligence services; they enjoy access to secret information; and they have at least some security-cleared staff.[39] In practice, however, and for reasons that are not quite clear, they have conducted relatively little scrutiny of intelligence services. The Auditor General has never done a comprehensive performance audit of CSIS or CSE, something that CSIS' review body, the Security Intelligence Review Committee (SIRC), has recommended as early as the 1989.[40]

C. Courts

The courts adjudicate individual claims that the executive has done wrong. Those claims can take various forms, alleging actions inconsistent with the Constitution of Canada, including infringement of Charter rights;[41] decisions that fail to be procedurally fair or reach an improper outcome;[42] or actions that cause harm to be repaired through the payment of damages.[43] Although courts are limited by procedural rules when it comes to the nature of the claims they can adjudicate, [44] they serve as a means of accountability by repairing for wrongdoing and indirectly, by putting pressure on the executive to avoid future wrongdoing.

Courts, especially the Federal Court, play a role in holding the executive to account when it comes to national security matters, as they are called upon to consider applications for warrants authorizing searches and now, disruption of security threats.[45]

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32 CSIS and CSE are exempt from publishing the quarterly financial reports required the *Financial Administration Act*, *supra* note 14, s 65.1, by *Regulations Exempting Departments and Parent Crown Corporations form the Requirements of Subsections 65.1(1) and 131.1(1) of the Financial Administration Act*, SOR/2011-62, s 1. The Treasury Board has also exempted CSIS and CSE from publishing Part III of the Estimates, which contains the Reports on Plans and Priorities and the Departmental Performance Reports.

33 Forcese & Roach, *supra* note 6 at 16–17.

34 MacDonald, supra note 30.

35 Paul G Thomas, "Parliamentary Scrutiny and Redress of Grievances" (2007) 31(1) Canadian Parliamentary Review 6.

36 Ann Chaplin, "The Constitutional Legitimacy of Officers of Parliament" (2011) 29 National Journal of Constitutional Law 71 at 88–95, 101.

37 *Auditor General Act*, RSC 1985, c A-17, s 7(2) (setting out the Auditor General's mandate). See also Good, *supra* note 28 at 119.

38 Chaplin, supra note 35 at 81–87.

39 *Auditor General Act*, *supra* note 36 s 7(2), 13 (providing that Auditor General's mandate covers all money drawn from the Consolidated Revenue Fund, giving the Auditor General access to all information necessary to fulfill responsibilities and providing for Auditor General's staff to obtain security clearances); *Privacy Act*, RSC 1985, c P-21, ss 34(2), 38–39, 62.

40 Stuart Farson, "Parliament and its Servants: The Role in Scrutinising Canadian Intelligence" (2000) 15(2) Intelligence and National Security 225 at 251–253 (suggesting that Auditor General was either unwilling or unable to conduct a value for money audit of CSIS in the early to mid 1990s).

41 *Constitution Act, 1982*, s 52(1); *Canadian Charter of Rights and Freedoms*, s 24.

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

43 *Crown Liability and Proceedings Act*, RSC 1985, c C-50, ss 3, 21.

44 Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) (discussing various restrictions on justiciability).

45 *CSIS Act*, *supra* note 2 ss 21–21.1.

They also consider the use of secret information in criminal and immigration proceedings.[46] Freestanding claims that the government's national security activities have run afoul of constitutional, statutory and common law rules or caused harm giving rise to compensation as a matter of tort or extracontractual obligation are made more difficult because of procedural, especially evidentiary, restrictions that apply to national security matters.[47] As a result, the courts play a less significant accountability role when it comes to national security than they do in other areas, making it less likely that the validity of ministerial directions or the Department of Justice's interpretation of national security legislation and directions will be challenged.

D. Conclusion

In principle, the ordinary system of accountability applies to national security matters. There is no constitutional rule that exempts the executive from being held to account for its national security activities. Indeed, because those measures must be both effective and proportionate to the threats to security of Canada, it is especially important for the executive to be held to account for its activities. As I have attempted to show, however, much of the ordinary system of accountability extends only in a limited way to national security matters, largely because of the intense secrecy that surrounds them.

Although there are undoubtedly reasons to worry about excessive secrecy in some areas, there also should be little doubt that the government of Canada has secrets worth keeping. This is true not only of the means and ends of its own intelligence activities, but also those of its intelligence and military allies.[48] The legitimate need for secrecy cannot, however, completely displace accountability. The risks of wrongdoing are simply too great and the potential consequences of such wrongdoing too severe.

THE PARALLEL SYSTEM OF NATIONAL SECURITY ACCOUNTABILITY

A. The Creation of the Parallel System

The way in which the ordinary system of accountability extends (or fails to extend) to the government of Canada's national security activities is the result of choices made largely when CSIS was created in 1984. In particular, more might have been done to ensure Parliament's involvement in national security accountability by creating, as had been recommended, a security-cleared parliamentary committee with access to secret information and by empowering officers of Parliament, especially the Auditor General, to scrutinize the intelligence services' spending.[49]

Parliament chose instead to create a parallel system of accountability within the executive branch. The parallel system's location within government is intended both to help the executive hold the intelligence services to account and to protect the secrecy of the information used to scrutinize the services' and other departments and agencies' activities. In principle, subject to necessary constraints flowing from security requirements, the parallel system should reproduce as many of the functions performed outside the executive branch in the ordinary system as possible. In practice, however, the parallel system falls short of this standard.

Parliament established the parallel system by creating expert review bodies, first for CSIS, and later for CSE and the RCMP. These review bodies are the Security Intelligence Review Committee (SIRC), the CSE Commissioner and the Civilian Complaints and Review Commission for the RCMP (CCRC). The review bodies enjoy a degree of independence from the executive, and have broad access to secret information (albeit much less so in the case of the CCRC than SIRC or the CSE Commissioner) and security-cleared staff.[50] Generally speaking, the review bodies are charged with examining their agencies' activities to ensure their propriety and investigating complaints against the agencies.[51]

B. Limits and Reform of the Parallel System

The review bodies and by extension, the parallel system as it currently exists, have several limits. First, they cover only three of the agencies involved in national security matters, leaving several departments

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46 *Canada Evidence Act*, RSC 1985, c C-5, s 38 *et seq; Immigration and Refugee Protection Act*, RSC 1985, c I-2.5, s 83 *et seq*.

47 *Canada Evidence Act*, *supra* note 45.

48 See e.g. *Access to Information Act*, RSC 1985, c A-1, s 15; *Security of Information Act*, RSC 1985, c O-5, s 8(1), *sub verbo* "special operational information".

49 Farson, supra note 39 at 232.

50 *CSIS Act*, *supra* note 2, ss 34, 37–39; *National Defence Act*, *supra* note 2, 273.63; *RCMP Act*, *supra* note 5, ss 45.3, 45.34, 45.39–45.45.

51 *CSIS Act*, *supra* note 2, s 38; *National Defence Act*, *supra* note 2, s 273.63(2); *RCMP Act*, *supra* note 5, s 45.34.

and agencies, notably the Canada Border Services Agency, which has developed a significant intelligence program since its creation in 2004, outside of the parallel system of accountability.[52] Second, although cooperation among national security departments and agencies has become routine, the review bodies can only examine their agency and cannot share secret information with one another, so they cannot conduct joint reviews.[53] Third, the review bodies' mandates focus heavily on one type of wrongdoing, impropriety, to the near total exclusion of the other, inefficacy.[54] The Trudeau government is currently conducting a public consultation which, among other things, raises the possibility of reforms that would address at least some of these gaps in the parallel system of accountability.[55]

In June 2016, the Government House Leader introduced a bill that would, if passed, create a committee composed of security-cleared Senators and MPs appointed by the prime minister and located within the executive branch.[56] The committee will have the broad mandate to review the "legislative, regulatory, policy, administrative and financial" framework for security and intelligence as well as any specific security and intelligence activity.[57] The committee will be explicitly empowered to cooperate with review bodies.[58] The committee will have broad access to secret information, including to information protected by solicitor-client privilege and professional secrecy of advocates and notaries, which should allow it access to Department of Justice legal advice interpreting the intelligence services' enabling legislation.[59]

Although there are some well-founded concerns about the degree of control the executive will have over the proposed committee, its structure addresses several gaps that currently exist in the parallel system.[60] Unlike the review bodies, the committee can examine security and intelligence matters wherever in the federal government they take place, including joint operations among agencies and extending not only to the propriety, but also to the efficacy of such activities.[61] The committee should have the powers it needs to reproduce much of the scrutiny that might take if Parliament and its officers were able to scrutinize the government of Canada's national security activities in their usual way.

In particular, the new committee should be able to perform the functions that the various parliamentary committees perform when it comes to the other departments and agencies that fall within their mandates. This is especially important when it comes to evaluating the financial performance of the intelligence services, both when it comes to their estimated and actual spending, and the relationship between the powers and limits set out by public statute and the way in which they are implemented through secret ministerial directions and the Department of Justice's legal advice.

In order to do so, it will be necessary for the committee to cooperate closely with review bodies, which must themselves be given the powers necessary to effectively scrutinize security and intelligence activities across government. This might be done either by creating review bodies to cover the rest of the intelligence and security community and establishing "statutory gateways" to allow them to cooperate on the review of joint operations, or preferably, by creating a single body charged with reviewing and adjudicating complaints concerning the government's intelligence and security activities.[62]

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52 A bill currently before the Senate would create an Inspector General for CBSA: Bill S-205, *An Act to amend the Canada Border Services Agency Act (Inspector General of the Canada Border Services Agency) an to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2015 (committee report presented 22 June 2016).

53 Forcese & Roach, supra note 6, at 13–14.

54 Paul Robinson, *Eyes on the Spies: Reforming Intelligence Oversight* (Ottawa: University of Ottawa, Centre for International Policy Studies, 2008) at 2.

55 Canada, Department of Public Safety, *Our Security, Our Rights: National Security Green Paper, 2016* (Ottawa: Public Works and Government Services Canada, 2016).

56 Bill C-22, *supra* note 7, cls 4, 12.

57 *Ibid* cl 8.

58 *Ibid* cls 9, 16(3), 22–23.

59 *Ibid* cl 13(2).

60 Ron Atkey, Craig Forcese & Kent Roach, "Making the Spies Accountable: Real Change or Illusion?" *The Globe and Mail* (12 September 2016).

61 Bill C-22, *supra* note 7, cl 9.

62 Forcese & Roach, *supra* note 6 at 35–36. See also Jacques JM Shore, "Intelligence Review and Oversight in Post-9/11 Canada" (2006) 19(3) International Journal of Intelligence and Counterintelligence 456 at 471–472.

C. The Relationship Between the Parallel and Ordinary Systems of Accountability

With the creation of the committee of Senators and MPs in the executive branch and the eventual reform of the review bodies, the parallel system will come closer to reproducing the functions performed in the ordinary system of accountability. Even so, more thought will need to be given to the relationship between the parallel and ordinary systems. For one, the parliamentary committees (as opposed to the proposed executive committee) whose mandates cover intelligence and security matters will almost certainly continue to exist. What will their relationship be with the executive committee? Is there any sense in holding open hearings on intelligence and security matters when closed hearings on the same subject are (presumably) being carried on by the executive committee?

Moreover, there remains a need to reflect on whether an appropriate balance has been struck between the ordinary and parallel systems. The parallel system is an exception to the ordinary system. The use of broad legislation to authorize intelligence activities, clarified not through public statutory instruments, but through secret ministerial directions (and Department of Justice legal opinions), is a departure from the normal way of doing things. Likewise, the authorization of broad envelopes of funding, subject to limited financial reporting is a departure from the normal rules. Such departures should be no greater than what is strictly necessary. Whose responsibility will it be to monitor the balance between the ordinary and parallel systems? Could a greater role be played on financial matters by the Auditor General and Parliamentary Budget Officer and on legal matters by the creation of an independent reviewer of national security legislation, which exist in Australia and the United Kingdom?[63]

Finally, however much is done to strengthen the parallel system so that it covers the entire intelligence and security community, allows for the review of joint operations and examines questions of efficacy as well as propriety, there is a risk that the parallel system will fail. In particular, the institutions parallel system may draw attention to wrongdoing or risks of wrongdoing, in as explicit terms as are possible when dealing with highly-classified intelligence activities, and yet fail to get anyone in the ordinary system to take up their concerns and consider their recommendations. For instance, CSE Commissioner, has, nearly since CSE was put on a statutory footing in 2001, raised concerns about the wording and interpretation of CSE's enabling provisions in the *National Defence Act*. The government has repeatedly committed to resolving the problems by amending the *National Defence Act* and yet has never done so.[64]

This is a problem that does not lend itself to an easy solution as it stems from the necessary secrecy surrounding the government of Canada's intelligence and security activities. The responsibility for ensuring that secrecy does not prevent actual or potential problems in the operations of the intelligence services falls primarily on the executive. The parallel system exists to identify problems and propose solutions, but the executive alone can act on them. As a result, both the review bodies and especially, the soon-to-be-created committee of parliamentarians need to focus their efforts on ensuring that the executive takes this responsibility seriously. What more can be can be done to ensure that the executive hears and responds to allegations of wrongdoing?

CONCLUSION

The executive's powers in the area of national security are great, as are the risks posed by wrongdoing, both in the form of inefficacy and impropriety. Canada has gradually brought national security activities under the aegis of the ordinary system of accountability, based on the interaction among the executive, Parliament, and the courts but it has also created a parallel system of accountability within the executive to reproduce features of the ordinary system maladapted to dealing with secret information. The Trudeau government's proposed reforms would strengthen the parallel system, but considerably more thought must be given to whether an appropriate balance between the ordinary and parallel systems has been struck.

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63 Forcese & Roach, *supra* note 6 at 37–39. If the Auditor General could provide additional scrutiny of the intelligence services' actual spending and performance, the Parliamentary Budget Officer (PBO) could, in principle, provide the Senate and the House of Commons with analysis, research and estimates concerning the planned spending of the intelligence services by virtue of the *Parliament of Canada Act*, RSC 1985, c P-1 s 79.2. However, unlike the Auditor General, the PBO does not likely have the security-cleared staff or resources to do so at present.

64 Communications Security Establishment Commissioner, *supra* note 23 at 43–44.

SECURING CANADA: THE 2016-2017 THREAT ENVIRONMENT AND NATIONAL SECURITY

Stephanie Carvin[1][2]

Abstract: Canada is sometimes described as the "peaceable kingdom", but the reality is that it faces a complex variety of national security threats that target our communities, economy and public safety. As state and non-state actors harness new technologies and leverage networks, these threats have evolved since the end of the Cold War in ways that are not always obvious but can have a lasting impact on our nation. This paper provides an overview of the current Canadian threat environment and argues that it is important for Canadians to *responsibly* widen our understanding of national security threats. This entails an appreciation for the fact that it average citizens who bare the costs of the government failing to protect our nation against national security threats. This includes the social and economic harm that can leave lasting impact on our communities and damage our prosperity. The paper concludes with three guiding principles for re-thinking our national security policies at a time when the Canadian government seeks to reform them.

Le Canada est parfois décrit comme un « royaume pacifique », mais, dans les faits, une gamme complexe de menaces pèsent sur nos communautés, sur notre économie et sur la sécurité publique. Dans un contexte où les acteurs étatiques et non étatiques maîtrisent les nouvelles technologies et exploitent différents réseaux, ces menaces ont évolué depuis la fin de la guerre froide de manières parfois subtiles, mais qui peuvent avoir une incidence durable sur notre nation. Cet article offre un survol des menaces qui pèsent actuellement sur le Canada et fait valoir qu'il importe que les Canadiens élargissent *de manière responsable* leur conception des menaces à la sécurité nationale. Pour cela, on doit reconnaître que ce sont les citoyens ordinaires qui font les frais de l'échec du gouvernement à protéger notre nation contre les menaces à la sécurité nationale, y compris contre les dommages sociaux et économiques qui peuvent affecter nos communautés à long terme et nuire à notre prospérité. Finalement, l'article propose trois principes directeurs pour repenser notre politique de sécurité nationale, à l'heure où le gouvernement canadien cherche à la réformer.

INTRODUCTION

The most important job for any government is the protection of its citizens. Without safety and security, it is not possible for human rights to flourish or for citizens to experience the cherished freedoms promised by their constitutions and domestic arrangements. This reality has been long recognized by political philosophers and practitioners.

This paper seeks to set out the threat environment[3] – the context in which the balance of rights and security must be made, implemented and critiqued. A key idea I wish to convey throughout is that we need to *responsibly* widen our understanding of national security threats so that we can calibrate our policy and legal instruments with a view to creating the space for Canadian citizens to flourish. Importantly, this responsible widening does not prescribe a securitization of society or draconian response. Instead, it suggests that it is important to have a broad view of the impact of national security, especially an appreciation of the impact of instability and uncertainty they generate on our society such as the cost to human capital and our economy, the impact on the ability for business, community institutions to flourish and for individuals to live their lives free from fear and intimidation. As such, a grounding in a community and societal based approaches to national security threats is fundamental to understanding the nature of the threat, but also how democracies should calculate their response.

Violent Extremism

Despite heightened concerns about the threat of terrorism after a year of violent attacks around the

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1 The author is an Assistant Professor at the Norman Paterson School of International Affairs.

2 As well, the author would like to thank Craig Forcese, Jeremy Littlewood and an anonymous reviewer for comments on this paper.

3 There is no shortage of security issues that could be discussed here. Due to space constraints, the paper highlights those national security issues that are listed in section 2 of the *CSIS Act*.

world in 2016, Canada has a lengthy history of dealing with violent extremism[4] from a number of sources and for a number of causes. This includes Irish Republicans in the 19th Century, Doukabours, Quebec nationalists, Armenians, Tamils, Sikhs and Islamist Extremists. Communities within Canada have also been targeted by right wing extremist groups. It is worth noting that, every bomb that went off in Canada between 2002-2012 was claimed by or attributed to left-wing or single-issue extremists.[5]

Since 9/11 CSIS has ranked terrorism as the number one threat to Canada.[6] In particular, the threat of violent extremism inspired by Al Qaida, the Islamic State (often referred to by its Arabic acronym Daesh), and like-minded groups has been identified as a pressing concern. This almost certainly reflects the number of investigations currently undertaken by security services, the allocation of resources to this issue relative to other threats as well as an assessment of the likelihood and impact of an attack against Canada, Canadian interests abroad, or by an individual with a "nexus to Canada" against another country.[7]

Five Threat-Related Activities

Radicalization: The threat of terrorism manifests itself in Canada in five ways. First, individuals actively seek to radicalize others to encourage them to adopt a violent extremist mindset.[8] Once established in communities, radicalizing influences play a role in targeting youth, and disrupting families, schools and community institutions in the process. Radicalization may be done through a combination of person-to-person contact and online activities. However, it is worth noting that there is a debate among scholars and analysts as to how online plays a role and to what extent it can actually replace in-person contact.[9] Importantly, there is no single path to radicalization, nor is there any particular profile of individuals likely to adopt such beliefs. This lack of profile and pathway makes the job of national security agencies more difficult as it is extremely challenging, if not impossible, to predict who may actually mobilize to violence.

Financing: Second, in Canada individuals seek to finance violent extremism at home in abroad. This can happen in a number of ways. Charities can be set up so as to secretly fund violent extremist groups.[10] Individuals may seek to siphon funds from otherwise legitimate charities and institutions and direct them towards violent extremism.[11] Violent extremists and

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4 This paper typically uses the term "violent extremism" rather than "terrorism" although both are used. The terms are treated as mostly interchangeable, but former is more broad in scope and avoids the political baggage of the latter.

5 Between 2004-2010, a group calling itself Resistence Internationaliste set off three bombs: a Hydro-Tower close to the US border before a visit of then-US President George W. Bush in 2004; a bombing of the car of an oil executive in Quebec in 2006; and the bombing of a Canadian Forces Recruitment Centre in 2010. A summary of these attacks can be found in CBC.ca, "Group claims responsibility for Quebec blast" http://www.cbc.ca/news/canada/montreal/group-claims-responsibility-for-quebec-blast-1.915266. At time of writing, no one has been charged in these attacks. (This investigation has not been without controversy. For a critical take of the investigation into Resistence Internationaliste see Nora T. Lamontagne and Justin Ling, "Inside Canada's Five-Year-Long Anti-Terror Investigation of a Group of Quebec Communists", vice.com, 19 March 2015. Available online: http://www.vice.com/en_ca/read/inside-canadas-five-year-long-anti-terror-investigation-of-a-group-of-young-communists-235. Between October 2008-2009 there were several bombings of EnCana infrastructure in British Columbia. The case remains unresolved, the only suspect having died in 2012. See Sunny Dhillon, "Questions linger about Encana bombings" *Globe and Mail*, 27 December 2013. Available online: http://www.theglobeandmail.com/news/british-columbia/questions-linger-about-encana-bombings/article16109812/. In May 2010, Roger Clement set off a firebomb at an Royal Bank of Canada branch in Ottawa to protest their involvement in the oil sands. He was convicted in December 2010. See CTV.ca, "Ottawa man sentenced to three years for RBC firebombing". 7 December 2010. Available online: http://ottawa.ctvnews.ca/ottawa-man-sentenced-to-three-years-for-rbc-firebombing-1.583144

6 This ranking can be in the "Threat Environment" section of CSIS's Public Report, some of which can be found online at the organization's website: https://www.csis-scrs.gc.ca/pblctns/index-en.php?cat=01

7 CSIS often describes the individuals it monitors as those with a "nexus to Canada". This means individuals who are Canadian citizens, permanent residents or who may have some status that allows them to travel to or live in Canada (such as a student visa.)

8 The key here is *violence*. Individuals are allowed to hold whatever beliefs they wish in Canada. However, should they try to bring about their beliefs through violent acts (or by supporting violent acts) this becomes a national security issue.

9 A summary of the debate and existing data can be found in Paul Gill, Emily Corner, Amy Thornton and Maura Conway, "What are the Roles of the Internet in Terorrorism?: Measuring Online Behaviours of Convicted UK Terrorists", Vox-Pol Network of Excellence, 2015. Available online: http://www.voxpol.eu/wp-content/uploads/2015/11/DCUJ3518_VOX_Lone_Actors_report_02.11.15_WEB.pdf

10 In 2011, a Tamil Charity, the Canadian Foundation for Tamil Refugee Rehabilitation (CAFTARR), lost its charitable status for providing $700,000 in funds to "non-qualified donees" that were believed to be part of the Tamil Tiger Movement. Michael Woods, "Tamil foundation loses charity status", *Toronto Star*, 12 December 2011. Available online: https://www.thestar.com/news/gta/2011/12/12/tamil_foundation_loses_charity_status.html

11 During the 1990s, there were several reported cases where funds were likely diverted from Sikh temples to support violent extremism abroad. See David G.Duff, "Charities and Terrorist Financing", *University of Toronto Law Journal*, Vol. 61, No. 1, Winter 2011. pp. 73-117. See also see Stewart Bell, "Chapter 2: Snow Tigers" in *Cold Terror: How Canada Nurtures and Exports Terrorism Around the World*, Etobicoke: John Wiley & Sons Canada, Ltd., 2007. pp. 47-102.

their supporters have also been known to use crime to support their activities such as extortion and credit card skimming.[12] More challenging for national security agencies (and almost certainly more common) is the use of legitimate sources of funds to support violent extremist activities. This includes diverting otherwise legitimate sources of funding (student loans, welfare payments, selling-off goods or cash from knowing or unknowing friends and relatives) towards more nefarious ends.

Facilitate: Third, violent extremists seek to facilitate violent extremists in their activities. This may include providing guidance on how to engage in threat-related activity or actively assisting individuals in engaging in an act of violent extremism. Further, individuals may provide advice on travelling abroad for extremist purposes, how to cover their actions, connecting individuals to extremist networks. However, this facilitation may take on a more direct role in the active planning of violence, including coaching or assisting individuals in carrying out an attack. For example, Momin Khawaja was convicted for actively supporting individuals who sought to conduct attacks in the United Kingdom, including designing an explosive device.[13]

Travel: Fourth, as reflected in media headlines over the last five years, Canadians seek to go abroad in order to engage in or support violent extremism abroad. Reliable data on the extent to which Canadians have travelled overseas to engage in violent extremism is not available. It is likely, however, that Canadians have long travelled to participate in conflicts with which they have ethnic or national ties, or to which they have ideological sympathies. This includes Lebanon, Afghanistan, Somalia and most recently, Syria and Iraq. At the time of writing, Canadian authorities have stated that there are 180 individuals that have travelled overseas that are assessed as engaging in or supporting "terrorism-related activities".[14]

It may seem strange that Canada would be concerned with letting violent individuals go overseas. After all, why not just let the individuals leave instead of posing a threat at home? There are a number of reasons why allowing individuals to travel from Canada to conflict zones is a serious threat. First, extremist travelers are often going overseas to engage in violence, usually with the intent of actively killing people or supporting others who do. If Canada knew of other countries that were knowingly letting their citizens come to our borders with the intent to engage in violence, we would rightfully be upset. As such, Canada has legal, political and moral obligations to prevent such individuals from travelling.[15] Second, once these individuals have travelled, they may actively facilitate others in doing so using extremist networks and the contacts they have made. For example, both Andre Poulin and John Magiure, two Canadians that travelled to Syria, are believed to have actively worked to recruit individuals in Canada to join them.[16] Third, while there may not be many who would mourn the death of a violent extremist, their actions often result in their deaths, and frequently disrupt and even destroy the families that surround them. Fourth, even if these individuals do die, their passports may live on in conflict zones. This gives violent extremist groups access to Canadian passports that they can use to facilitate their members to other countries.

Related to this (and fifth), Canadian foreign fighters threaten the integrity and viability of the Canadian passport. If large numbers of Canadians engage in travel for extremist purposes, it casts a shadow of doubt over Canadians that wish to travel abroad generally. Allowing large numbers of individuals to travel from our borders may also hurt relations with our friends and allies who are also concerned about the impact of radicalized violent extremists engaging in threat-related activity on, or passing through their soil.

Finally, individuals who go abroad are likely to get advanced training which can make all of the difference in terms of the success, effectiveness and lethality of terrorist attacks. For example, part of the reason for the

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12 On extortion within Tamil communities, see Bell, *Cold Terror*, pp. 61-63. On credit card skimming, CBC News: "Credit card fraud helps fund terrorism: police" 25 May 2006. Available online: http://www.cbc.ca/news/canada/calgary/credit-card-fraud-helps-fund-terrorism-police-1.604191

13 Khawaja was the first Canadian convicted under the 2001 *Anti-Terror Act*. See R. v. Khawaja, 2012 SCC 69, [2012] 3 S.C.R. 555

14 Public Safety Canada, "2016 Public Report On The Terrorist Threat To Canada", 25 August 2016. Available online: http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2016-pblc-rpr-trrrst-thrt/index-en.aspx#s3. Public Safety Canada does not define "terrorism-related activities" in their report.

15 For example, Canada has a legal obligation under United Nations Security Council Resolution 2178, 24 September 2014. Available online: http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf

16 On Poulin see, Nazim Baksh and Adrienne Arsenault, "Timmins, Ont.-born jihadist recruited 5 others for ISIS", CBC.ca, 2 March 2015. Available online: http://www.cbc.ca/news/world/timmins-ont-born-jihadist-recruited-5-others-for-isis-1.2978988; On Maguire see, Nick Logan, "Convicted terror twin Ashton Larmond devised plan to sneak out of Canada, join ISIS", *Global News*, 30 August 2016. Available online: http://globalnews.ca/news/2912904/convicted-terror-twin-ashton-larmond-devised-plan-to-sneak-out-of-canada-join-isis/.

terrible success of the extremely deadly Paris November 2015 and Brussels March 2016 terrorist attacks is that the perpetrators had travelled abroad, received training in building bombs and conducting terrorist attacks. They also relied upon extremist networks they encountered on their travel to facilitate and plan their activities as well as hide from law enforcement. Had Canadian violent extremists, such as Aaron Driver, Michael Zehaf-Bibeau or Martin Couture-Rouleau received such training abroad, it is possible their attacks would have been far more deadly.

Attack Planning: The final way in which violent extremists pose a threat to Canada is by planning and conducting attacks. This includes attacks within Canada, or against Canadian interests abroad or our allies. As noted above, Canada has experienced attacks from many different kinds of extremist organizations over the years as well as individuals motivated by a number of ideologies. Attacks range from the kidnapping of Canadian and foreign individuals by Quebec Nationalists during the 1970s, to the 1985 Air India Attack which killed 329 people (plus two baggage handlers when a second bomb detonated at Narita airport in Japan), to the assassination of foreign individuals on Canadian soil in so-called "spill-over" violent extremism (such as the attacks against Turkish diplomats by Armenian extremists in the 1980s), through to the targeting of critical infrastructure (such as hydro-towers and pipelines) by single-issue extremists.

Violent extremist attacks can be roughly divided into three categories: those directed by groups, those approved by groups but planned and coordinated by local cells and finally those that are inspired by a group's ideology.[17] The classic example of the first would be the 9/11 attacks, directed and supported by Al Qaida. An example of the second kind of attack would be the 1999 "Millennium Plot" when Ahmed Ressam, an Algerian citizen living in Canada attempted to drive a car full of explosives into the United States with the intention of conducting an attack at the Los Angeles Airport. Ressam had travelled abroad to Pakistan where he received six months of basic training from Al Qaeda in using weapons and bomb-making. However, the Los Angeles plot was largely developed by Ressam with little to no guidance or supervision from abroad.[18]

An example of inspired attacks is the Toronto 18 Case, where a group of young individuals sought to conduct a major attack in the name of Al Qaida or the ideology.[19] Although many violent extremist groups view Canada as a legitimate target, the vast majority of Canadian plots and attacks have been of this latter, inspired category.[20] While there have been some cells (such as the Toronto 18 case) many have also been lone-actors, such as the perpetrators of the two October 2014 attacks as well as Aaron Driver.[21] At time of writing, many plots in Canada over the past three years were planned or conducted by individuals who had not or were unable to travel abroad or obtain training in conducting attacks. It may be sorry comfort, but this means that most lone-actor plots in Canada have been relatively unsophisticated compared to other attacks in Europe between 2015-2016.

The Future of Violent Extremism in Canada

It should be noted that the five activities discussed above are not mutually exclusive: individuals involved in violent extremism often take on more than one role. Recruiters may seek to radicalize, finance and facilitate their protégées. And as noted above, those who have travelled overseas may wish to conduct violent attacks at home, or elsewhere, once they return.

Further, the kinds of activities that violent extremists engage in are often determined as much by opportunity as much as motivation. For example, during the

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17 This attack typology is discussed in more detail in Mitchel D. Silber, *The Al Qaeda Factor: Plots Against the West*, Philadelphia: University of Pennsylvania Press, 2012.

18 Silber, *Al Qaeda Factor*, pp. 57-67

19 Michelle Shephard, *Decade of Fear: Reporting From Terrorism's Grey Zone*, Vancouver: Douglas & McIntyre, 2011. pp. 103-135.

20 Asside from the "Millennium Plot", a second recent exception to this may be the 2013 "Via Rail Plot" where Chiheb Esseghaier is believed to have travelled abroad and may have received some support or approval from Iran-based Al Qaida elements. However, the extent of this support is not clear. Tu Thanh Ha, Colin Freeze and Daniel Leblanc, "RCMP arrest two for 'al-Qaeda-supported' plot to bomb Via train", *Globe and Mail*, 22 April 2013. Available online: http://www.theglobeandmail.com/news/national/rcmp-arrest-two-for-al-qaeda-supported-plot-to-bomb-via-train/article11465138/

21 What constitutes a "lone actor" attack is up for some debate. For example, most "lone-actors" are in contact with other like-minded individuals, and many leak details of their plots to bystanders. Paul Gill, *Lone-Actor Terrorists: A behavioural analysis*, Abingdon: Routledge, 2015. See especially Chapter 4. Gill also discusses various definitions pp. 11-15. For the purpose of this paper, lone-actor attacks will be treated as plots which are primarily planned and designed to be carried out by one individual in the name of a violent extremist cause.

Islamic State's ascendency in 2014-2015, it actively encouraged individuals who sought to join it as a terrorist group to travel to Syria.[22] With lax border controls at the Turkish-Syrian border, and a relatively easy-access conflict zone (relative to Somalia and Afghanistan), up to 31,000 fighters made the journey to join the Islamic State by December 2015.[23] However, with the so-called "caliphate" experiencing a reversal of fortune under the sustained counter-terrorism pressures of the anti-Islamic State coalition, the group has changed tactics: instead of encouraging travel to Syria and Iraq, the Islamic State began to urge its followers to conduct attacks abroad. It is now sending trained extremists to the West as well as calling upon their sympathizers to engage in attacks in their home countries. Unfortunately, 2015-2016 saw a number of deadly attacks worldwide, including Bangladesh, Belgium, France, Germany, Iraq and the United States as a result of this change in tactics.

Indeed, in the near term, a major threat to Canada's national security will come from the fallout of the Islamic State's territorial decline. This is likely producing what Clint Watts calls the "cascading effect" of terrorism:[24] a situation where success begets success and other lone actors will be inspired by not only the Islamic State's propaganda, but also the success of its followers. This goes beyond "copycat" activities and could become a more systemic problem that governments around the world will struggle to counter.[25]

However, it is also important for national security agencies to keep their eyes on a broad range of extremist movements. Canada is not immune to the forces or impact of the rise of right wing extremism (or "alt-right" groups) in Europe and the United States. Such groups frequently engage in hate crimes which are typically treated as public order or law-enforcement issues rather than national security concerns.[26] However, such extremism has spilled over to large-scale attacks before (such as the 2011 attacks of Anders Breivik in Norway) and there is no reason to believe that this will not happen again in the future.[27] Canadian national security agencies will need to keep abreast of developments in this and other areas of violent extremism. Additionally, policy makers should be prepared to ensure their "counter-violent extremism" programs look beyond Al Qaida or Islamic State-inspired extremism.

ESPIONAGE AND FOREIGN INFLUENCE

The notion of espionage often instantly conjures up Cold War movies of Americans and Russians chasing each other around, seeking information on super weapons or military plans. The reality, unsurprisingly, is far less glamorous – countering the efforts of foreign intelligence agencies in Canada involves painstaking work: intelligence officers are far more likely to spend time behind a desk than at *Casino Royale*. Nevertheless, the threats emanating from espionage continue to evolve and pose serious challenges to Canadian national security.

For the purpose of this paper, espionage will be considered an intelligence activity directed towards the acquisition of information through clandestine means and proscribed by the laws of the country that it is committed. Typically, it may involve a range of activities, such as delivering, transmitting, communicating or receiving information with an intent or reason to believe that it may be used against the interests of the state it is collected from or to the benefit of the state that collected it.[28] Understandably, like most countries, Canada does not like to talk about its espionage successes or failures – they tend to come to light only when something has gone very wrong. Nevertheless, it is possible to discuss

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22 This contrasts with the approach of Al Qaida, a self-consciously elitist organization that heavily screened individuals that wished to join it.

23 The Soufan Group, "Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters"

24 Foreign Policy Research Institute, "FPRI's Clint Watts Discusses the Effects of "Cascading Terrorism" on Morning Joe", 29 June 2016. http://www.fpri.org/news/2016/06/fpris-clint-watts-discusses-effects-cascading-terrorism-morning-joe/

25 Stephanie Carvin, "After Nice, a bolstered Islamic State – and increased risk of cascading terrorism" *Globe and Mail*, 15 June 2016. http://www.theglobeandmail.com/opinion/after-nice-a-bolstered-islamic-state-and-increased-risk-of-cascading-terrorism/article30937923/

26 For example, in its Public Report, CSIS states "Right-wing extremist circles appear to be fragmented and primarily pose a threat to public order and not to national security."

27 Although it is not regarded as a violent extremist attack, the perpetrator of the June 2014 slaying of three police officers held views that are consistent with the Sovereign Citizen/Freeman on the Land movements. However, given the lack of ideological coherence to these movements (which reflect militant anti-government views and inconsistent set of grievances rather than a defined set of principles), it is difficult to make a definitive assessment in this case. See CBC.ca "Justin Bourque statement to RCMP shows no remorse for killings" 27 October 2014. http://www.cbc.ca/news/canada/new-brunswick/justin-bourque-statement-to-rcmp-shows-no-remorse-for-killings-1.2814230

28 This is a modified definition based on the one found in Jan Goldman, "Espionage", in *Words of Intelligence: And Intelligence Professional's Lexicon for Domestic and Foreign Threats*, Plymouth: Scarecrow Press, 2011. pp. 110-111.

broadly the kinds of activity Canada is concerned with when it comes to the intelligence agencies of other countries.

Although much of this section will be devoted to how the threat from espionage is evolving, the threat of what might be called "traditional" espionage remains. These are activities related to the collection of important information related to the safety, national defence and security of Canada. Perhaps the most prominent recent Canadian example of traditional espionage is case of Jeffrey Delisle, a former sub-lieutenant in the Navy who sold information to the Russians between 2007-2012 and was subsequently the first person convicted under the 2001 *Security of Information Act* for doing so.[29] Less damaging to Canada's security, but still significant is the case of Qing Quentin Huang, a Navy contractor who was also charged under the *Security of Information Act* for attempting to sell information to China.[30] These cases may be said to be "traditional" in the sense that they are attempts by states and individuals to acquire government information (in this case related to national defence) using human sources (or HUMINT). Further, it is noteworthy that both of these cases may be considered "insider threats", that is cases of individuals inside organizations seeking to harm the organization via their access.[31]

The biggest evolution in "traditional" espionage has been in the cyber-realm. States are now able to steal privileged or classified information from other countries without resorting to human sources. Instead, they are able to harness their technological prowess in order to hack into the systems of governments in order to steal information. For example, China and Western countries often trade accusations back and forth with regards to the theft from hacking into military contractors.[32] Between 2010-2011, several Canadian departments were breached and exploited by a foreign entity, identified in the media as Chinese People's Liberation Army (PLA) Unit 61398.[33] This included DND's Defence Research and Development Canada (DRDC) and Immigration and Refugee Board on the eve of Canada deporting one of China's most wanted men.[34] Additionally, in 2014 the Canadian government took the step of publically blaming China for a "cyber intrusion" into the National Research Council's computer systems.[35]

Economic Espionage

However, in today's competitive global economy, states no longer only seek information related to the actions of governments and militaries, but also the private sector. Indeed, while most states wish to give companies an edge in the global market, some states actively provide clandestine support in order to ensure they are successful. In recent years this threat has manifested in several ways. First, states have been known to use their cyber capabilities in order to steal intellectual property from private companies in order to produce cheaper versions that can compete on the market, undermining the original developer. Second, state-based or state-sponsored actors are able to hack into company files, including business strategies, plans, and corporate files. Access to strategies helps rival companies compete on bids, or provide an advantage in negotiations. Personnel files may identify individuals of interest who may be targeted for further espionage operations, bribes and/or blackmail. The Canadian company Nortel was allegedly an example

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29 Jane Taber, "Canadian spy Jeffrey Delisle gets 20 years for selling secrets to Russia", *Globe and Mail*, 8 February 2013. Available online: http://www.theglobeandmail.com/news/national/canadian-spy-jeffrey-delisle-gets-20-years-for-selling-secrets-to-russia/article8390425/

30 Colin Freeze, Karen Howlett and Jeff Jones, "RCMP charge Ontario man with attempting to pass naval secrets to China" *Globe and Mail*, 1 December 2013. http://www.theglobeandmail.com/news/national/rcmp-to-announce-update-on-national-security-investigation/article15704364/

31 Insider Threats can damage organizations in several ways. They may use their access in order to conduct an attack from within. Others may seek to use their access to information to cause damage by leaking it broadly, or selling it. In this sense, "insider threats" are more or less a methodology rather than being tied to a particular national security threat. For an overview see Federal Bureau of Investigation, "The Insider Threat: An introduction to detecting and deterring an insider spy". Available online: https://www.fbi.gov/file-repository/insider_threat_brochure.pdf

32 See, for example, Reuters, "China under suspicion in U.S. for Lockheed hacking", 2 June 2011. Available online: http://www.reuters.com/article/us-lockheed-china-idUSTRE7517B120110602 and Shen Yi, "Time to end the cyber-spying blame game" China Daily, 22 January 2015.

33 The unit is also sometime identified as Advanced Persistent Threat 1 or APT1 and is famous for having hacked into the New York Times systems.

34 Colin Freeze, "Canada targeted in 2011 hacks by accused PLA unit", *Globe and Mail*, 19 May 2011. Available online: http://www.theglobeandmail.com/news/national/canada-targeted-in-2011-hacks-by-accused-pla-unit/article18750958/

35 Steven Chase and Colin Freeze, "Chinese hacked government computers, Ottawa says", *Globe and Mail*, 29 June 2014. Available online: http://www.theglobeandmail.com/news/national/chinese-hacked-government-computers-ottawa-says/article19818728/

of such a targeted campaign by Chinese hackers which is believed to have played a role in its eventual bankruptcy in 1999.[36] Nortel's collapse, sadly, lead to the loss of thousands of Canadian jobs and a major source of Canadian innovation in our economy. It is a brutal example of the impact and harm of espionage on Canada's well-being.

State-Owned Enterprises

One of the most challenging issues related to the economy for national security agencies relates to state-owned enterprises or (SOEs), "commercial entities operated by foreign governments that can further the legitimate policy and economic goals of the nations they represent."[37] Many countries have some kind of state-owned companies, such as Canada's Crown corporations, which are largely designed to address market-failures. However, there are stark differences between the behaviour of Canada's Crown corporations and the behaviour of certain foreign SOEs in our economy. For example, Chinese SOEs are given large subsidies that allow them to exist despite considerable inefficiencies.[38] Additionally, as Duanjie Chen argues, Chinese SOEs are not publically accountable in the same way Crown corporations are. "Chinese SOEs are run by appointees of the Communist party whose first duty is to the state, the majority or even sole shareholder of SOEs."[39] (Similarly, Russian President Vladimir Putin has appointed KGB veterans to key positions in economic enterprises wrestled from oligarchs who took control of them after the collapse of the Soviet Union.[40]) In this way, some SOEs are able to survive and even thrive, despite considerable inefficiencies. This raises two problems for the Canadian economy. First, inefficient companies are unlikely to be particularly productive or innovative and thus, not particularly beneficial for Canada generally. Second, SOEs are able to leverage the power of their state to give them an uncompetitive advantage in the market place. While Canadian private sector companies face the pressures of the market and are held accountable for following Canadian laws, SOEs do not face these concerns in the same way. For example, some SOEs are able to make use of large, low-interest or interest-free loans from their state when competing with private sector companies in a competitive bidding situation. This undermines the ability for the private sector to compete and potentially skews the economic landscape in which Canadian companies are supposed to thrive. As a worse-case scenario, states may be willing to use their cyber tools in order to engage in economic espionage to support their SOEs, as described above.

States may be particularly willing to use or back their SOEs when they seek to invest in strategically important areas such as energy and certain areas of technology. As CSIS' 2013-2014 Public Report notes, certain SOEs may "be used to advance state objectives that are non-transparent or benefit from covert state support such that competitors may be disadvantaged and market forces skewed."[41] In addition, ownership of companies within certain sectors also allows countries access to sensitive technology (such as those with military applications, or that are particularly research and development intensive) so they can then export it back home. For example, North Korea is reportedly using "state-trading companies" in China to procure technology related to its nuclear and missile program to get around international sanctions.[42]

The issue of SOEs is a vexing one for a country like

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36 CBC.ca, "Nortel collapse linked to Chinese hackers", 15 February 2012. Available online: http://www.cbc.ca/news/business/nortel-collapse-linked-to-chinese-hackers-1.1260591. In September 2016 it was reported that the former Nortel campus, purchased as a site for Department of National Defence expansion in 2010, did not meet "five-eyes" standards for highly classified intelligence. Additionally, it was reported that the government is still having difficulties rendering the space secure and free of listening and intelligence collecting devices. See Robert Fife, "Department of National Defence's new $1-billion facility falls short on security", *Globe and Mail*, 2 September 2016. Available online: http://www.theglobeandmail.com/news/politics/department-of-national-defences-new-1-billion-facility-falls-short-on-security/article31685234/

37 CSIS, "2013-14 Public Report", Available online: https://www.csis-scrs.gc.ca/pblctns/nnlrprt/2013-2014/index-en.php

38 Economist, "State Owned Enterprises: Fixing China Inc" 30 August 2014. http://www.economist.com/news/china/21614240-reform-state-companies-back-agenda-fixing-china-inc

39 Duanjie Chen, "China's State Owned Enterprises: How Much Do We Know? From CNOOC to It's Siblings", University of Calgary: SPP Research Papers, Vol. 6, No. 19, June 2013. Available online: https://www.policyschool.ca/wp-content/uploads/2016/03/chinas-soes-chen.pdf

40 Mark. M. Lowenthal, *Intelligence: From Secrets to Policy*, 6th Edition. Los Angeles: CQ Press, 2015. p. 472.

41 CSIS, "2013-2014 Public Report".

42 John Park and Jim Walsh, "Stopping North Korea, Inc.: Sanctions Effectiveness and Unintended Consequences", MIT Security Studies Program, August 2016. Available online: http://web.mit.edu/ssp/people/walsh/Stopping%20North%20Korea%20Inc_Park%20%20Walsh_FINAL.pdf While this case study is mostly about companies in China, it is indicative of similar cases that may affect Canada or Canadian companies in the future.

Canada that requires large amounts of foreign investment in order to exploit its natural resources and to grow its economy. In response to the take over of the Canadian energy company Nexen by the Chinese state-owned China National Offshore Oil Corporation (CNOOC) in 2012, the Canadian government announced a new policy with regards to investment by SOEs requiring the investing company to demonstrate its "commercial orientation; freedom from political influence; adherence to Canadian laws, standards and practices that promote sound corporate governance and transparency; and positive contributions to the productivity and industrial efficiency of the Canadian business."[43] As such, these investments are now subject to a "net benefit" and a national security review process. However, how this process works is largely unclear to the broader public and has been criticized by Canadian business and the Chinese government.[44]

Put bluntly, the future of espionage in Canada is that it will continue: it is a truism that "there is no such thing as 'friendly' intelligence agencies. There are only the intelligence agencies of friendly powers."[45] Indeed, cyber-tools are becoming more advanced and states are likely to continue to seek an advantage for themselves and their SOEs through the use of stolen information. The consequences of these actions can be dire – while terrorism often receives much attention and focus from the media, espionage remains largely under the radar. And yet, the Nortel case demonstrates just how detrimental espionage can be to the livelihoods of average Canadians and disruptive to the communities that lose jobs, investment and future opportunities. While disruption and competition are to be expected in capitalist economies, a national security issue emerges when a foreign power engages in the combination of clandestine activities and the systematic theft of information described above in order to fundamentally alter our economic landscape to suit its interests.

CLANDESTINE FOREIGN INFLUENCE

All states seek to influence one another – this is why governments have foreign policies and embassies around the world. Such activities are carried out in a matter that is transparent, or at least with the knowledge of the governments to whom foreign policies are aimed. However, foreign influence that is *clandestine*, that is done in secret and often illicit, is an important national security issue for Canada. Due to its very nature, clandestine foreign influence is one of the hardest threats to define, analyse and counter. Nevertheless, it is possible to identify at least three ways this national security issue poses a threat to Canada.

First, actors working on behalf of foreign governments or entities have been known to intimidate individuals and (particularly expat) communities in Canada. For example, Tamil extremist groups have been reported as using harassment and violence to establish and maintain control over temples in Toronto and violent gangs to suppress dissent.[46] In addition, there have been allegations that the Chinese government has sought to silence critics in the Chinese Canadian press through campaigns of harassment and intimidation.[47] Such campaigns threaten the rights of individuals to free speech and peaceful dissent in Canada.

Second, foreign governments have been known to target politicians in ways that go beyond normal lobbying efforts. It is certainly true that the Canadian government hires registered lobbyists in places like Washington DC to help encourage Congressional representatives to pass initiatives that would be beneficial to Canada. However, such practices are relatively open, transparent and common. Yet, there are states that engage in clandestine foreign influence operations against politicians that are of concern. For example, states may seek to place individuals in or close to positions of power where they can influence policy makers (who unaware of the individual's ties to a foreign state) to make decisions that are favourable to their interests. Alternatively, states may seek to groom or develop relations with an individual over time where connections cross the line from lobbying to clandestine foreign influence. For example, in 2015

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43 Innovation, Science and Economic Development Canada, "Statement Regarding Investment by Foreign State-Owned Enterprises", 7 December 2012. Available online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html

44 Robert Fife, "China open to free-trade deal, but only with certain provisos", *Globe and Mail*, 15 January 2016. p. A1.

45 Lowenthal, *Intelligence*, p. 206. Lowenthal attibutes the quote to a "'senior U.S. government official' (probably Secretary of State Henry A. Kissinger)" in the 1970s.

46 Stewart Bell, *Cold Terror*, 65-67 and 71-75

47 Craig Offman, "Expat Sheng Xue reaches out about Chinese government's intimidation", *Globe and Mail*, 4 March 2016. Available online: *http://www.theglobeandmail.com/news/national/expat-sheng-xue-reaches-out-about-chinese-governments-intimidation/article29040694/*; Craig Offman, "Chinese Canadian Post editor says she was fired over Chan critique" *Globe and Mail* 5 August 2015. Available online: http://www.theglobeandmail.com/news/national/chinese-canadian-post-editor-says-she-was-fired-over-chan-critique/article25855965/; Canadaland, "Is the Canadian-Chinese Press Controlled By Beijing?" 26 June 2016. Available online: http://www.canadalandshow.com/podcast/canadian-chinese-press-controlled-beijing/

it was reported that an Ontario provincial cabinet minister was being investigated for being under the undue influence of the Chinese government. That the politician was the minister responsible for citizenship, immigration and trade – all files that would be of great benefit to a foreign power seeking to establish strategic economic ties and benefits – is significant.[48] Such practices raise national security concerns because they have the ability to skew the rule of law, encourage corruption and skew the economic landscape in favour of foreign interests.

Finally, clandestine foreign influence can manifest itself in ways that resemble subversion: the attempt to undermine a government or political system by individuals working secretly from within. Although subversion is recognized as a threat to the security of Canada under the *CSIS Act*, it is rarely publically invoked. The very notion is reminiscent of Cold War fears that communist organizations were working to infiltrate organizations in order to further their ends. Nevertheless, over the past decade there have been allegations of concerted efforts by states in order to affect the democratic processes in Europe, and more recently, the United States. For example, there have been numerous reports that Russia is funding far-right political parties in Europe at a time of economic uncertainty and pressures created by waves of refugees. Such allegations are extremely difficult to prove or conclude. However, it is clear that Russia welcomes the support of these parties.[49]

During the 2016 US presidential elections allegations of targeted hacking operations have been frequent. The cyber-intrusion and exploitation of the Democratic National Committee[50], and several reported attacks on the electoral commissions of several swing states[51] have been reported in the media and attributed (albeit unofficially) to Russia. Further, there are reports that Russia is behind a well-orchestrated attempt to influence social media, spread propaganda and fake news stories and supporting alt-right voices.[52] This has thrown an element of chaos into the presidential campaign as well as allegations of unprecedented foreign influence.

States have always tried to spread rumours and propaganda to further their ends. Nevertheless, with the addition of cyber-elements, there are serious risks to central institutions of Western democracies – the foundation of our way of life. Although there is little-to-no reporting of such activities in Canada, the fact that it may be happening to our allies means that there is potential for it to happen here as well. Indeed, whether it is for the purpose of stealing information, conducting online attacks or influencing public opinion, state-sponsored hacking groups may be rapidly emerging as a serious threat to Canada's national security. Policymakers and government officials need to take appropriate steps to protect our electoral infrastructure.

CONCLUSION

In order to counter the serious threats discussed above, security agencies must monitor and/or frustrate those who seek to exploit networks and technology for their own illicit and clandestine purposes without disrupting the flows of communications and trade, and the privacy of individuals. Yet, what that balance looks like cannot be determined by the security services themselves. Instead, it must be determined by politicians held accountable by their electorate. At the same time, our understanding of the threats must also evolve – the cost of terrorism is not simply in deaths, but also in broken families, disrupted communities, and even co-opted institutions. Spies no longer only seek the "crown jewels" of weapons designs and military movements, but also information that can skew the economic landscape of our country.

At time of writing, the Canadian government is beginning the process of reviewing national security

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48 Craig Offman, "CSIS warned this cabinet minister could be a threat. Ontario disagreed", *Globe and Mail*, 16 June 2015. Available online: http://www.theglobeandmail.com/news/national/csis-warned-this-cabinet-minister-could-be-a-threat-ontario-disagreed/article24974396/ It should be noted that the allegations against the politician have not been proven in court nor have any charges been laid. The Minister is also suing the *Globe and Mail*.

49 Economist, "Russia's European Supporters: In the Kremlin's pocket" 14 February 2015. Available online: http://www.economist.com/news/briefing/21643222-who-backs-putin-and-why-kremlins-pocket

50 Eric Lichtblau and Eric Schmitt, "Hack of Democrats' Accounts Was Wider Than Believed, Officials Say" *New York Times*, 10 August, 2016. Available online: http://www.nytimes.com/2016/08/11/us/politics/democratic-party-russia-hack-cyberattack.html

51 Robert Windrem, William M. Arkin and Ken Dilanian, "Russians Hacked Two U.S. Voter Databases, Officials Say", *NBCNews.com*, 30 August, 2016. Available online: http://www.nbcnews.com/news/us-news/russians-hacked-two-u-s-voter-databases-say-officials-n639551

52 Andrew Weisburd and Clint Watts, "How Russia Dominates Your Twitter Feed to Promote Lies (And, Trump, Too)", *The Daily Beast*, 6 August, 2015. Available online: http://www.thedailybeast.com/articles/2016/08/06/how-russia-dominates-your-twitter-feed-to-promote-lies-and-trump-too.html

laws, practices and procedures.[53] Having outlined the national security threat environment that Canada faces, there are at least three important implications for policy-makers going forward for thinking about how to achieve security within the framework of human rights and our Constitution.

First, the starting point for thinking about balancing liberty and security must be an acknowledgement that even in an age of lone actor attacks, transnational terrorist networks, and cyber-enhanced foreign influence activities, that the power of a state against a solitary individual is extraordinary. When this power is used outside of the framework of human rights and laws, it rapidly becomes arbitrary and repressive. It undermines the reason why security agencies should exist in the first place: the protection of our democracy, rights and way of life. It is unlikely that any state will ever be able to strike a perfect balance; successful plots or near-misses always raise concerns that our laws are not strong enough. However, enhanced review will promote better understanding of the concerns that national security agencies face and the potential for loss from these threats among policy makers, enabling them to strike a balance between security and liberty than may have otherwise been the case.

Second, in reviewing the national security threat environment, this paper has tried to make the case that it is average citizens who bare the costs of failure. Further, that it is important to take a wide view of the impact of national security threats: yes it is true that more people are killed by bathtubs than terrorists, but this fails to take into account the toxic ripples generated by non-violent supporters of violent extremism. This includes the impact of radicalization, diversion of funds, intimidation, the sowing of mistrust and overall disruption of communities. Further, the failure of a company due to espionage is more than just a loss to shareholders. It is the loss of livelihoods, prosperous communities and opportunity. This wider community or societal view of the impact of national security threats enables us to understand the true costs of insecurity.

Finally, Canada is a wealthy, diverse society. While our openness may provide opportunity for threats to manifest, it also provides the government the resources to counter them. One of the most important ways to ensure security is through the development of trust between communities and national security agencies. Generating trust with those under pressure from violent extremism will help foster communication that may lead to important information exchanges that could save lives. In particular, many terrorism plots experience some kind of leakage to bystanders. Building resources so that concerned persons can come forward in a way that they feel secure is therefore vital for Canadian national security.

Equally challenging, but just as important, building trust between companies and the government in order to exchange information on threats helps to provide the private sector with the knowledge it needs to protect itself while at the same time giving the government an understanding of the kinds of challenges companies are facing from exploitation and attacks. Developing such an exchange has proven to be challenging, but furthering cooperation and trust will be mutually beneficial.

National security threats are a serious and potentially growing concern. Enabled by technological developments, they are quickly evolving. This paper has outlined some of the major challenges that national security agencies are trying to face, as well as politicians and policymakers who must provide the legislative and policy tools while ensuring a reasonable balance between liberty and security. Taking a wide view of the impact of these threats not only helps us to understand the true costs of insecurity, but also the perspective needed in order to counter national security threats effectively and democratically.

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53 See the consultation paper released by Public Safety Canada

SPECIAL SECTION:
ARTS AND HUMAN RIGHTS

THE ARTS AND HUMAN RIGHTS SYMPOSIUM 26-27 JUNE 2015 HUMAN RIGHTS RESEARCH AND EDUCATION CENTRE, UNIVERSITY OF OTTAWA "FOOD-FOR-THOUGHT"

Larry Chartrand and John Packer

INTRODUCTION

"Human Rights" as an idea may be understood as universal in conception and reach. As a project, it resonates globally with the intention to inspire and shape behavior. In its positivist expressions, it has been developed through philosophy, politics and law with a normative scope and content which both emancipates and empowers. Its premise (of human nature) exceeds its perfect manifestation; in this sense, "human rights" are always at least in part aspirational – striving for full and equal lives in dignity and rights – including norms and standards of conduct and result. But the gap between promise and reality may also disappoint ... and may invite contention. This is arguably a principal challenge today.

The Arts are manifestations of human creativity, communication, ideals and imagination. They may manifest human dignity in their conception, performance, sharing/exchange and development. They are a core component of civilization – with a means and aim to constitute and carry culture. So the Arts are to be supported and protected; their destruction is to be condemned. The Arts can mobilize powerfully.

Together, the Arts and Human Rights are essentially related – yet appear under-explored in their inter-section.

Aside from their own important relation, what might we learn from a serious exploration of the Arts and Human Rights? What light might be shed on contemporary challenges and opportunities for human development – in Canada and the world?

1. HUMAN RIGHTS SEEN THROUGH AN ARTS LENS?

It might be argued that the media of the Arts are more powerful than Human Rights norms and law in promoting positive social change. The emotive response in a cry for help demonstrated poignantly through the visual arts can reach many people and transcend language and cultural boundaries. The potential for human rights to be powerful perhaps lies outside the often impenetrable political and legal institutions of words and rationality and resides instead in the ability of the arts to animate the obligations to act upon the ideas and words that pronounce the importance of human dignity.

How do the Arts "view" Human Rights? How can artists work with human rights researchers, teachers and advocates? Is this a sensible partnership with fruitful prospects?

With regard to normative developments, what do or can the Arts tell us about the content of "human dignity" that merits protection and promotion through "inherent and inalienable rights"?

Can an image, sound or movement be equally authoritative of a normative human rights principle as, e.g., the law itself expressed in words contained in statutes or cases?

Why must law be framed so narrowly (so dry and devoid of the human)? Can we publish standards of behavior, including law, in Art?

2. THE ARTS SEEN THROUGH A HUMAN RIGHTS LENS?

From this perspective, those interested in furthering Human Rights agendas might view the Arts as a

potential ally in communicating messages about Human Rights issues or concerns. Art becomes a functional tool to be used for promoting human rights.

But Art can also destroy Human Rights and dignity or reinforce prejudice and stereotypes and can have decidedly anti-human rights messages. This realization prompts the question of whether there is a Human Rights-related ethics of Art? Do artists have a responsibility to produce Art that is ethical or moral?

What are the boundaries of Art? Can Art be assessed as valid or not valid if it transcends the moral and ethical? Is it Human Rights and dignity that confines and binds artistic expression? Should it?

The public display of an artistic expression is what transforms it into a statement that will be interpreted through the eyes of the public observer who will inevitably assess its message as a contribution to the welfare of humanity. Therein lays the connection. The Arts may be concerned with the welfare of humanity, not because of the intent of the artist (who may even explicitly have tried to avoid such quality), but because of the public nature that allows others to view it and give it meaning that will lead to self-reflection on its impact emotionally, socially and or intellectually. Human Rights values are implicated because the "relationship" between the Art and the observer is one that generates questions of meaning (ranging from the minute to the profound).

Is it the human process of the search for meaning that is fundamental to an iterative relationship to Human Rights values?

Insofar as the making of Art is an irrepressible human predisposition, can there be full lives in dignity and freedom without Art? Is there a human right to Art? And if so, what would be its core content or (pre) requisites?

3. ARTS SEEN THROUGH SPECIFIC SOCIAL, POLITICAL AND LEGAL PERSPECTIVES?

Western Art, even Human Rights motivated Art, may be seen as privileged and therefore colonial. What do we mean when Art critiques Art?

Western society has dominated the concept of rights and limited it to humans. Other cultures do not limit dignity to the human animal, but extend respect to all animals, indeed all life. Why only "human" dignity? Why not dignity for all life?

Are public observers simply observers? Is it incompatible to be an "objective" observer where the Art is evoking a social response? Or is the observer a "witness" and if witness, what could/should they do as a witness?

What are we to understand by and learn from "anti-colonial Art", "anti-homophobic Art", "Black Art", "Art of the oppressed – poverty Art", etc.?

What about "Art as Manifesto" – resistance or revolution?

What comparisons and differences exist between methods? What does this understanding say about the connection between Art and (other) forms of the protection of human rights?

4. RETHINKING EDUCATION THROUGH THE ARTS AND HUMAN RIGHTS

How can a focus on the connection between Human Rights and the Arts contribute to knowledge? Can Art improve Human Rights? Can Human Rights improve Art? If so, how do we convey, teach, learn about such understandings in a university? In schools? In centres of detention or other places of rehabilitation? In public education and life-long-learning? What are the institutional constraints in promoting such education?

COLLOQUE SUR LES ARTS ET LES DROITS DE LA PERSONNE

26-27 JUIN 2015, CENTRE DE RECHERCHE ET D'ENSEIGNEMENT SUR LES DROITS DE LA PERSONNE, UNIVERSITÉ D'OTTAWA « ÉLÉMENTS DE RÉFLEXION »

Larry Chartrand et John Packer

INTRODUCTION

Les « droits de la personne » en tant qu'idée pourraient être entendus comme étant universels dans la conception et la portée. En tant que projet, ils font écho à l'échelle mondiale à l'intention d'inspirer une conduite et de façonner des comportements. Dans leurs expressions positivistes, ils se sont développés grâce à la philosophie, à la politique et au droit avec une portée normative et un contenu qui émancipent et responsabilisent à la fois. Leur prémisse (de nature humaine) dépasse leur manifestation parfaite; en ce sens, « les droits de la personne » sont toujours, en partie du moins, l'expression d'une aspiration – visant la jouissance des vies pleines et égales en dignité et en droits – y compris les normes et les règles de conduite et les résultats. Mais le décalage entre promesses et réalité pourrait également décevoir… et pourrait susciter de la controverse. C'est sans conteste le plus grand défi aujourd'hui.

Les Arts sont des manifestations de la créativité humaine, de la communication, des idéaux et de l'imagination des individus. Ils peuvent manifester la dignité humaine dans leur conception, réalisation, échange/partage et développement. Ils sont au cœur de la civilisation – avec les moyens et l'objectif de constituer et de transporter la culture. Les Arts doivent donc être soutenus et protégés; leur destruction doit être condamnée. Les Arts peuvent mobiliser puissamment.

Ensemble, les Arts et les Droits de la personne sont essentiellement liés – mais ne semblent pas encore suffisamment explorés dans leur intersection.

Au-delà de leur propre relation importante, que pourrions-nous apprendre d'une étude approfondie des Arts et des Droits de la personne ? Quelle lumière pourra être faite sur les défis et les opportunités actuels pour le développement humain – au Canada et dans le monde ?

1. LES DROITS DE LA PERSONNE VUS À TRAVERS LE PRISME DES ARTS ?

On peut soutenir que les médias des Arts sont plus puissants que les lois et les normes sur les droits de la personne dans la promotion du changement social positif. La réponse émotive, dans un appel à l'aide démontré de façon saisissante par les arts visuels, peut atteindre de nombreuses personnes et transcender les barrières culturelles et linguistiques. Le potentiel des droits de la personne à être puissants réside peut-être en dehors des institutions politiques et juridiques des mots et de la rationalité souvent impénétrables, mais réside au contraire dans la capacité des arts à animer les obligations de mettre en pratique les idées et les paroles qui prononcent l'importance de la dignité humaine.

Comment les Arts « voient-ils » les Droits de la personne ? Comment les artistes peuvent-ils travailler avec les chercheurs, les enseignants et les défenseurs des droits de la personne ? S'agit-il d'un partenariat judicieux ayant des chances de succès ?

En ce qui concerne les développements normatifs, qu'est-ce que les Arts nous disent ou peuvent nous dire au sujet du contenu de la « dignité humaine » qui mérite une protection et une promotion grâce aux « droits inhérents et inaliénables » ?

Une image, un son ou un mouvement peut-il avoir la même autorité qu'un principe normatif en matière de droits de la personne, à l'instar par ex. de la loi elle-même exprimée par des mots contenus dans les textes législatifs ou la jurisprudence ?

Pourquoi la loi doit-elle être conçue de manière si restrictive (aussi aride et dépourvue de toute dimension humaine)? Pouvons-nous publier des normes de comportement, y compris la loi, dans l'Art?

2. LES ARTS VUS À TRAVERS LE PRISME DES DROITS DE LA PERSONNE ?

De ce point de vue, les personnes intéressées à faire progresser les programmes des Droits de la personne pourraient considérer les Arts comme un allié potentiel dans la communication des messages portant sur les

questions et préoccupations relatives aux droits de la personne. L'Art devient un outil fonctionnel à utiliser pour la promotion des droits de la personne.

Mais l'Art peut aussi détruire les droits et la dignité de la personne ou renforcer les préjugés et les stéréotypes; il peut aussi contenir des messages résolument contre les droits de la personne. Cette prise de conscience nous amène à poser la question de savoir s'il existe une éthique de l'Art liée aux Droits de la personne. Les artistes ont-ils une responsabilité de produire l'Art qui est éthique ou moral ?

Quelles sont les frontières de l'Art ? L'Art peut-il être considéré comme étant valide ou non valide s'il transcende la morale et l'éthique ? Y a-t-il des droits et une dignité de la personne qui limitent et lient l'expression artistique ? Le devraient-ils ?

L'exposition publique d'une expression artistique est ce qui la transforme en une déclaration qui sera interprétée à travers les yeux de l'observateur public qui va inévitablement évaluer son message comme une contribution au bien-être de l'humanité. C'est là où réside le lien. L'Art peut être concerné par le bien-être de l'humanité, pas à cause de l'intention de l'artiste (qui pourrait même avoir explicitement tenté d'éviter une telle qualité), mais à cause de la nature publique qui permet à d'autres personnes de le voir et de lui donner un sens qui mènera à l'autoréflexion sur son impact au plan émotionnel, social ou intellectuel. Les valeurs des Droits de la personne sont en jeu à cause de la « relation » entre l'Art et l'observateur est celle qui génère des questions de sens (d'infime à profond).

Est-ce le processus humain de recherche du sens qui est essentiel à une relation itérative avec les valeurs relatives aux droits de la personne ?

Dans la mesure où la réalisation de l'Art est une prédisposition humaine irrépressible, peut-il y avoir des vies pleines en toute dignité et liberté sans l'Art ? Y a-t-il un droit humain à l'Art ? Dans l'affirmative, quels seraient ses contenus essentiels ou ses (pré-)requis ?

3. LES ARTS VUS SELON LES PERSPECTIVES SOCIALES, POLITIQUES ET JURIDIQUES SPÉCIFIQUES ?

L'art occidental, même l'art motivé par les droits de la personne, peut être considéré comme privilégié et par conséquent, colonial. Que voulons-nous dire lorsque l'Art critique l'Art ?

La société occidentale a dominé le concept des droits et l'a limité aux humains. D'autres cultures ne limitent pas la dignité à l'animal humain, mais étendent le respect à tous les animaux, en fait, toute forme de vie. Pourquoi seulement la dignité « humaine » ? Pourquoi pas la dignité pour toute forme de vie ?

Les observateurs publics sont-ils de simples observateurs ? Est-il incompatible d'être un observateur « objectif » lorsque l'Art évoque une réponse sociale ? Ou l'observateur est-il un « témoin » et, s'il l'est, que pourrait-il/devrait-il faire en tant que témoin ?

Que devons-nous comprendre par et apprendre de « l'Art anti-colonial », « l'Art anti-homophobe », « l'Art noir » « l'Art pour les opprimés – l'Art contre la pauvreté », etc. ?

Qu'en est-il de « l'Art comme Manifeste » – résistance ou révolution ?

Quelles comparaisons et différences existent entre les méthodes ? Qu'est-ce que cette compréhension laisse entendre sur la relation entre l'Art et les (autres) formes de protection des droits de la personne ?

4. REPENSER LE SYSTÈME D'ÉDUCATION À TRAVERS LES ARTS ET LES DROITS DE LA PERSONNE

Comment l'accent mis sur la relation entre les Droits de la personne et les Arts peut-il contribuer à accroître les connaissances ? L'Art peut-il améliorer les Droits de la personne ? Les Droits de la personne peuvent-ils améliorer l'Art ? Dans l'affirmative, comment pourrons-nous apprendre, enseigner et transmettre de telles conceptions dans les universités ? Dans des écoles ? Dans des centres de détention ou d'autres lieux de réhabilitation ? Dans les domaines de l'éducation publique et de l'apprentissage continu ? Quelles sont les contraintes institutionnelles dans la promotion d'une telle éducation ?

2015 SYMPOSIUM ON THE ARTS AND HUMAN RIGHTS

NOTE ON THE PROCEEDINGS, BY OMID B. MILANI

June 26th and 27th, 2015, University of Ottawa, Canada

The 2015 Symposium on the Arts and Human Rights began with an Opening Dinner held at the Wabano Centre for Aboriginal Health (www.wabano.com), featuring two addresses (see *supra*) followed by a day-long consultation held at the Human Rights Research and Education Centre at the University of Ottawa. The Symposium explored the nexus between the arts and human rights and critically analysed their relationship with regard to Indigenous arts and culture in particular. At the Opening, a keynote address on artistic and creative expression and the linkage between culture and human rights was delivered by Professor Yvonne Donders of the University of Amsterdam (for the full text of her address, see elsewhere in this section of the Yearbook) during which a number of issues pertaining to creative expression, culture, and human rights were raised, notably within the framework of international law.

Adopting a broad approach to the subject-matter, Professor Donders' address pivoted around culture, cultural expressions, and cultural rights, as well as the multi-dimensional relationships among them. The role of the arts in promoting human rights – specifically through raising awareness, promoting tolerance, and giving voice to victims of human rights violations – was also discussed. The linkage between the arts and human rights, particularly at the crossroads of freedom of expression, was explored with a focus on the intersection of art, its creator and other contributors, and the specific content of international human rights law. Freedom of expression was said to be the cornerstone for any artistic and cultural expression, although the inter-relations are complex and extend well beyond freedom of expression. In particular, the right to cultural heritage and enjoyment thereof were discussed. It was suggested that such rights, despite their textual or explicit absence from human rights instruments, could be inferred from human rights treaties. However, the difficulty in defining and understanding culture and cultural rights was highlighted. Indeed, culture, as a dynamic and changeable phenomenon, can sometimes be detrimental to human rights. For example, cultural practices can manifest or support exclusion, ethnocentrism, oppression, and so forth. In the same vein, the question of making decisions as to which cultures should be promoted was raised. Cultural rights, emphasizing cultural particularities and differences, might also be invoked against the basic universalism of human rights – an erroneous conclusion, according to the speaker.

Apart from a direct connection found between numerous human rights and culture, many rights possess a strong cultural dimension; e.g. the right to a fair trial, which involves linguistic rights, as well as the rights to health and to adequate food have evident cultural dimensions. In so far as States may (or must) adopt policies about trial processes, health and nutrition, etc., they make decisions about the culture for which they have positive responsibilities. Needless to say, the interests of States and cultural and artistic communities do not always coincide. In the extreme, of course, the State may even commit cultural crimes such as genocide. In this regard, the example of Indigenous peoples in Canada was raised accompanied by a brief overview of the recent Truth and Reconciliation Commission's Report.

Professor Donders' keynote address was followed by a response from Professor Allen Ryan of Carleton University who had a quite different focus (for the full text of his address, see *supra*). He began by acknowledging that the Symposium took place on unceded Algonquin territory and emphasizing the significance of space, in particular the Wabano Centre. 'Wabano' (meaning 'new beginnings' in the Anishnaabe language) indicates the importance of space for forming and fostering new relationships. The Wabano Centre, where both Indigenous rights and arts are celebrated, was said to be a magical place, a place of hope and renewal and creativity, for learning and play, and for laughter. A number of architectural features of the Centre were pointed out: the Dome of a Giant Medicine Wheel, for instance, that represents the quadrants of human experience – the spiritual, emotional, physical, and mental – was called to everyone's attention along with the star blanket tiles which were purchased collectively by students to support the expansion of the Centre.

As respondent to Professor Donders, Professor Ryan pointed to the artworks at the Centre such as *North American Indian Prison Came II* (1999) by Plains Cree artist George Littlechild which commemorates the legacy of Indian Residential Schools. A number of

Canadian Indigenous artists were named, including Alex Janvier, Dephne Odjig, Tom Hill, Robert Houle, and the Métis artist Christi Belcourt, whose work appeared (with her kind permission) on the invitation and the programme for the Symposium. Professor Ryan also briefly invoked the concept of 'survivance'; for Indigenous peoples, it is beyond mere survival and embodies the gathering space and artworks as well as the stories of survivance touched upon by Gerald Vizenor in his book *Fugitive Poses: Native American Indian Scenes of Absence and Presence* (1998) which provides active presence and repudiation of dominance, tragedy, and 'victimry'. Professor Ryan concluded his remarks by emphasising the hospitality of Indigenous peoples, stressing that everyone who is of sincere and responsible spirit is welcome among Indigenous communities regardless of their ethnicity. Such generous inclusivity, extended to all people of good heart, was said to be commonplace among Indigenous peoples. The final note in the response, evoking empathy among participants, was followed by a live drumming and singing performance and a traditional feast.

On the second (and full day) of the Symposium, which took place at the Human Rights Research and Education Centre, University of Ottawa, several critical and topical issues were raised and discussed regarding the arts and the nexus between the arts and human rights. It was suggested that various kinds of arts could be classified, for example commercial, therapeutic, and social. It was mentioned that among those kinds of arts, the social artistic expression has a certain power to bring about social change. This was felt to be of particular interest for human rights in order to promote a culture of respect for human rights. It was also added that the arts possess considerable potential for educating people; they can be considered an "alternative pathway of knowledge". Pursuant to this discussion, purely commercial arts were criticized and the role of the arts for the broader benefit of society was stressed.

With regard to the normative aspect of the relationship between the arts and human rights, it was discussed that the protection of Indigenous cultural heritage is a fundamental right, as recognized in a number of international instruments, notably the United Nations Declaration on the Rights of Indigenous Peoples (www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx) adopted in 2007. It was also noted that, due to the inherent contradictions between intellectual property rights and the concept of cultural heritage, recognizing intellectual property rights might not be the most effective solution for problems surrounding intangible cultural heritage. For instance, concepts such as "ownership", terms of protection, an expiry date, or subject matter limitation were discussed and scrutinized to clarify such inconsistencies. Additionally, despite the distinction and distance between the concepts of 'tangible' and 'intangible', in many cases tangible cultural heritage and intangible cultural heritage are difficult, if not impossible, to disentangle from one another.

Regarding the fundamental and philosophical relationship between the arts and human rights, issues such as arts as [part of human] being, arts for emancipation, and the common mission of the arts and human rights were noted. Art, as discussed in the Symposium, could be understood as an integral part of *being* (rather than *doing*) – of the essential character of our species found in individuals, communities and humankind as a whole. This idea expresses a core element of human life, which simply goes beyond mere exercise of rights and liberties and an instrumentalized use of the arts or artefacts.

The distinction between the arts as *being* (as opposed to *doing*) is not only a matter of philosophical categorization, but of praxis. Art, conceptualized as *being*, juxtaposes the arts with the well-being of humankind in an inextricable fashion. A dignified life will then be, among other things, subject to facilitation and promotion of the arts. This can perhaps explain, in part, the perennial and ceaseless predilection of humans for creation. But this irrepressible impulse, as pointed out and discussed in the Symposium, has been disrupted due to commodification of arts especially in modern times. With the prevalence of the Western notions of property and ownership, the works of art have been treated more or less as goods. This was noted to have caused misunderstandings among communities such as between Indigenous peoples in Canada and the European settlers. It was nonetheless stated that the arts, from a human rights perspective, are regarded as not only property but also means of communication, [creative] expression, and resistance. However, on the other hand, it was also observed that the arts may be employed in the furtherance of political, and often violent, agendas. By contrast, it was pointed out that the arts can generate joy and contentment, an exuberant "Yes!" to life, indicating a commonality in the ends of the arts and of human rights – of fuller lives in dignity and freedom. Art was also suggested to be treated as methodology and epistemology, as a source of episteme and a mode of academic expression in law, and especially in human rights law. Art was criticized from various social and legal perspectives. It was agreed that the arts can go beyond rationality and provide legal scholarship with a unique access to knowledge.

The Symposium generated colourful and diverse opinions and ideas on the arts and human rights, providing an opportunity to explore and share

experiences and insights into the arts and human rights. The Symposium manifested a fair degree of diversity, which was made possible by bringing in participants from various backgrounds and with sundry interests, such as legal academics and practitioners, artists and researchers, and so forth coming from a handful of countries. The Symposium furnished the conceptual bedrock for the next year's Summer School on the Arts and Human Rights, held at the University of Ottawa, Faculty of Law, 20-24 June 2016 (for both the 2016 Course programme and contributors, along with the 2017 details, see: http:/cdp-hrc.uottawa.ca/en/courses/dcc3113).

SYMPOSIUM SUR LES ARTS ET LES DROITS DE LA PERSONNE DE 2015

COMPTE RENDU PAR OMID B. MILANI

26 et 27 juin 2015, Université d'Ottawa, Canada

Le Symposium sur les arts et les droits de la personne de 2015 commence par un dîner d'ouverture tenu au Wabano Centre for Aboriginal Health (www.wabano.com, en anglais seulement), durant lequel deux allocutions ont été prononcées (voir ci-dessus). Le repas est suivi d'une consultation tenue toute la journée au Centre de recherche et d'enseignement sur les droits de la personne de l'Université d'Ottawa. Le Symposium permet d'explorer le lien entre les arts et les droits de la personne, et de faire l'analyse critique de leur relation particulièrement quant à la culture et aux arts autochtones. À l'ouverture, un discours sur l'expression artistique et créative et le lien entre la culture et les droits de la personne est prononcé par la professeure Yvonne Donders, de l'Université d'Amsterdam (pour obtenir le texte intégral, voir ailleurs dans la présente section de l'annuaire). Durant son allocution, elle soulève de nombreuses questions concernant l'expression créative, la culture et les droits de la personne, surtout dans le cadre du droit international.

En adoptant une approche globale du sujet, la professeure Donders parle de culture, d'expressions culturelles et de droits culturels, ainsi que des liens multidimensionnels qui existent entre ces sujets. On parle du rôle des arts dans la promotion des droits de la personne, plus précisément en faisant de la sensibilisation, en faisant la promotion de la tolérance et en donnant une voix aux victimes de violations des droits de la personne.

Le lien entre les arts et les droits de la personne, particulièrement au carrefour de la liberté d'expression, est exploré en mettant l'accent sur l'intersection de l'art, de son créateur et d'autres contributeurs, et sur le contenu précis du droit international en matière des droits de la personne. On dit que la liberté d'expression était la pierre angulaire de toute expression artistique et culturelle, mais que les interrelations sont complexes et vont bien au-delà de la liberté d'expression. On discute tout particulièrement du droit au patrimoine culturel et à la jouissance de ce dernier. On mentionne que ces droits pourraient, même en l'absence d'indications textuelles ou explicites des instruments de promotion des droits de la personne, être inférés de traités relatifs aux droits de la personne. Toutefois, la difficulté de définir et de comprendre la culture et les droits culturels est mise en évidence. En effet, la culture, en tant que phénomène dynamique et évolutif, peut parfois porter préjudice aux droits de la personne. Par exemple, les pratiques culturelles peuvent témoigner de l'exclusion, de l'ethnocentrisme et de l'oppression, et appuyer ces concepts. Dans le même ordre d'idée, on soulève la question de décider quelles cultures devraient être promues. Les droits culturels, axés sur les particularités et les différences culturelles, pourraient également être invoqués contre l'universalisme de base des droits de la personne – ce qui serait une conclusion erronée selon la conférencière.

À l'exclusion d'un lien direct entre les nombreux droits de la personne et la culture, beaucoup de droits présentent une forte dimension culturelle, notamment le droit à un procès équitable, qui comprend des droits linguistiques; par ailleurs, les droits à la santé et à une alimentation suffisante présentent des dimensions culturelles évidentes. Les États peuvent (doivent) adopter des politiques en matière de procès, de santé et de nutrition, entre autres. Ils prennent des décisions au sujet de la culture envers laquelle ils ont des responsabilités positives. Il va sans dire que les intérêts des États et ceux des collectivités culturelles et artistiques ne coïncident pas toujours. À la limite, bien sûr, l'État peut même commettre des crimes culturels comme un génocide. À cet égard, l'exemple des peuples autochtones du Canada a été soulevé et accompagné d'un aperçu du récent rapport de la Commission de vérité et de réconciliation.

L'allocution de la professeure Donders est suivie d'une réponse du professeur Allen Ryan de l'Université Carleton, qui porte sur un aspect très différent (pour obtenir le texte intégral de son allocution, voir ci-dessus).

Il commence en soulignant que le Symposium a lieu sur un territoire algonquin non cédé et en mettant l'accent sur l'importance du lieu, tout particulièrement le Wabano Centre. Le terme « Wabano » (qui signifie « nouveaux départs » dans la langue anishnaabe) indique l'importance du lieu pour la formation et la promotion de nouvelles relations. On dit du Wabano Centre, où sont célébrés les droits et les arts autochtones, que c'est un endroit magique, un lieu d'espoir, de renouvellement et de créativité, où il fait

bon apprendre, s'amuser et rire. Des caractéristiques architecturales du Centre sont portées à l'attention de tous : notamment, le dôme d'une roue médicinale géante qui représente les quadrants de l'expérience humaine – le spirituel, l'émotionnel, le physique et le mental – ainsi que les tuiles de la bande Star Blanket qui ont été achetées collectivement par les étudiants pour financer l'expansion du Centre.

Dans sa réponse à la professeure Donders, le professeur Ryan souligne les œuvres d'art qui se trouvent au Centre, comme le tableau *North American Indian Prison Came II* (1999) de George Littlechild, artiste de la Nation Cri des plaines, qui commémore l'héritage des pensionnats indiens. De nombreux artistes autochtones canadiens sont nommés, notamment Alex Janvier, Dephne Odjig, Tom Hill, Robert Houle et l'artiste métis Christi Belcourt, dont une œuvre était illustrée (avec son aimable permission) sur l'invitation et le programme du Symposium. Le professeur Ryan discute aussi brièvement du concept de « survivance »; pour les peuples autochtones, il s'agit de plus que la simple survie. Ce concept englobe la rencontre du lieu et des œuvres d'art ainsi que les histoires de survivance dont fait mention Gerald Vizenor dans son livre intitulé *Fugitive Poses: Native American Indian Scenes of Absence and Presence* (1998), qui parle de la présence active et du rejet de la dominance, de la tragédie et de la « victimerie ». Le professeur Ryan conclut en mettant l'accent sur l'hospitalité des peuples autochtones, et insiste sur le fait que toute personne ayant un esprit sincère et responsable est la bienvenue au sein des collectivités autochtones, quelle que soit son ethnicité. On dit de cette inclusivité généreuse, qui comprend toutes les personnes de bon cœur, qu'elle est habituelle chez les peuples autochtones. Les derniers mots de sa réponse, qui évoquent l'empathie chez les participants, sont suivis d'un spectacle de tambour et de chant et d'un festin traditionnel.

Pendant la deuxième journée (une journée entière) du Symposium, qui a lieu au Centre de recherche et d'enseignement sur les droits de la personne de l'Université d'Ottawa, plusieurs questions essentielles et d'actualité concernant les arts et le lien entre les arts et les droits de la personne sont soulevées et examinées. On indique que divers types d'arts pourraient être regroupés en catégories, comme les arts de nature commerciale, thérapeutique et sociale. On mentionne que grâce à ces types d'arts, l'expression artistique sociale a un certain pouvoir pouvant instaurer un changement social. Ceci s'avère être d'un intérêt particulier en ce qui concerne les droits de la personne, afin de promouvoir une culture de respect pour ces derniers. On ajoute que les arts présentent un important potentiel d'éducation; ils peuvent être considérés comme une voie différente menant vers la connaissance. Après cette discussion, on critique les arts purement commerciaux et souligne le rôle des arts qui profitent à l'ensemble de la société.

En ce qui concerne l'aspect normatif de la relation entre les arts et les droits de la personne, on mentionne que la protection du patrimoine culturel autochtone est un droit fondamental, comme il est reconnu dans de nombreux instruments internationaux, notamment la Déclaration des Nations Unies sur les droits des peuples autochtones (https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/08/PDF/N0651208.pdf?OpenElement) adoptée en 2007. On note également qu'en raison des contradictions inhérentes entre les droits de propriété intellectuelle et le concept de patrimoine culturel, le fait de reconnaître les droits de propriété intellectuelle pourrait ne pas constituer la solution la plus efficace aux problèmes entourant le patrimoine culturel immatériel. Par exemple, les concepts de la propriété, de la protection, d'une date d'échéance et de la limitation d'un sujet font l'objet d'une discussion et d'un examen approfondi afin de clarifier ces incohérences. En outre, malgré la distinction et la distance entre les concepts de ce qui est « matériel » et « immatériel », il demeure impossible dans bien des cas de les distinguer.

En qui a trait à la relation fondamentale et philosophique entre les arts et les droits de la personne, on mentionne les arts comme étant un être [partie d'un être humain], pour l'émancipation et la mission commune des arts et des droits de la personne. L'art, selon les discussions dans le cadre du Symposium, pourrait être considéré comme une partie intégrante de l'être (plutôt que de *l'action*) – du caractère essentiel de nos espèces trouvées chez les personnes, au sein des collectivités et dans l'ensemble de l'humanité. Cette idée exprime un élément essentiel de la vie humaine, qui va tout simplement au-delà du simple respect des droits et libertés et d'une utilisation instrumentalisée des arts ou des artéfacts.

La distinction entre les arts en tant qu'être (plutôt qu'en tant qu'*action*) n'est pas seulement une question de catégorisation philosophique, mais de praxie. L'art, conceptualisé en tant qu'être, juxtapose les arts au bien-être de l'humanité de façon inextricable. Une vie digne sera donc, entre autres, caractérisée par la facilitation et la promotion des arts. Ceci peut expliquer, en partie, la prédilection permanente et incessante des êtres humains pour la création. Cette impulsion irrépressible, comme elle est mentionnée et examinée au Symposium, a toutefois été freinée par la commercialisation des arts, surtout dans les temps modernes. Compte tenu de la prévalence des notions occidentales de propriété et d'appartenance, les œuvres d'art ont été plus ou moins été traitées comme des marchandises. On mentionne que cette situation a causé des malentendus entre les collectivités,

notamment entre les peuples autochtones canadiens et les colons européens. On indique néanmoins que les arts, du point de vue des droits de la personne, sont considérés comme non seulement une propriété, mais également comme un moyen de communication, d'expression [créative] et de résistance. D'autre part, on observe que les arts peuvent être utilisés pour l'exécution de programmes politiques et souvent violents. En revanche, on souligne que les arts peuvent procurer de la joie et un sentiment de satisfaction, ainsi que faire dire un « oui! » exubérant à la vie, ce qui indique un lien commun entre les arts et les droits de la personne – ou des vies plus dignes et plus libres. On suggère également de traiter l'art comme une méthodologie et une épistémologie, une source d'épistémé et un mode d'expression académique dans la loi, et surtout dans la loi en matière de droits de la personne. L'art fait l'objet d'une critique de différents points de vue sociaux et légaux. On convient que les arts peuvent être bien plus que rationnels et qu'ils fournissent un cadre de formation juridique offrant un accès unique à la connaissance.

Le Symposium engendre l'expression d'opinions et d'idées diverses et colorées sur les arts et les droits de la personne, et donne ainsi l'occasion d'explorer et d'échanger des expériences et des connaissances sur les arts et les droits de la personne. Le Symposium offre un bon niveau de diversité, ce qui est rendu possible grâce aux participants de divers horizons et intérêts, notamment des universitaires et des praticiens du domaine juridique, des artistes et des chercheurs en provenance de quelques pays. Le Symposium fournit le cadre conceptuel pour l'école d'été de l'an prochain sur les arts et les droits de la personne, qui se tiendra à la Faculté de droit de l'Université d'Ottawa, du 20 au 24 juin 2016 (pour connaître le programme de 2016 et les contributeurs, et pour obtenir des renseignements détaillés pour 2017, voir : http://cdp-hrc.uottawa.ca/fr/courses/dcc3113).

THE COLOURS OF HUMAN RIGHTS: ARTISTIC AND CREATIVE EXPRESSIONS

KEYNOTE ADDRESS AT THE LAUNCH OF THE SYMPOSIUM ON THE ARTS AND HUMAN RIGHTS (HUMAN RIGHTS RESEARCH AND EDUCATION CENTRE, UNIVERSITY OF OTTAWA, CANADA,26-27 JUNE 2015)

Dr. Yvonne Donders[1]
Wabano Centre for Aboriginal Health, 26 June 2015

We all know that titles of seminars and research programmes have to be short and catchy. At the same time, we know that behind those titles there is an abundance of different issues that can be discussed. Of course I cannot discuss all of them tonight. Coming from international human rights law, this topic is a logical one for me. The topic of "the arts" on the other hand is not really my specialty. Lucky for you it is the specialty of my commentator, Professor Allan Ryan, so we are in good hands. I actually would like to take a bit of a broader perspective on the arts and human rights, by using the term artistic and creative expressions, or even broader, cultural expressions. This is so because the arts as end-products are not protected by international human rights law. Artistic and creative *expressions*, reflecting the *process* of imagining, inventing and creating, are.

As indicated in the 'food for thought' note of this Symposium[2], artistic and creative expressions and human rights have a multidimensional relationship. Artistic and creative expressions may entertain or inspire people, but they may also convey powerful messages. This is why they can be, and increasingly are, used to *promote* human rights or the values of human rights. Artistic and creative expressions are used to educate and learn, to promote tolerance and respect for others, to portray human rights violations, or to give a voice to victims of human rights violations. They may also more broadly contribute to social or political debates, bringing counter-discourses and potential counter-weights to existing power structures. The vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies.[3]

At the same time, artistic and creative expressions depend upon respect for human rights, most notably the right to freedom of expression. Freedom of expression is not only about journalism or the media, but also protects expressions of an artistic and creative nature. Moreover, the right to freedom of expression includes the right to seek, receive and impart information and ideas, orally, in writing and in print, and *in the form of art*.[4]

As I said, the arts or artistic expressions *as such* are not directly protected by human rights. Human rights protect mainly the rights of the creators of and contributors to the arts, as well as the rights of persons enjoying them, for instance through the right to take part in cultural life. Human rights protect the rights of people and peoples, and not *directly* things, such as cultural expressions or cultural heritage.

Cultural heritage is, for instance, not explicitly mentioned in human rights treaties. Although access to cultural heritage can be induced from several human rights provisions, cultural heritage as such is not directly protected by human rights treaties.[5] Of course there are the UNESCO Conventions and other treaties on the protection of cultural heritage.[6] Increasingly, these treaties link cultural heritage

1 Professor of International Human Rights and Cultural Diversity, and Director, Amsterdam Center for International Law, University of Amsterdam

2 See the full text reproduced in this Yearbook.

3 See, *inter alia*, the Report of the UN Special Rapporteur in the field of cultural rights, Farida Shaheed, *The right to freedom of artistic expression and creativity*, UN Doc. A/HRC/23/34, 14 March 2013.

4 Article 19 of the UN International Covenant on Civil and Political Rights (1966) includes: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, *in the form of art*, or through any other media of his choice." [emphasis added] Similar provisions can be found in regional human rights treaties.

5 See the Report of the independent expert in the field of cultural rights, Farida Shaheed, *Access to and Enjoyment of Cultural Heritage*, UN Doc. A/HRC/17/38, 21 March 2011.

6 UNESCO Convention on Protection of the World Cultural and Natural and Cultural Heritage (1978), UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001), UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (2003).

to human rights. Whereas the earlier heritage conventions were mainly about the preservation and safeguarding of cultural heritage (notably objects or places) as such, the later heritage conventions moved to the protection of cultural heritage as being of crucial value for individuals and communities. The addition of *intangible* cultural heritage to be safeguarded has been instrumental to this increased emphasis on the link between cultural heritage and cultural communities, underlining their relationship with cultural heritage as part of their cultural identity. This has also strengthened the link between cultural heritage and human rights.

Cultural *expressions* are also the object of a UNESCO Convention, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005). The idea of this convention is to highlight that cultural expressions have not only economic or commercial value, but they also have intrinsic cultural value, by conveying identities, values and meanings. Although this sounds like human rights, formally speaking, this Convention is not a human rights treaty. The way the provisions are formulated does not give rights to individuals and communities. The Convention actually gives rights to States – to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory. However, many of its provisions have a link with human rights, in particular cultural rights.[7]

For a long time, cultural human rights were ignored, not taken seriously by States, academics, or non-governmental organizations. Cultural rights were seen as something extra, a bonus, after other (more important) human rights were realized.

For instance, when the right to participate in cultural life was included in the Universal Declaration of Human Rights (UDHR) and also later in international human rights treaties, the concept of 'culture' was seen from a narrow perspective, or culture with a capital C. Culture mainly referred to the material aspects of culture, indeed the arts and literature. These elitist cultural products had to be made available and accessible to the larger population. There was no mention of the broader concept of culture, including intangible elements, or culture as a way of life. The UDHR also did not mention any specific rights for peoples, minorities, or indigenous peoples. Equality and non-discrimination were the key elements, not special rights for certain cultural communities. Luckily, international human rights are not static. After having been created, their interpretation has been dynamic incorporating new developments.[8]

One of the main challenges of promoting cultural rights is the complex notion underlying it: the concept of 'culture'. It is already difficult enough to define 'arts' or 'cultural expressions', let alone the even broader concept of 'culture'. Culture is a concept with a dynamic and changeable character. It is not an inactive or static notion, but it can develop and change over time. Culture can refer to many things, varying from cultural *products*, such as the arts and literature, to culture as a *process*, as a way of life. It has an *objective dimension*, reflected in visible characteristics such as language, religion, or customs and a *subjective dimension*, reflected in shared attitudes, ways of thinking, feeling and acting. In addition, culture has an individual and a collective dimension. Cultures are developed and shaped by communities. Individuals identify with several of those cultural communities – ethnicity, nation, family, religion, etc., shaping their personal cultural identity. The complexity and dynamics of the concept of culture are difficult to grasp in legal terms.

At the same time, there is a *need* to look at culture from a human rights perspective, precisely because culture is so important to human beings. Culture shapes our thinking and behavior and it is a source for creativity and freedom. Cultural identity and cultural community are part of human dignity. But we also know that culture is not an abstract or neutral concept. Culture may be a mechanism for exclusion and control, whereby power structures play a role. It may be oppressive to people and hinder their personal development. Some cultural practices or expressions are very questionable from a human rights perspective, because they promote intolerance, stereotypes or discrimination.

An important question therefore is: *who* decides which cultures and cultural expressions should be promoted and protected? Should that be the State? The UNESCO

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7 Yvonne Donders, "Cultural Rights and the UNESCO Convention: More than Meets the Eye?", in: Christiaan De Beukelaer, Miikka Pyykkönen and J. P. Singh (eds.), *Globalization, Culture and Development - The UNESCO Convention on Cultural Diversity*, Palgrave MacMillian, 2015, pp. 117-131.

8 Yvonne Donders, "Do Cultural Diversity and Human Rights make a Good Match?", *International Social Science Journal 199*, 2010, UNESCO, Blackwell Publishing, pp. 15-35; Yvonne M. Donders, *Towards a Right to Cultural Identity?*, School of Human Rights Research Series No. 15, Intersentia/Hart, Antwerp/Oxford/ New York, 2002, 400 pp.

Convention seems to follow this approach. Human rights, however, including cultural rights, are meant to *protect* us against the State, to give us the freedom to express and create and develop our cultures. Should, then, cultural communities be the final judges of cultural expressions? Or is it every individual for herself? This is actually one of the reasons that States have not always been so keen on cultural rights. They fear that strengthening cultural rights can lead to tension and instability in society. Giving cultural communities certain cultural rights may empower them not only culturally, but also socially and politically, and this may endanger national unity.

Many academics and NGOs have also been reserved when it comes to cultural rights. Some of them saw the promotion of cultural rights as cultural relativism, undermining the universality of human rights. Cultural rights, by emphasizing the value of differences between cultures and endorsing particularities, would imply cultural relativism. In my view, cultural rights and universality do *not* have to mutually exclude each other. There is broad agreement that human rights should be universally enjoyed, by all persons. No one will argue that some people in the world do not have human rights at all. International human rights norms and standards clearly endorse this universal approach. The UDHR not only refers to universality in its title, but its provisions also speak of 'everyone' and 'all persons', affirming that *all* human beings have these rights. International human rights treaties do the same. The universal *value* and *application* of human rights does, however, not necessarily imply the *uniform implementation* of these rights. In other words, while human rights apply universally to everyone, the implementation of these rights does not have to be uniform and leaves considerable space for cultural diversity.[9]

I have so far been talking about cultural rights as if it is crystal clear what these rights are. If we want to define them, cultural rights are those human rights that promote and protect cultural interests of individuals and communities and that are meant to advance their capacity to preserve, develop and change their cultural identity. But which human rights are actually *cultural* rights?

The categorization of human rights is caused by the titles of two human rights treaties adopted in 1966: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although cultural rights are mentioned in the title of the second one, the text of this treaty does not make clear which provisions belong to the category of 'cultural rights'. In fact, none of the international instruments provides a definition of 'cultural rights'. Consequently, we can compile different lists of international legal provisions that could be labelled 'cultural rights'.

One of the most important cultural rights is actually the right to equality and non-discrimination. This may sound paradoxical, but the right to equality also implies the right to be different. This is because having equal rights is not the same as being treated equally. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal situations should be treated unequally. Consequently, not all difference in treatment constitutes discrimination, as long as the criteria for differentiation are reasonable and objective and serve a legitimate aim. Difference in treatment may also involve positive action to remedy historical injustices or to promote cultural diversity.

Apart from the right to equality, there are many human rights that promote and protect cultural expressions. Some provisions in international human rights instruments explicitly refer to 'culture'. One example is the right to take part in cultural life, included in the UDHR and in several international human rights treaties.[10] Another example is the right of peoples to self-determination, by which peoples may also freely pursue their cultural development. There are also rights for cultural communities such as minorities and indigenous peoples to enjoy their own culture, practice their own religion and speak their own language.

Apart from rights explicitly referring to culture, many human rights have a direct link with culture. The main example already mentioned is the right to freedom of expression, which guarantees the freedom to artistically and creatively express oneself, for instance via the arts, novels or poems. Another example is the right to freedom of association, which also protects cultural organizations. The right to education is also crucial for artistic and creative expressions. Finally, the right to

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9 Yvonne Donders, Inaugural Lecture delivered upon appointment to the Chair of Professor of International Human Rights and Cultural Diversity at the University of Amsterdam on 22 June 2012, http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf

10 Yvonne Donders, "Mesurer le droit de participer à la vie culturelle : le développement des indicateurs", in : J. Bouchard, S. Gandolfi et P. Meyer-Bisch (eds.), *Les droits de l'homme: unegrammaire du développement*, l'Harmattan, Paris, 2013, pp. 229-246; Yvonne Donders, "Study on the legal framework of the right to take part in cultural life", in: Y. Donders and V. Volodin (eds.) *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, UNESCO/Ashgate, December 2007, pp. 231-271.

freedom of religion, as an important part of cultural identities, is an example of a cultural right.

Apart from rights explicitly or directly related to culture, many human rights have a strong *cultural dimension*. Although some human rights may at first glance have no direct link with culture, most of them have cultural implications.

A first example is the right to a fair trial, which includes the right to be informed of the charges in a language that one can understand, as well as the right to free assistance of an interpreter if a person cannot understand or speak the language used in court.

The right to health is another example of a human right that has important cultural implications. Think about ways of treatment and the use of certain traditional medicines. Culture also plays a decisive role in sexual and reproductive health. The right to health includes, therefore, that health facilities and services must be culturally appropriate, meaning respectful of the culture of individuals and communities.

A final example is the right to adequate food. The preparation and consumption of food have clear cultural connotations. The importance of the cultural dimension of food is also shown by the fact that several food traditions, such as French cuisine, the Mediterranean diet, and the traditional Mexican kitchen, have been recognized as intangible cultural heritage on the list of UNESCO.

States have to respect and protect cultural rights as well as the cultural dimension of human rights. In doing so, they have to balance the cultural interests of certain individuals or communities with those of others and of the broader society. This balancing act is important because, as said before, cultural rights may also pose challenges. Cultural expressions have been used as a justification for harmful ideas and practices that are in conflict with or limit the enjoyment of human rights. Cultural expressions may be used to promote stereotypes, intolerance or racism. Cultural expressions and practices are very diverse, which makes it difficult to make general, abstract statements about their acceptability in relation to human rights. However, cultural expressions that are clearly in conflict with human rights cannot be justified with reference to cultural rights. Respect for cultural rights cannot be an argument to systematically or grossly deny the human rights of certain individuals or communities.

This is also confirmed in the UNESCO Convention on the Diversity of Cultural Expressions, where it states in Article 2(1) that "No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms or to limit the scope thereof."

International human rights law also has a protection system built-in. Cultural rights, just as other human rights, cannot be enjoyed unlimitedly. Sometimes these rights can, or even should, be limited. Such limitations should be provided by law and serve a legitimate aim, for instance securing respect for the rights and freedoms of others or protecting public order and the general welfare in a democratic society.

Specific limitation clauses can be found in most human rights instruments. They are meant to prevent the unlimited exercise of cultural rights from seriously endangering the rights of others or of society as a whole. The right to freedom of expression, for instance, explicitly includes that this right carries with it special duties and responsibilities.[11] Freedom of expression can, therefore, be limited in order to avoid racist or discriminatory expressions, or to prevent that creative expressions harm the cultural life of society as a whole or of specific groups, such as women, children or minorities.

Harmful artistic and creative expressions are, however, seldom defeated by law alone. Law alone cannot solve all contentious issues and cannot by itself change cultural expressions or practices. Therefore, education and awareness-raising are necessary parts of this endeavor. Changes are most successful if they arise within the cultural or artistic communities themselves and are not imposed from the outside, by law or by the State. Of course, this does not relieve States from the responsibility to find ways to promote such changes. But cultural communities, including artistic communities, have an important responsibility themselves as well.

While States nowadays generally acknowledge the importance of cultural expressions and human rights, they still do not always see cultural rights as substantive human rights but more as policy-oriented

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11 Article 19(3) of the International Covenant on Civil and Political Rights includes: "The exercise of the rights provided for in...this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

goals that do not impose direct obligations. It is important to keep emphasizing that cultural rights are human rights that protect an essential part of human dignity. As such, they have the same value as other human rights of a civil, economic, political or social nature. Cultural rights should not be seen as an 'extra' after other human rights have been implemented.

We know that violations of cultural rights have taken place and are still taking place. We were recently painfully reminded of that by the Canadian Truth and Reconciliation Commission (TRC).[12] It was even in the Dutch newspapers. This Commission concluded that Canada's Aboriginal policy "can best be described as cultural genocide". According to the report, one of the central goals of Canada's policy was, through a process of assimilation, to cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. In contrast to *physical genocide*, which is the mass killing of the members of a targeted group, and *biological genocide*, which is the destruction of the group's reproductive capacity, *cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. In human rights terms, this is the cultural dimension of the collective and individual right to life.[13]

In practice, as described in the TRC report, land was seized, populations were forcibly transferred and their movement was restricted. Native languages were banned. Spiritual practices were forbidden and objects of spiritual value were confiscated and destroyed. And last but not least, families were disrupted to prevent the transmission of cultural values and identity from one generation to the next. Although these policies stopped years ago, I can indeed imagine that many survivors of this cultural genocide are still in a process of healing.

This study shows once again the tremendous importance of culture and cultural identity for human beings and communities. It shows that limiting or taking away that cultural identity, or forcing people into a cultural identity that is not theirs, is directly affecting their human dignity and a violation of their human rights.

Returning to the specific topic of the arts and human rights, it is therefore no less than *logical* to link cultural, artistic and creative expressions to human rights. It affirms that such expressions are important to the existence, identity and dignity of individuals and communities. The link is also *necessary*, because human rights can be the sword and the shield for cultural expressions. Human rights provide the freedom that allows individuals and communities to develop, enjoy and maintain cultural expressions. At the same time human rights can shield the same individuals and communities from possible negative side effects of cultural expressions.

As stated before, human rights cannot be enjoyed unlimitedly. They cannot be invoked or interpreted in such a way as to justify the violation of the rights and freedoms of others, or to exclude certain groups of persons, such as women, from the enjoyment of human rights.

To fully appreciate the complex interlinkages between artistic and creative expressions and human rights, further elaboration and exploration is needed. This firstly demands a holistic approach to the topic. International law in relation to artistic and creative expressions is rather scattered. The different international treaties on human rights, indigenous rights, cultural heritage and cultural expressions should be studied in parallel and if possible aligned in their implementation.

Secondly, it is important to address this topic from a multidisciplinary and multi-stakeholder approach. I already told you that law alone cannot solve all issues, but neither can lawyers or academics alone do so. This is why symposia such as this, where different people with different backgrounds come together and share and exchange ideas, are so important. I am sure this will be an excellent stepping stone for the research programme on the arts and human rights that will further explore the relationship between the two, and hopefully thereby strengthen both. Artistic and creative expressions are not only needed to give sense, belonging and dignity to our lives, they also give colour to human rights.

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12 www.trc.ca

13 Yvonne Donders, "Old Cultures Never Die? Cultural Genocide in International Law", in: I. Boerefijn et al (eds.), *Human Rights: Pre-Conflict, In Conflict, and Post-Conflict*, Liber Americorum Professsor Bastiaan de Gaay Fortman, Intersentia, March 2012, pp. 278-304.

LAUNCH OF THE SYMPOSIUM ON THE ARTS AND HUMAN RIGHTS

HUMAN RIGHTS RESEARCH AND EDUCATION CENTRE, UNIVERSITY OF OTTAWA

WABANO CENTRE FOR ABORIGINAL HEALTH

JUNE 26, 2015

Remarks by Dr. Allan J. Ryan, New Sun Chair in Aboriginal Art and Culture, Carleton University, in response to a keynote address by Professor Dr. Yvonne Donders, University of Amsterdam.

I would first like to acknowledge that we are gathered this evening, at the Wabano Centre in Ottawa, Ontario, on unceded Algonquin territory.

We are fortunate to be in this space tonight. It is a most appropriate space in which to open an event dedicated to exploring the relationship between Human Rights and the Arts. This place and the upcoming symposium are all about relationships.[1]

When Professor Packer asked me to respond to Professor Donders' address, I said I would like to talk about the *space*. When Prof. Donders subsequently told me some of the issues she would be addressing – many of which I thought about mentioning myself – I said, "I would like to talk about the space, because it will have a profound effect on how both your words and my words will be received, and how the symposium is framed and understood". (If you are a teacher you know how important the first class is.)

In the Anishnaabe language, Wabano means "New Beginnings", and the Wabano Centre for Aboriginal Health is a place of new beginnings, where new relationships are fostered – where new communities are formed. The recently completed renovations were designed by the renowned Métis architect Douglas Cardinal, who now lives in Ottawa.[2] And this grand gathering space is at the heart of these renovations.

It is a space where indigenous rights are celebrated, both individual and communal. Where human dignity and indigenous identity are affirmed and respected. Where both human rights and Aboriginal rights are affirmed and respected. I also think this is a magical space, a place of hope and renewal and creativity and learning and play and laughter. It is a place of inspiration and possibility that attracts visitors from around the world who want to know what goes on here. And it is why there is so much artwork. It is a place of mourning and reflection too, but it is also a healing space, and a spiritual space, set underneath the dome of a giant medicine wheel representing the four quadrants of human experience – the spiritual, emotional, physical and mental. It is a space of cultural memory and cultural celebration. It is an inviting cross-cultural communal space. There is a spirit here that feeds the soul. And sometimes the body too.

Last week, just ahead of National Aboriginal Day – and how many countries have one of those? – six hundred people paid two hundred dollars each to attend the Wabano Centre's annual Igniting the Spirit fundraising gala at a nearby hotel, where they dined, bid on a number of items at auction, and enjoyed world renowned hoop dancers in performance.[3] Many of those in attendance had never been to Wabano, but they had heard about the good work going on here and they wanted to support it and, in a small way, be part of it.

This place also embodies the twin concepts of cultural determination and healing through the arts. Here, the two are inseparable. (In many Native communities they are inseparable.) So, I want to briefly call your attention to some of the artworks in this space that

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1 See www.wabano.com. For more on the importance of relationships, see Shawn Wilson, *Research is Ceremony: Indigenous Research Methods*, Halifax and Winnipeg: Fernwood, 2009.

2 See www.djarchitect.com. Douglas Cardinal Architect Inc. Cardinal is best known for designing the Canadian Museum of History (formerly the Canadian Museum of Civilization) in Gatineau, Quebec. From the website: "We hope to create something beautiful that stands as a true testament of those who have come before us...and to be remembered and cherished by those who come after us."

3 Igniting the Spirit Gala 2015, "A Celebration of the Strawberry Moon." Hampton Inn, Ottawa, June 18, 2015.

you might like to have a closer look at later:

On the back wall is a framed print, *North American Indian Prison Camp II* (1999), by the Plains Cree artist George Littlechild commemorating the legacy of Indian residential schools. Its theme is mirrored in the permanent installation on the second floor concourse just above us.[4] An unexpected component of that installation is a wonderful display of six black and white portraits of celebrated Canadian Aboriginal artists (Daphne Odjig, Tom Hill, Robert Houle, Heather Igloliorte, Jeffrey Thomas and Alex Janvier) by the award-winning Métis photographer and Ottawa resident, Rosalie Favell.[5] The individuals, including Favell herself, are role models for natives and non-natives alike, and reflect the vitality of contemporary Aboriginal arts and culture.

I should also mention that the invitation and printed program for this evening's gathering feature a detail from the painting, *What We Teach Our Children* (2008), by Métis artist Christi Belcourt who has been researching the medicinal qualities of the many plants and flowers she depicts in her work.[6] Two of her beadwork-inspired paintings, *Reverence for Life* (2013) and *Gina's Flowers*, can be seen on the walls of this room. More recently, Christi has been lauded for spearheading the *Walking with Our Sisters* art project that features hundreds of decorated and donated moccasin vamps honouring the missing and murdered Aboriginal women in this country. This important exhibition comes to Ottawa this fall.[7]

This gathering space and the artworks in it also embody what mixed-blood Anishinaabe author Gerald Vizenor calls "survivance." In his book, *Fugitive Poses, Native American Indian Scenes of Absence and Presence* (1998), Vizenor reflects on the concept of "survivance" as it is played out in the arts and lives of contemporary Aboriginal people. He writes: "Survivance, in the sense of native survivance, is more than survival, more than endurance or mere response; the stories of survivance are an active presence... survivance is an active repudiation of dominance, tragedy and victimry." Later, in his book, *Postindian Conversations* (1999), he adds: "Survivance stories honor the humor and tragic wisdom of the situation, not the market value of victimry... Stories of survivance are a sure sense of presence."[8] "A sure sense of presence" – that is definitely what we have here tonight.

On the floor in front of you, you'll see a giant starblanket design. Each of the diamond shaped tiles can be purchased and personalized online to support the expansion costs and the many services that Wabano offers.[9] For the past fourteen years I have brought graduate students here to learn about the Centre, and experience the space. In exchange, they bring toys for the Centre's Christmas party. Since the expansion was completed four years ago, the students have also collectively purchased a tile on the starblanket each year to support the programs. Many of the students eagerly volunteer for these same programs.

Some of the non-native students are initially surprised at the welcome they receive at Wabano. But they shouldn't be. Here, I'm reminded of the words of the American Cherokee author Daniel Heath Justice who wrote: "It was never Indian against non-Indian – it was always people of good heart fighting for respect and

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4 Trina Bolam, currently a PhD student in Cultural Mediations at Carleton University, designed and wrote the text for the Residential School installation on the upper concourse. See Aboriginal Healing Foundation (www.ahf.ca) and Legacy of Hope Foundation (www.legacyofhope.ca).

5 See www.rosaliefavell.com. The installation also features photographs of writers, Tomson Highway, Thomas King, Maria Campbell, Richard Wagamese, and Haida sculptor/painter and jeweller, Robert Davidson.

6 See christibelcourt.com. From her website: "Based on tradition, inspired by nature." In 2007, Belcourt's book, *Medicines to Help Us: Traditional Métis Plant Use*, was published by the Gabriel Dumont Institute in Saskatoon. In 2010, she was a presenter at the 9th Annual New Sun Conference on Aboriginal Arts: Something Else Again! at Carleton University. Her mural, *My Heart (is Beautiful)*, 2010, was featured on the publicity for the event, and was on display throughout the conference. (See photos in the 2010 New Sun Conference Archive at www.trickstershift.com.) In 2013, her mural, *Water Song*, 2010, was featured in the exhibition, *Sakahàn: International Indigenous Art* at the National Gallery of Canada. The gallery subsequently purchased the piece. In 2015, the Italian fashion designer, Valentino, collaborated with Belcourt to create a series of garments inspired by the *Water Song* mural for his Resort 2016 collection. See: Theartofdress.org/tag/christi-belcourt/

7 See walkingwithoursisters.com. The touring exhibition stops in Ottawa at Gallery 101 and the Carleton University Art Gallery, September 25 – October 16, 2015.

8 *Fugitive Poses: Native American Indian Scenes of Absence and Presence*. Lincoln and London: University of Nebraska Press, 1998, and *Postindian Conversations*, Gerald Vizenor and A. Robert Lee, Lincoln and London: University of Nebraska Press, 1999. A presenter at the 9th Annual New Sun Conference on Aboriginal Arts: Something Else Again! in 2010, Gerald Vizenor is one of the most influential Native American writers of the last half century, with over forty books to his credit giving voice to such concepts as "narrative chance," "trickster discourse" and "terminal creeds," as well as "survivance." See photos in the 2010 New Sun Conference Archive at www.trickstershift.com.

9 See www.wabano.com : Donate, Buy a Tile.

freedom against an institutional system and its agents who would deny us any place other than as antiquated museum pieces gathering dust ... in the American imagination ... It has never been as simplistic as 'only Indians should teach / write about / talk about Indian issues.' Considerate non-Indians have a place in our communities and we hold enormous respect for those who are sincere and responsible, regardless of their ethnicity."[10] That is an amazingly generous statement of inclusivity.

In the United States and certain parts of Canada – if we are not talking about sports teams – it is still okay to use the term, "Indians." Personally, I'm partial to "people of good heart." I like that term, "people of good heart." I think there are a lot of people of good heart here tonight, and I think it bodes well for the symposium that you are here, and that we are all gathered together tonight in this very special and energizing space.

Chi miigwetch, nia:wen, qujannamiik, howa'a sta, merci, and thank you.

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[10] In "We're Not There Yet, Kemo Sabe: Positioning a Future for American Indian Literary Studies", American Indian Quarterly 25, No.2 (Spring. 2001), 266. In 2012, Professor Justice was a presenter at the 13th Annual New Sun Conference on Aboriginal Arts: Trailblazers, and is currently Chair of the First Nations Studies Program at the University of British Columbia in Vancouver.

ART AND HUMAN RIGHTS: AN AESTHETIC CRITIQUE OF ACADEMIC DISCOURSE ON HUMAN RIGHTS

Omid Milani[1]

Abstract: In order to explore the nexus between art and human rights, one needs to revisit critically the *realities* of both "art" and "human rights". A more profound understanding of the academic discourse on art and human rights can unveil the connection between the two. In so doing, a brief but profound [re] conceptualization of reality and aesthetics is indispensable. In an attempt to understand the realities of art and human rights, the concepts of *Restless* and *Arrested* realities are suggested and examined in this paper. In harmony with the concept of reality that I will attempt to theorize in this paper, two kinds of art are discussed: *Minouique* and *Gittique* and their characterizations. Ultimately, based on the theory of reality and the aesthetic system, art as a critical methodology in human rights law is considered.

Pour explorer la connexion entre l'art et les droits de la personne, il importe de réexaminer de manière critique les *réalités* de l'art et de ces droits. Une compréhension approfondie du discours universitaire sur ces derniers et sur l'art peut faire apparaître le lien entre les deux. Pour ce faire, une brève, mais profonde [re]conceptualisation de la réalité et de l'esthétique est indispensable. Afin de favoriser la compréhension des réalités des droits de la personne et de l'art, le présent article propose et examine les concepts de réalité *agitée* et *arrêtée*. En accord avec le concept de réalité qu'il théorise, il traite d'un système esthétique fondé sur les concepts d'art *minouique* et *gittique* et sur leur caractérisation. Finalement, en s'appuyant sur la théorie de la réalité et sur le système esthétique, il examine l'art comme méthodologie critique du droit relatif aux droits de la personne.

THE JOINT MISSION OF ART AND HUMAN RIGHTS: EMANCIPATION

Since time immemorial, *creation* and *beauty* have been integral parts of mankind's daily preoccupation. Artistic and creative expressions and *Homo sapiens*[2] have been intimate comrades since the dawn of human development. Why our ancestors, who lived in petrifying darkness and constant fear of the beast, spent several hours of daylight to make only one bead or a drawing on some cave wall raises a crucial question: why art?[3] Thinking of the exigencies of survival and the imminence of life threats on the one hand, and human's ancient predilection for creating beautiful objects on the other hand can be an enthralling point of departure for our query. Evidently, *beauty* has always been just as vital and necessary as other basic needs of humans. Making that little bead was perhaps the only daily exercise that could alleviate the harshness and hardship of everyday life for our ancestors – a process of letting thoughts and feelings into the physical world. Art does make life tolerable. In other words, if art, or creative expression in a broader sense, could mitigate the rigidity, inflexibility, and overwhelmingness of natural life, then it must always have been essential to our *being*.

Among all properties of an artwork, formal and otherwise, *beauty* merits further scrutiny. Despite

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2 I have deliberately used this term, *Homo sapiens*, in contrast to the notion of *Homo faber*; the latter refers to a specific capacity of humans, i.e. the capacity to fabricate and create, while the focus in the former is on human wisdom. *Homo faber*, Hanna Arendt believed, misunderstands life as a process of making and fabrication. "The process of making", according to Arendt, "is itself entirely determined by the categories of means and end." Hanna Arendt, *The Human Condition*, 2nd ed. (Chicago: University of Chicago Press, 1998), 143. For an analysis of the concept of *Homo faber*, instrumentality, and Hanna Arendt's ideas on the arts as products of *Homo faber*, see: Hanna Arendt, "Work", in *The Human Condition*, 2nd ed. (Chicago: University of Chicago Press, 1998), 136-173.

3 An overwhelming majority of literature on critical history of art tends to overlook and dismiss the significance of humans' perennial predilection for art, a question that begs rigorous and close scrutiny. However, for a brief and rather biased history of art, see: Jonathan Harris, *The New Art History: A Critical Introduction* (New York: Routledge, 2001); Helen Gardner, Fred S. Kleiner, *Gardner's Art through the Ages: A Global History*, 13th ed. (Australia: Thomson/Wadsworth, 2009); Laurie Adams, *Art across Time* (Boston: McGraw Hill College, 1999); or *The Met's Heilbrunn Timeline of Art History*, **available online at: <http://www.metmuseum.org/toah/>.**

many post-modern understandings of art, which tend virtually to dismiss beauty altogether,[4] I think the concept of beauty can be central to aesthetics. By reviving and redefining beauty, it can, once more, enter the stage and play its unique role. Beauty is the very balance and harmony between the brutal, harsh, overwhelming, and formal reality on the one hand and the non-physical, creative, and chaotic reality on the other hand. Such harmony, however, can never be achieved, unless the *reality* as a whole is exposed. I shall return to this concept further below.

This contentious dichotomy between the rigid and the loose realities is more or less what Friedrich Nietzsche, in his book *The Birth of Tragedy*, refers to as the *dialectical interplay of Apollo and Dionysos*.[5] From that perspective, one can argue that art, to say the least, can temporarily liberate humans from the misery and anguish of the brute, like a refuge from the harsh and petrifying realities. Only on cave paintings reindeer would never become scarce, a lion's wrath would not intimidate man, and a jaguar would stand still peacefully. In fact, it would not be too big of a claim to say that the very notions of Nature, Man, Life, Death, the beast, etc. were all *created*, rendered, and grasped during those moments of contemplation and abstraction. Therefore, it would be entirely unfair to diminish the function of art to a mere medication, an analgesic, for human suffering.[6] In fact, what matters more is the very interaction between art and the rigid and often agonizing reality, i.e. the *impact* that art and creative expressions can leave on our everyday life. The artist can *create* and redesign the reality and order of everyday life. The artist can react to the disturbing and disgusting and beautify the world through his or her creation. Art, this "boundlessly exuberant *Yes* to life",[7] as Nietzsche writes, can transcend the limits of rational reality. Thus, it would be reasonable to conceive that art – whether in the form of alleviation of mankind's suffering or redesigning the reality – can indeed emancipate humans.

Emancipation of humanity – a seductive promise of the Enlightenment – has also been deemed to be the cornerstone of human rights.[8] Human rights, too, were born to free humans from misery, and to liberate humanity from the blood-stained claws of oppressors and the evil of the pulpit, the painful and harsh reality with which humanity has been struggling since time immemorial. Needless to say, the human rights enterprise, despite some achievements, has miserably failed to fulfill its fundamental promises. A brief and superficial historical analysis opens our eyes to a few corners of the grim reality. The reality is so overwhelming that "no degree of progress allows one to ignore", Derrida says, "that never before in absolute figures, have so many men, women, and children been subjugated, starved, or exterminated on earth."[9] This failure has happened due to a number of epistemological and methodological reasons, on which I will elaborate shortly.

In a seemingly independent, but in fact intimately related development, a rather odd change, concurrent with the Enlightenment, began to take place. Art, in modern times, has gone through a metamorphosis, turning into a luxury commodity, unaffordable for most of humanity and assessed and judged by a select few. Museums, theatres, auctions, and concert halls are today where art is sold and purchased. Art, in a sense, has been pushed to a realm that is governed not by everyone, but by an elitist social class.[10] It is as though the role that art has been playing throughout our entire evolution, in our everyday life, is now being

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4 In a fair number of post-modern approaches to aesthetics, beauty does not seem to play any role. Arthur Danto's 'open-door' theory – which basically permits all works and messages into the realm of art, which is yet silent as to how an artwork communicates its message and what constitutes a successful communication – is a classic example of such theories. See Cynthia Freeland, *But Is It Art? An Introduction to Art Theory* (Oxford: Oxford University Press, 2002), 58.

5 Although I am borrowing the terminology of Nietzsche's work, I will not remain faithful to Nietzsche's entire conceptualization of this divide. In fact, the theory of the two realities that I will develop has no more than the basics in common with Nietzsche's Apollo and Dionysos. See generally Paul R. Daniels, *Nietzsche and the Birth of Tragedy*, (Durham: Acumen Pub., 2013), 40.

6 For instance, according to Sigmund Freud's theory of wit, the humorous is "a sabbatical let-out that lets us redesign categories and concepts." Humour, I believe, is the epitome of creative expression. Freud called his theory of humour *Relief Theory*. See Jonathan Miller, "Jokes and Joking: A Serious Laughing Matter", in John Durant and Jonathan Miller (eds.), *Laughing Matters: A Serious Look at Humour* (Harlow: Longman, 1988), 12.

7 Friedrich Nietzsche, *Ecce Homo*, R. J. Hollingdale trans. (Harmondsworth: Penguin, 1992), 50.

8 Costas Douzinas, in his book *The End of Human Rights* (Portland: Hart Publishing, 2000, at 1), writes: "Human rights are the fate of post-modernity, the energy of our societies, the fulfilment of the Enlightenment promise of emancipation and self-realisation". He continues (at 2) that human rights' "[v]ictory is none other than the completion of the promise of the Enlightenment, of emancipation through reason."

9 Jacques Derrida, *Spectres for Marx*, P. Kamuf trans. (London: Routledge, 1994), 85.

10 For an interesting analysis of art, money, market, and museums, see: Cynthia Freeland, *But Is It Art? An Introduction to Art Theory* (Oxford: Oxford University Press, 2002), 90-111.

played by another actor. Art does not seem vital anymore.[11] Today, the modern human lives with the fatal illusion of forgoing art and creative expression: a by-product of the Enlightenment and its rational arsenal. *Rationality*, the bedrock of human rights, and its progenies have embarked upon the extremely complex mission of *emancipation*, unaided and unaccompanied, without acknowledging the unique role of art; the mission that I think is doomed to failure.[12] In fact, human rights alone are substantially incapable of engendering sustained changes, as they belong to the rigid reality of humans, virtually alien to the realm of free and chaotic realities.

1. LIBERATING HUMAN RIGHTS: ON THE RESTLESS AND ARRESTED REALITIES OF HUMAN RIGHTS

Here, I wish to criticize one of the reasons why the human rights enterprise has arguably failed to fulfill its promise. At the outset, it is important to distinguish between two realities in general (also applicable to human rights' reality), which henceforth I refer to as *restless* reality and *arrested* reality. I will return to this intellectual dichotomy throughout this article.[13] The *restless* reality of human rights and the *arrested* reality of human rights are not to be confused. The *restless* reality of human rights can be vaguely explained as a dream of liberating humanity from misery and anguish, a reality that comes into existence in response, or influenced by, the *arrested* [grim] reality, e.g. oppression, inequality, blood-shedding of cruel rulers, etc. One of the advantages of acknowledging this dichotomy is unveiling an interdependent and symbiotic relationship: the *restless* reality of human rights generates the textual human rights; the latter cannot exist without the former. However, the *restless* reality of human rights, too, would not exist, without its *arrested* reality. The aspiration for peace, equality, and justice would exist and become urgent in a world replete with violence, inequality, and injustice. On the other hand, the textual expression of human rights, i.e. the instruments and documents (which are only one limited interpretation of the *restless* reality of human rights), can only exist if the *restless* reality of human rights exists. This dialectical relationship needs further elaboration.

What I aim to explore here is the lost connection between the *restless* reality of human rights and the *arrested* reality thereof (the latter encompasses human rights instruments, documents, scholarship, and generally human rights *text*). For one thing, *restless* realities, although universally shared and perceived, are virtually beyond our objective judgement and assessment. This reality, I would argue, is universal. The irony, however, is that what we normally refer to as human rights, i.e. the mainstream understanding of human rights, is *not* the *restless* reality of human rights, but rather their verbal and textual expression.[14] To put it differently, it has become virtually impossible to speak of human rights without uttering words and verbalization of our thoughts. Our understanding of human rights

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11 It may be worth quoting here Martin Heidegger on this development: "We have seen many new art works and art movements arise... [T]he question, however, remains: is art still an essential and necessary way in which truth that is decisive for our historical existence happens, or is art no longer of this character?"; see Martin Heidegger, "The Origin of the Work of Art", Albert Hofstadter trans., in: *Philosophies of Art and Beauty: Selected Readings in Aesthetics from Plato to Heidegger*, Hofstadter and Kuhns, eds. (New York; The Modern Library, 1964), 700.

12 The literature on critique of the mainstream human rights is overwhelming; see, e.g., Ibrahim J. Gassama, "A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism," *Brook.J.Int'lL.* 37 (2012), 407.

13 I will attempt to clarify the concept of *restless* reality and *arrested* reality, in contrast to the existing literature and by referring to evidential data. For now, to put it simply, the *restless* reality is a pole in the spectrum of reality, its characterisations including: immeasurable, unquantifiable, chaotic, limitless, boundless, uncertain, and so forth. The *arrested* reality, on the other hand, is the opposite pole, with traits such as: delineated, measured, defined, standardized, limited, rigid, etc. It might be absurd, and rather counterproductive, to try verbally to elaborate on the concept of *restless reality*. The loose and *restless* reality of human rights is, in essence, different from the human rights of which we conventionally know and speak. One of the very distinctive characterizations of the *restless* reality of human rights – versus the *arrested* – is the very verbal expression of the latter. Nonetheless, it does not mean that we should not strive to make this intellectual distinction. The *restless* realities of human rights, justice, freedom from oppression, equality, and so on and so forth are, in substance, different from the mainstream, textual, and concretized understanding of them. The main difference between this concept of reality and, e.g., Nietzsche's dichotomy is that the two realities are equal and that there is no hierarchical relationship between them. Their relationship is symbiotic and their existence relies upon each other. Second, the concepts of *restless* and *arrested* reality are not representing a divide, but a spectrum, and finally, on an aesthetic point, various art forms (creative expressions) do not belong to either of these realms, instead their formal appearance is within one end of the spectrum of reality, i.e. *arrested* reality. For instance, essentialist modes of verbal and textual expression, examples of which are widely and manifestly found in legal writing, are closer to the pole of the *arrested* reality; similarly, poetry, storytelling, and other such expressions are in the realm of the *arrested* reality, despite the fact that they are more reflective of the *restless* reality. I will explain this further in the third section. This conceptualization of reality is also fundamentally different from that in Plato's Allegory of the Cave. For one thing, in the theory I develop in this paper, there is no original (ideal) and shadow (imitation). See generally Plato, *The Republic*, Benjamin Jowett trans. (360 BCE), available online at: http://classics.mit.edu/Plato/republic.8.vii.html.

14 Such conceptualization of human rights reality can perhaps put an end, or at least open a new horizon, to the long-running debate on universality of human rights versus cultural relativism.

has become *all-too-textual*. This inclination towards the textual understanding of human rights is but a perilous tendency, an inclination fuelled by modernity and rationality.[15] But it is beyond obvious that the reality of human rights cannot be reduced to its verbal expression.

I think it is now indispensable to explain why and how an excessive inclination towards rationality can become detrimental to the human rights enterprise and its promise. I want to approach this critique through the aforementioned prism of dual reality. Based on the conceptualization of Reality, rational and textual expression of human rights is only one small fraction of their Reality. Therefore, binding our knowledge of human rights to such a narrow expression of them will ultimately lead to a misconception, or short-sightedness. In other words, if the dialectical relationship between the two realities of human rights, namely *restless* and *arrested*, is [the real or the entire reality of] *Human Rights*, we need to be in a constant oscillation between the two realities, clinging to the hope of achieving an equilibrium.[16] This, however, is not the case today. Human rights scholarship and the academic discourse on human rights are stuck at one end of this spectrum. Lawyers, human rights scholars, academics, and other professionals seem to have forgotten, if they ever realized, that these two realities are two sides of the same coin. This overwhelming inclination is a risk of modernity – a "manufactured risk", as Anthony Giddens puts it.[17]

Many, if not all, of the existing contradictions within human rights[18] can perhaps be understood better through this analysis. The never-ending contentions between, e.g., national security and freedom of expression, copyright and freedom of access to information, the right to development and the environment, citizenship and freedom of movement, all become intelligible through this perspective – each of which can be the subject of a separate paper. Such paradoxes, I believe, are inherent within the *arrested* reality of human rights. Texts and languages, after all, are such fertile ground to generate conflicts and misunderstandings. The divorce between the rigid (*arrested*) reality of human rights and the free (*restless*) reality of them is perhaps what philosophers and thinkers have elsewhere referred to as the duality of human rights and natural law, of human and nature.[19] The battle between natural law and human rights is over. Human rights are the victors of this bloody confrontation, a victory gained at the cost of losing a balance, elevating human rights to the religion of modernity. I think it is self-evident that the reality of our contemporary world is far from harmonious or in equilibrium, and instead it is replete with holocausts, genocides, ethnic cleansings, human greed, and so on and so forth. But, ironically, the path we have taken to re-establish this [promised] balance, to beautify the world, has been arguably counter-productive and self-destructive. We have been constantly contributing to the rigidity of the human rights reality through our methodologies and standardizations, through yet more fabrication and creation, with the naïve hope of engendering change. By contrast, the way to reform the status quo runs through the symbiotic relationship between the realms where we can liberally, freely, maximally, and loosely create [*restless reality*] and where we can solidify and rigidify our aspirations and imaginings [*arrested reality*].

Mournfully, we have imprisoned ourselves in the *arrested* reality, stuck in its rigidity, in a desperate quest for change. Casting a superficial look upon the academic discourse in our law schools, upon the norms and disciplines, our legal research methodologies, and most tragically our teaching methods reveals an unstoppable fetish and desire in legal scholarship to rigidify the reality, repeatedly tightening the very knot that we have been hoping to untie for a long time. If we have moved too far towards the *arrested* reality of human rights, and if we have lost our once intimate tie with the *restless* reality, how can we fertilize the discourse for the long lost equilibrium, this fragile harmony that today may only exist in our wild and pleasant imaginations? To give this question an answer, I will revisit the concept of beauty. But before doing so, I will argue that some creative expressions,

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15 For an interesting critique of rationality and reason's emancipatory capability see: Rolando Gaete, *Human Rights and the Limits of Critical Reason* (Aldershot, Dartmouth University Press, 1993); also a review of the book by Douzinas: Costas Douzinas, "Human Rights and the Limits of Critical Reason" Book Review of *Human Rights and the Limits of Critical Reason* by Rolando Gaete, in *The Modern Law Review* 58(1) (1 January 1995), 138-140.

16 I have previously called this equilibrium 'beauty'.

17 See generally Anthony Giddens, "Risk", in *Runaway World: How Globalization is Reshaping our Lives* (London: Profile Books, 2002), 20.

18 See Costas Douzinas, "The Paradoxes of Human Rights," *Constellations* 20(1) (2013), 51.

19 For characterization of natural law and natural rights, see generally Anthony Lisska, *Aquinas's Theory of Natural Law* (Oxford: Clarendon, 1996); for a comprehensive examination of the historical metamorphosis from Nature to human rights see Costas Douzinas, *The End*, 23., where Douzinas points out that "Natural law is a notoriously open-ended concept and its understanding is clouded in historical and moral uncertainty." These traits, i.e. open-ended, clouded, and uncertain, are the very characterizations of the *restless* reality.

meeting the criteria that I shall shortly enumerate, can be vehicles for humanity to facilitate the oscillation between the *arrested* and *restless* reality poles. Creative expressions are therefore either detrimental or beneficial to this balance. And here is where art re-enters the stage to play its critical, albeit oft-neglected, role. But what kind of a creative expression is capable of performing this task?

2. ON MINOUIQUE ART: THE WORMHOLES[20] TO THE OTHER END OF REALITY

Before I begin to discuss art and examine its relevance to human rights, I feel obliged to clarify the complex theory of aesthetics. My aesthetic system and how I define art and beauty differ fundamentally from that of the classical Greek,[21] as well as modern theories of art.[22] In this section, I will strive to give a, hopefully, clear answer to the question of 'what is art?', or at least what I mean by *art* in this paper. This ambitious, complex, and of course delicate task of laying out the details of an aesthetic system requires a lot more than a few paragraphs. However, owing to the limits of space and time for this short paper, I provide a condensed version of the theory that is consistent with the theory of dual reality.

Perhaps all of us, somewhere in the midst of the hectic business of routine, have pondered over a work of art, thinking of its features and properties, and what makes it "art"? We may have even gone further to assess an artwork, whether it is *good* art or *bad* art. Creation, I believe, is the integral element of any work of art; any creative expression, hence, can be called art.[23] Nonetheless, I believe works of art can be perceived within a spectrum with two poles: namely *Minouique* and *Gittique* art,[24] on which I will elaborate shortly.

Thus far, I have suggested only one condition, a formal trait, in defining art: creative form. Thus, for both *Minouique* and *Gittique* works of art, a certain level of creativity in form is required. It is, nevertheless, commonsensical that there exists manifest distinction between various forms of art. Think of a music piece composed by Wagner and the ringing sound of a fire alarm for instance. It is worth noting however that it is not only the complexity of the former that makes it more beautiful than the latter. To put it differently, a highly creative form is not necessarily a complex one. Therefore, although all forms are distinctive, what distinguishes them is a creative quality, that I call *clarity*.

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20 Wormhole is defined in the Oxford Dictionary as: "a hypothetical connection between widely separated regions of space-time".

21 The classical Greek theory of art primarily pivots around the imitation of nature, human life, or beauty. Art is [to be] an imitation of the eternal ideal realities. Imitations of worldly objects are not therefore art; they are copies of the ideas. This dichotomy is entirely different than what I have proposed. It implies a substantial and inherent hierarchy between the two realities, with superiority of idea and inferiority of imitation, whereas the two realities, in my theory, are by their nature, neither superior or original, nor inferior or fake. Instead, they are equal. However, in any given context, they can appear to be of hegemonic features over the other. And that is not because of their nature, but due to the discursive hegemony in which realities are formed. Moreover, various forms of art, according to the ancient Greek aesthetics, belong to different realities, something that Nietzsche also founds his art critique upon. For a brief review of classical Greek aesthetics, see: Freeland, *But Is It Art?*, 30-39.

22 Immanuel Kant and David Hume are perhaps the most notable art critics of the Enlightenment. My theory of aesthetics, despite sharing some elements, does not fully concur with the fundamental aspects of their aesthetic systems. First, although I believe that [some sort of] form is required for a work of art, I do not entirely concur with Kant's account of [significant] *form*. In fact, I would argue that considering a premier role for the form in aesthetics will lead to a highly-narrow definition of art. To put it differently, it is not only a particular order of lines and colours and a specific juxtaposition of notes that make a work of art beautiful. Our aesthetic emotions are not provoked through merely perfect forms. My theory here significantly diverges from most of the modern critiques of aesthetics. I do not concur with the quality of "purposiveness without a purpose" – what Kant believed to be the common trait of beautiful objects. Unlike Kant, I think the purpose of art is beyond mere satisfaction of our aesthetic faculties, a "free play of imagination". I will explain this purpose shortly in this paper. For Kant's views on aesthetic, see generally: Immanuel Kant, *The Critique of Judgement* (1790), James Creed Meredith trans. (Oxford: Clarendon Press, 1969), especially the 'Deduction of Pure Aesthetic Judgments' and section 51. For David Hume's ideas, see Frank A. Tillman, Steven M. Cahn, *Philosophy of Art and Aesthetics, from Plato to Wittgenstein* (New York: Harper & Row, 1969), 115-130.

23 I have utilized the term 'art', in a broad sense that is semantically close to *technê* that encompasses any fabrication, making, creating, etc. In this sense, art refers to a capacity of mankind, i.e. making, from which the concept of *Homo Faber* stems. See *supra* note 1. "The Latin word Faber", Hanna Arendt writes, "probably related to *facere* ("to make something" in the sense of production), originally designated to the fabricator and artist who works upon hard material, such as stone or wood; it also was used as translation for the Greek *tektōn*, which has the same connotation." Arendt, *The Human*, 136 (note 1).

24 *Minouique* is an adjective from the root of *Minou* (in Farsi مینو) which roughly means intangible, beyond senses, invisible, etc. I have borrowed this term from Persian mythology. I have used it in adjective form to ascribe a quality to *Minouique* art, which is reflectiveness of the *restless* reality. *Gittique*, on the other hand, is an adjective derived from *Gitti* (in Farsi گیتی) which refers to the qualities opposite to *Minouique*, namely visible, tangible, and material. By *Gittique* art, I refer to the kind of art (creative expression) which is not, and cannot be, reflective of the *restless* reality. Interestingly, in Persian mythology these two concepts, i.e. *Gitti* and *Minou*, are interdependent. However, a hierarchy, or at the least a sequence of existence, is implied in their relationship. *Minou* is believed to be the root of *Gitti* and *Gitti* is the garment on *Minou*. See Fatemeh Lajevardi, "Minou and Gitti and the Iranian Illuminationist Ontology" (title trans. from Farsi), *Borhan and Erfan* 1(2) (2004): 119-149.

For any form of creation, a certain level of detachment from the arrested reality is needed. All creations need to defy the pre-existing realities in a sense; a degree of liberation from the fixed reality is needed to fabricate anything, whether for writing a novel or a scholarly essay. The more creative the form is, the clearer it becomes. Picasso's *Guernica* [25] is a shining example of creative form that even defied the artistic traditions of painting of his time. In simple terms, a more creative form is a more powerful medium to reflect the Reality. But creative, I reiterate, does not necessarily mean intricate; there is no correlation between the level of creativity and complexity. Minimalist forms can be more creative than maximalist ones. Now one may wonder, what is then the difference between legal documents [which still qualify as a form of creative expression] and Francisco Goya's paintings, for instance? I call the former *Gittique* art, meaning that although it enjoys a certain level of creativity, the form is incapable of conveying a message to be considered an equivalent to Goya's work, an example of *Minouique* art. The reason is that the legal document is created within the realm of the *arrested* reality, with little to no clear reference to its *restless* reality. It is neutral, if not dismissive, towards the *restless* reality. The form, too, lacks the required level of creativity. Writing a scholarly paper is largely about compliance with more or less unified definitions, standards, and other "do's and don'ts", whereas a work of *Minouique* art is essentially about creativity rather than conformity. Moreover, the legal document is not created to reflect the *restless* reality; conversely, it is manufactured to remain within and even perpetuate the features of the *arrested* reality. In order to understand a legal text, linguistic interpretations and contextual examinations are utilized, all referring to the *arrested* reality, seeking validation and legitimacy from within the very realm that the text has emerged. The form, therefore, needs to gain clarity through creativity to reflect the Reality of its subject. Here comes the second condition specific to *Minouique* art: clarity. A work of art ought to be formally clear enough to convey meanings and messages that the artist aims to communicate. This can only be achieved through meaningful and harmonious choice of form.

For the legal document, creativity is, first, limited and, second, the legal document is not written with the aim of reflecting the *restless* reality of it, but for a different *purpose* with no referential element to the *restless* reality. It can rather veil the reality and contaminate our understanding of it. Hence, the form is *unclear*.

This brings us to the third condition of *Minouique* art: the *purpose* of the work of art. The said condition for the *Minouique* art is intertwined with the second one. Unlike Kant,[26] I think there is a purpose behind a work of *Minouique* art and why we find it beautiful. A beautiful object serves a goal. The goal, however, is not only satisfaction of our aesthetic faculties and the *free play of imagination*, but is unveiling the reality, the *entirety* of reality. To explain further, based on the dichotomy of reality, anything that exists has two realities (namely, *restless* and *arrested*, therefore the subject of an artwork), be it e.g. mere expression of feelings or a political message, has also two realities. If a creative expression is *not* made with the purpose and intent of unveiling the Reality of its subject in *toto*, therefore it cannot be *Minouique* art. It may however be *Gittique* art. Examples of *Gittique* art can be neglectful, deceitful, or formally-unclear creative expressions.

Two of the aforementioned traits, i.e. neglectfulness and deceitfulness, lead us to the two last requirements of an artwork to qualify as *Minouique* art. The last, but never the least, prerequisites for *Minouique* art are *insightfulness* and *sincerity*;[27] a *Minouique* work of art is sincere and insightful in its expression. Let us assume a creative form, e.g. a photograph or drawing of a juicy and seemingly delicious hamburger; the form can be creative – depending on the techniques used by the photographer or the painter,[28] it can even be made to reflect the reality of the burger, a tiny fraction of its reality, i.e. its look and taste, but are these enough to call this work a *Minouique* art? The answer, I think, is a definite "No". Compare the example of the hamburger picture with another work of art, e.g. the story of a steak from slaughterhouse to the plate in a restaurant, condensed in one frame. This work,

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25 Guernica, whether in terms of content or form, is considered to be one of the greatest works of the 20th century. Picasso is said to be one of the founders of cubism. For a short article on cubism and Guernica, visit: https://www.khanacademy.org/humanities/art-1010/early-abstraction/cubism/a/picasso-guernica

26 Kant utilizes the curious phrase of "purposiveness without a purpose" in his critique of beauty. See generally, Kant, *The Critique*.

27 Let's assume that the subject of an artwork is expression of feelings or a sociopolitical message. Whichever the case is, the artist, depending on their sensitiveness, can acquire knowledge of their feelings or the sociopolitical situation. This perceptiveness of feelings, situations, status quo, etc. is what I call insightfulness of the *Minouique* work of art. The sensitive eyes of Goya and ears of Vivaldi had helped them acquire knowledge, an insight that prepares the artist to produce an artwork. However, the other requirement, i.e. sincerity, is distinct from insightfulness. In fact, an artist may be of great insight and knowledge, but may decide to conceal, manipulate, or distort reality. A virtuoso musician, for instance, who abhors war, composing a military march, is insightful but not sincere in their expression. A *Minouique* work of art is to be both sincere and insightful.

28 Shining examples of such works can be commonly found in commercials, advertisements, and the like.

Omid Milani, *Appalled by Reality*, (Ottawa, 2016)

I would argue, is more sincere and insightful than the former. The reality of hamburger is not only its tastiness, but also includes the way we treat animals these days and innumerable other facts. However, it is worth mentioning that all works of art are to some extent biased. The use of a medium, the choice of a subject, and an artist's mode of expression are all biases of any given work of art. Such unavoidable degree of partiality, however, is not at issue here. Nevertheless, there is a high degree of dishonesty, hypocrisy, or neglectfulness in the photograph of a burger, whereas the drawing that depicts the *story* of the steak provides further knowledge, albeit small and yet biased, about the subject. The fact that the picture of the mouth-watering burger is created to primarily tempt costumers, and even manipulate them, and make them neglect other realties pertaining to the burger, can illuminate the difference between the two works. This is not to polarize all works of art into *Minouique* and *Gittique*, but is rather to indicate a spectrum. In fact, each work of art, depending on numerous variables, may open our eyes to the reality of things and provide us with knowledge that is otherwise inaccessible to us. This is when a beautiful object acquires a potential to take us to the other end of reality, just like a *wormhole*. This property of *Minouique* art requires further scrutiny.

The fact that *Minouique* art can awaken us to the Reality [as a whole] and provide us with episteme ought to be of interest to human rights scholarship. *Minouique* art, I contend, is the highest form of critique. Critical judgement and critical legal studies, of course, without *Minouique*, art are deficient and defective. Art ought to be not only a glamorous add-on to the human rights legal scholarship, but an indispensable component of human rights (and, in general, of legal studies). The significance of art in human rights is even greater. Human rights, arguably the discipline that deals with human suffering, are to be critical of the status quo after all. But how can *Minouique* art be critical? For one thing, the very first step to criticize any issue is to gain knowledge of that matter. *Minouique* art, as we discussed, can unveil realities that are virtually beyond our rational and logical access, far-fetched for our conventional methodologies. The liberal and insightful engagement of the artist with the subject, accompanied by a powerful form can reveal the most neglected aspects of reality to the audience. Acquiring knowledge of reality is the very first step to be taken in order to make any social change. This is exactly why we may find a painting of, for instance, an execution scene beautiful and not disgusting.[29] Because the entire reality [or at least a sincere and insightful attempt to unveil the reality behind those incidents] is what we find beautiful, and exposing the reality is required to reach the very fragile balance, the equilibrium, I have called *beauty*. The execution scene depicted by Goya is sincere in its expression; it is created with the purpose of uncovering the Reality of the subject matter. Needless to say, the form is exceptionally creative, hence clear. Without *Minouique* art the balance, the beauty, will always remain beyond the reach of humanity. This explains the second reason why *Minouique* art ought to be incorporated in critical legal studies, specifically in human rights. The balance between the *arrested* reality [that crystalized tiny fraction of the Reality] and the *restless* reality is only possible through a constant oscillation between the two ends of the Reality spectrum. *Minouique* art is but a powerful vehicle for this purpose. In order to beautify the world and engender social change *Minouique* art can make the entire, or at least a great portion of, reality accessible to us.

In the harshly-competitive marketplace of academia, the long-time preoccupation of Faculties of Law has been training canny, even cunning, practitioners and academics, including (for the last couple generations or more) in the evolving discipline of human rights. Too much has been invested on the *arrested* reality,

29 As an exemplar, see: Goya, *The Third of May 1808* (El Tres de Mayo, 1808); Goya, *Here Neither* (Plate 36 of the Disasters of War series, 1812-15); Paul Delaroche, *The Execution of Lady Jane Grey* (National Gallery of London, 1833).

Francisco Goya, *The Third of May*, (El Tres de Mayo, 1808)

while too little, if any, attention has been given to the *restless* reality, what I believe is equally as significant as the textual and concretized reality of human rights. Our pleasant dreams are buried deep underneath the corpus of legal scholarship; the reality is concealed beneath the disturbing numbness caused by our *all-too-textual* fetish. One of the paths to break through this often-overlooked rigidity passes through *Minouique* art. The eyes of an artist, sensitive to the realities of our world, cannot be blinded with the rhetorical flow of jargons and mouth-filling definitions of human rights literature. Without *Minouique* art, we will be stuck in an *illusion of progress*,[30] publishing papers and articles that will collect dust in corners of [cyber] libraries or, at their best, will help generate yet more 'scholarly' articles. To put an end to this quite tragic, albeit seemingly glamorous, academic discourse on human rights, we need to leave our comfort zone and reach for our dreams once more; the dreams that once were, and hopefully still are, the very reasons behind any word we put down on paper, the very meanings of our legal vocabularies, the *Sein*[31] of our terminologies.

3.EPILOGUE

The bases of my understanding of Reality go well beyond mere intellectual and philosophical contemplations. In fact, my theory of reality is also explicable and even defensible within other disciplines. Today, with unprecedented scientific advancements and accessibility and availability of knowledge to the inquisitive,[32] I have the opportunity to revisit my theory against the yardsticks of other disciplines, such as physics and medicine, where unlike human rights law

30 I have borrowed the notion "illusion of progress" from Payam Akhavan in: "Proliferation of Terminology and the Illusion of Progress", *Genocide Studies and Prevention* 2:1 (2007), 73., where he writes: "The proliferation of terminology, however, the incantation of new strategic mantras, while obviously relevant to the legal and political construction of the world, can often become a self-contained exercise creating the mere illusion of progress."

31 It may be difficult, perhaps impossible, to translate the use of this Heideggerian term from German. Here, it may suffice however to describe this term as the Being of beings or the essence of things. See Thomas Hoffman, "Human Rights, Human Dignity, and the Human Life Form", *Comparative Perspectives on Law and Justice*, (Springer ,2014) 49 (Note 3).

32 To be more precise, the ones whose freedom of access to information is not hindered for various reasons.

definitions and jargons cannot matter less.[33] However, I neither claim nor attempt to establish the foundations of my theory upon the bases of science; nonetheless, this theory is, to say the least, plausible within those areas of knowledge. In addition, it is based on common sense that humans' perception is entirely limited by their sensory system, our receptors. Our perception is constructed through a constant translation of energies surrounding us. To put it in simple terms, our rational and sensual capabilities have no direct access to the reality; it is all interpretations that we call "perception".[34] These scientific parallels can strengthen the theory of *arrested* and *restless* reality. The reality of human rights, too, as I have demonstrated, falls within the theory.

The academic discourse on human rights, with numerous methodological and epistemological flaws, needs an entirely fresh approach to fulfill its promised objectives. The issues existing within human rights scholarship cannot be resolved with the same level of perception at which they were created, as Albert Einstein observed at the time when contemporary "human rights" were being articulated: "*Our world faces a crisis as yet unperceived by those possessing power to make great decisions for good or evil. [...]* A new type of thinking is essential if mankind is to survive and move toward higher levels."[35]

This, rather revolutionary, breakthrough will not be achieved, unless academics dare to return to the original commitments of human rights. This will, at its minimum, make many human rights scholars uncomfortable, disturbing the comfort entrenched in their so-called academic accomplishments. I do not, by any means, think that utilizing art as methodology will fix all the shortcomings of academic discourse on human rights. However, I do believe that art as methodology can bring about changes that are unachievable for the existing mainstream arsenal of academic and rational methodologies.

As to the aesthetics that I have developed in this paper, along with its novelty, some aspects can be of high particular interest to human rights: sincerity and insightfulness of the artwork. The propaganda exercises of the West and the East, the Capitalist and the Islamist, the *Iranophobic* Hollywood and the *Occidentophobic* IRIB[36], are all rich in *Gittique* art and virtually devoid of sincerity and insight. In fact, they generate a version of reality through their complex framing processes in order to further their policies: they do not *create* to unveil, but to conceal.[37] In comparing, for instance, a movie that is produced to depict a stereotypical and fake image of Iranians[38] with another movie with a rather non-essentialist approach,[39] one might not feel at complete

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33 I try to loosely explain this similarity, if not commonality, [between quantum mechanics and my theory of reality] here, the literature however is out there for the ones who are open to fresh ideas outside of the rigid academic environment of law. Based on some [relatively] recent findings in quantum mechanics, an atom can exist, at the same time, in two forms of matter and energy, until it is observed, then it ceases to exist in its duality. The atom, when observed and measured, behaves sometimes like matter and when it is not, it can exist anywhere, it can be wave and/or matter, or neither, a somehow chaotic status, called *superposition*, mysteriously similar to the concept of *restless* reality. For a rather simple explanation of wave-particle duality see: Luke Mastin, "Quanta and Wave-Particle Duality" and "Superposition, interference, and De-coherence", *Quantum Theory and the Uncertainty* Theory (2009), available online at: <http://www.physicsoftheuniverse.com/topics_quantum_quanta.html> and <http://www.physicsoftheuniverse.com/topics_quantum_superposition.html>; and for a more detailed and technical explanation see generally: Belal E. Baaquie, *The Theoretical Foundations and Quantum Mechanics*, (Springer e-Books, 2013)

34 The purpose of the central nervous system is to collect information from the environment, interpret it, and then decide whether to take action. The central nervous system gathers information via the sensory system. The sensory system has receptors sporadically appearing throughout the body which take information as a whole (such as pain) or receptors that are specially designed for specific functions and incorporated in an organ (such as the retina of the eye or vestibulocochlear system of the inner ear). The main function of the receptor, which is in direct contact with the environment, is to translate energy from the environment, as literally a conductor, and then transfer the translated message to the sensory nerves as a form of an electrochemical gradient. The olfactory system and cranial nerve is the only system that seems to have a direct linkage to the brain. It perceives chemical energy and turns it into an electrochemical message and thus is the only system, in which there is not, compared to other systems, a *major* translation (conduction) of the energy, yet it involves the decoding process in the brain. Other systems have to make drastic translations such as mechanical into chemical into electrochemical in the inner ear, electromagnetic into electrochemical in the retina of the eye, and vibration and pressure on the skin (mechanical) into electrochemical in the nerves. See Rodney A. Rhoades and David R. Bell, "Sensory Physiology", *Medical Physiology: Principles for Clinical Medicine* (Wolters Kluwer, Lippincot William & Wilkins: 2013), 61-90.

35 *New York Times*, "Atomic Education Urged by Einstein" (May 25, 1946), 13.

36 IRIB is the abbreviation for: "Islamic Republic of Iran Broadcasting" entity.

37 Erving Goffman, who has theorized the framing theory in sociology, explains how frames organize our experience of reality. See: Erving Goffman and John D'Amato, "Frame Analysis: An Essay on the Organization of Experience", *Reviews in Anthropology*, 20(3) (1992), 149; and Antoine Buyse, "Words of Violence: 'Fear Speech' or How Violent Conflict Escalation Relates to the Freedom of Expression", *Human Rights Quarterly* 36(4) (2014), 787.

38 A good example would be: Zack Snyder, *300* (2007, USA). In this movie, that generated nearly half a Billion dollars, the Persian Army, led by Xerxes Shah, is portrayed as wrathful savages and barbarians, whereas the Greeks are shown as heroes and civilized humans.

39 See, e.g., Asghar Farhadi, *A Separation* (2011, Iran). The movie that won the Academy Award for the best foreign language film, and generated just over USD 22 million, is a drama about a middleclass Iranian family.

ease to call both of them *Minouique* art, unless our assessment is only based on the form and the techniques. This subtle, yet significant, difference elevates a work of art to the status of *Minouique* art, the very kind of art which ought to be deemed a unique source of knowledge, through which real critique, and thus change, can be made possible. In modernity, however, in the absence of active individual and subjective judgement of beauty, the marketplace provides us with judgement. Once the critical engagement with the concept of beauty is lost, the judgement of the *power* can overcome and manipulate each and every one of us. The rational power within human rights academic discourse, in the same vein, is entrenched in all spheres of it. Within the university, for example, the very physical separation of Art and Law Faculties is arguably an attempt to protect and fortify the (insecure) legal scholarship. The day when a human rights course is designed, taught, and evaluated with art as methodology might now seem a rosy and far-fetched idea, but I believe it can be realised if we, once more, dare to dream and learn to keep the (beautiful) balance between our rational faculties and our aesthetic capacities... a mission, ultimately, to emancipate and beautify human rights.

SPECIAL SECTION: INDIGENOUS PEOPLES AND CHILDREN'S RIGHTS TO HEALTH IN CANADA

INTRODUCTORY NOTE

John Packer

This Special Section of the *Canadian Yearbook of Human Rights* addresses what is likely to be a subject of recurring interest and much debate in the future – in Canada and elsewhere – about the relationship, and possible reconciliation, between the evolved law resulting from colonial power and the law (or autonomous authority) of Indigenous Peoples. In 2014, this topic captured public attention in Canada in regard to the healthcare for some Indigenous girls who were suffering cancer and had been prescribed Western medicine in the form, inter alia, of chemotherapy – but whose parents and Indigenous communities asserted the autonomous right to Indigenous treatment and care notwithstanding differences in evaluations and prognoses. The lives of the girls hang in the balance.

In the case of J.J., who belongs to an Indigenous community in the Province of Ontario, the differences in perspective and approach between the State's public health authorities, on the one hand, and the girl's mother and Indigenous community on the other hand, gave rise to a dispute which was adjudicated by Justice G.B. Edward of the Ontario Court of Justice. In his controversial Judgment of 14 November 2014, Justice Edward found in favour of the girl's mother and community who had asserted autonomous rights to Indigenous healthcare pursuant to section 35 of the Canadian *Constitution Act, 1982*. A public debate ensued, along with various conduct on the part of the parties.

On 28 April 2015, following negotiations between the parties which found some mutually satisfactory arrangement and de facto reconciliation in the instant case, Justice Edward issued an Order constituting an extraordinary addendum to his 2014 Judgment reflecting the agreement of the parties – resolving the instant case but leaving largely unsettled the principal issues then in dispute. Views on the applicable law and its justifications remain substantially apart, touching fundamental issues.

This case, and the issues raised, are likely to take on increased significance in the future as Indigenous Peoples assert more fully their rights, i.a. as the rights of the child become more fully elaborated and sustained and as Canadian jurisprudence and relevant practices evolve.

The texts included in this Special Section are written versions of presentations delivered by four scholars as part of a panel discussion organised by HRREC and the Centre for Health Law, Policy and Ethics (https://commonlaw.uottawa.ca/health-law/) at the University of Ottawa on 28 November 2014. The panel sought to grapple with the challenging issues arising from the case of J.J. and the then decision and judgment of Justice Edward (i.e. prior to the subsequent amendment). The panelists were invited to share their different perspectives on the competing rights and responsibilities vis-à-vis the healthcare and survival of J.J.

The Judgment of Justice G.B. Edward of the Ontario Court of Justice is included in full text, together with the subsequent Order of amendment.

It may be noted that neither the individual autonomy of J.J. (a minor) nor her evolving capacity appear to have been considered in the case, nor was the principle of "the child's best interest" referenced in the initial Judgment as an objective standard

– each constituting standards binding upon Canada pursuant to the Convention on the Rights of the Child.[1] Nonetheless, in paragraph 83a (added in Justice Edward's 28 April 2015 Order/amendment), express reference is made to the standard of "the best interests of the child" being the "paramount" principle – seemingly referring to Article 3 of the Convention on the Rights of the Child.[2] By contrast, in paragraph 83b Justice Edward expressly invokes Article 24 of the United Nations Declaration on the Rights of Indigenous Peoples[3], which the Government of Canada has stated its intention to apply[4], according to which Indigenous Peoples in Canada have not only rights to "their traditional medicines and to maintain their health practices", but "also have the right to access, without any discrimination, to all social and health services" – in effect, reconciling the claims in this case. However, there is no reference to a fully autonomous authority – beyond the "traditional" – on the part of Indigenous Peoples regarding their own healthcare. This question, and the relevant international norms and standards, has yet to be adjudicated in Canada. Yet, the potential applicability, content and scope of the standards would appear to be wide and substantial.

Irrespective the effect of international norms and standards, one is left to contemplate the state of Canadian law in the matters arising in cases such as J.J. in the absence of an agreement between the parties as occurred in this case.

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1 Adopted and opened for signature, ratification or accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990; the Convention was signed by Canada on 28 May 1990 with the instrument of ratification subsequently deposited with the UN Secretary General on 13 December 1991 (see: https://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-11.en.pdf).

2 Interestingly, Justice Edwards appears to elevate the standard of "the best interests of the child" to that of "paramount" principle, although Article 3(1) of the Convention on the Rights of the Child stipulates only that it be "a primary consideration".

3 Adopted by vote of the General Assembly on 13 September 2007; UN doc. A/RES/61/295.

4 On 10 May 2016, Canada's Minister of Indigenous and Northern Affairs, the Hon. Carolyn Bennett, announced that Canada is "a full supporter, without qualification, of the United Nations Declaration on the Rights of Indigenous Peoples. Today's announcement also reaffirms Canada's commitment to adopt and implement the Declaration in accordance with the Canadian Constitution." See: Government of Canada (Indigenous and Northern Affairs Canada) News Release "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples", 10 May 2013, found (together with the less than supportive official statement of the previous Government) in the International Human Rights and Canada Database (IHRCanadaDb) at: https://hri.ca/database .

NOTE LIMINAIRE

John Packer

Cette section spéciale de l'*Annuaire canadien des droits de la personne* porte sur un sujet susceptible de susciter l'intérêt de façon récurrente, et passablement de discussion dans le futur – au Canada et ailleurs – sur la relation, et la possible conciliation, entre le droit hérité de la puissance coloniale et le droit (ou l'autonomie gouvernementale) des peuples autochtones. En 2014, ce sujet a captivé l'attention du grand public au Canada. En effet, des jeunes filles autochtones atteintes de cancer s'étaient vu prescrire par les professionnels de la santé un traitement occidental, notamment, de la chimiothérapie. Mais leurs parents et les communautés autochtones ont fait valoir leur droit à l'autonomie et à choisir un traitement et des soins autochtones, sans égard aux différences dans les méthodes d'évaluation et de pronostic. La vie des jeunes filles était en jeu.

Dans l'affaire J.J. concernant une enfant appartenant à une communauté autochtone de la Province de l'Ontario, les différences de point de vue et d'approche des autorités gouvernementales en matière de santé publique, d'un côté, et la mère de la jeune fille et sa communauté autochtone, de l'autre, ont débouché sur un litige sur lequel le juge G.B. Edward, de la Cour de justice de l'Ontario, a statué. Dans sa décision controversée du 14 novembre 2014, le juge Edward a tranché en faveur de la mère de la jeune fille et de la communauté qui avaient fait valoir leur droit à l'autonomie et au choix de soins de santé autochtones *en vertu de l'article 35 de la Loi constitutionnelle de 1982*. Un débat public a suivi, et les parties ont adopté divers comportements.

Le 28 avril 2015, après des négociations, les parties sont arrivées à un accord satisfaisant et l'affaire en question a été résolue de facto. Le juge Edward a rendu une ordonnance constituant un addenda extraordinaire à sa décision de 2014 reflétant un accord entre les parties; résolvant l'affaire en question, mais laissant non réglées les principales questions en litige. Les opinions concernant les lois applicables et les justifications connexes demeurent opposées sur le fond, même si elles touchent des enjeux fondamentaux.

Ce dossier et les questions qui ont été soulevées auront probablement une plus grande importance dans l'avenir alors que les peuples autochtones affirment davantage leurs droits, c'est-à-dire alors que les droits de l'enfant sont de plus en plus élaborés et soutenus, et alors que la jurisprudence canadienne et les pratiques pertinentes évoluent.

Les textes inclus dans cette section spéciale sont la version écrite des exposés présentés par quatre universitaires dans le cadre d'une discussion entre experts organisée par le Centre de recherche et d'enseignement sur les droits de la personne (CREDP) et le Centre de droit, politique et éthique de la santé (https://commonlaw.uottawa.ca/droit-sante/) à l'Université d'Ottawa le 28 novembre 2014. Le groupe d'experts s'est colleté avec les enjeux difficiles soulevés par l'affaire J.J. et par la décision rendue par le juge Edward (avant les modifications subséquentes). Les panélistes furent invités à exprimer leur point de vue respectif sur les droits et les responsabilités contradictoires eu égard aux services de santé et à la survie de J.J.

Le texte intégral de la décision du juge G.B. Edward de la Cour de justice de l'Ontario est inclus, avec l'ordonnance de modification subséquente.

Il convient de mentionner que ni l'autonomie individuelle de J.J. (une enfant mineure) ni sa capacité éventuelle ne semblent avoir été prises en considération dans l'affaire, non plus que le principe de « l'intérêt supérieur de l'enfant » qui avait été invoqué dans la décision initiale en tant que norme objective; les deux éléments constituant des normes contraignantes pour le Canada en vertu de la Convention relative aux droits de l'enfant.[1] Néanmoins, à l'alinéa 83a (ajouté à l'ordonnance de modification du juge Edward le

[1] Adoptée et ouverte à la signature, ratification et adhésion par l'Assemblée générale dans sa résolution 44/25 du 20 novembre 1989, entrée en vigueur le 2 septembre 1990; la Convention a été signée par le Canada le 28 mai 1990 avec l'instrument de ratification ayant été déposé ultérieurement auprès du Secrétaire général de l'Organisation des Nations Unies le 13 décembre 1991 (voir : https://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-11.fr.pdf).

28 avril 2015), il est expressément fait mention de la norme de « l'intérêt supérieur de l'enfant » comme étant le principe « suprême », ce qui semble faire référence à l'article 3 de la Convention relative aux droits de l'enfant.[2] En revanche, à l'alinéa 83b, le juge Edward invoque expressément l'article 24 de la Déclaration des Nations Unies sur les droits des peuples autochtones[3], un article que le gouvernement du Canada a affirmé vouloir appliquer[4], et selon lequel, au Canada, les peuples autochtones ont non seulement le droit à « leur pharmacopée traditionnelle et [...] de conserver leurs pratiques médicales », mais ils ont aussi le droit d'avoir accès, sans aucune discrimination, à tous les services sociaux et de santé » – ce qui revient en effet à concilier les revendications dans cette affaire. Toutefois, il n'est fait aucune mention d'une autorité entièrement autonome – au-delà de l'autorité « traditionnelle » – de la part des peuples autochtones en ce qui a trait à leurs propres soins de santé. Il reste encore à statuer sur cette question, de même que sur les normes internationales pertinentes, au Canada. Et pourtant, l'applicabilité potentielle, le contenu et le champ d'application des normes semblent assez vastes et conséquents.

Abstraction faite des normes internationales, il ne reste plus qu'à considérer avec attention l'état du droit canadien sur les nouvelles questions qui émergent dans des affaires comme l'affaire J.J. en l'absence d'une entente entre les parties, comme ce fut le cas dans cette affaire.

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2 Fait intéressant, le juge Edwards semble considérer le principe de « l'intérêt supérieur de l'enfant » comme le principe « suprême », lors même que l'article 3(1) de la Convention relative aux droits de l'enfant stipule seulement qu'il doit s'agir d'une « considération primordiale ».

3 Adoptée lors d'un vote de l'Assemblée générale le 13 septembre 2007; UN doc. A/RES/61/295.

4 Le 10 mai 2016, la ministre canadienne des Affaires autochtones et du Nord, l'honorable Carolyn Bennett, a annoncé que le Canada « appuie maintenant pleinement, et sans réserve, la Déclaration des Nations Unies sur les droits des peuples autochtones. L'annonce d'aujourd'hui confirme l'engagement du Canada d'adopter et de mettre en œuvre la Déclaration dans le respect de la Constitution canadienne. » Voir : gouvernement du Canada (Affaires autochtones et du Nord Canada) communiqué de presse intitulé « Le Canada appuie maintenant la Déclaration des Nations Unies sur les droits des peuples autochtones sans réserve », diffusé le 10 mai 2013, consulté (de même que la déclaration officielle sensiblement moins favorable publiée par le précédent gouvernement) dans la Base de données sur les droits internationaux de la personne et le Canada (IHRCanadaDb) à : http://hri.ca/fr/base-de-donnees/.

This is a case under Part III of the *Child and Family Services Act* and is subject to one or more of subsections 48(7), 45(8) and 45(9) of the Act. These subsections and subsection 85(3) of the *Child and Family Services Act,* which deals with the consequences of failure to comply, read as follows:

> **45.**—(7) *Order excluding media representatives or prohibiting publication.*— The court may make an order,
>
> . . .
>
> (*c*) prohibiting the publication of a report of the hearing or a specified part of the hearing,
>
> where the court is of the opinion that . . . publication of the report, . . ., would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.
>
> (8) *Prohibition: identifying child.*— No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.
>
> (9) *Idem: order re adult.*— The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.
>
> . . .
>
> **85.**—(3) *Idem.*— A person who contravenes subsection 45(8) or 76(11) (publication of identifying information) or an order prohibiting publication made under clause 45(7)(*c*) or subsection 45(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

COURT FILE NO.: C287/14E

ONTARIO COURT OF JUSTICE

B E T W E E N :

HAMILTON HEALTH SCIENCES CORPORATION

Applicant

— AND —

D.H., P.L.J., SIX NATIONS OF THE GRAND RIVER CHILD AND FAMILY SERVICES DEPARTMENT AND BRANT FAMILY AND CHILDREN'S SERVICES

Respondents

Before Justice G.B. Edward
Application heard on September 17th, 18th, 22nd, 25th, and on October 2nd, 3rd, 8th, 16th and 22nd, 2014
Reasons for Judgment

D. Jarvis / M. Lindo ..... **for the Applicant**
E. Montour ..... **for the Respondent Six Nations of the Grand River Child and Family Services Department**
M. Handelman / E. Capitano ..... **for the Respondent Brant Family and Children's Services**
S. Harris ..... **Office of the Children's Lawyer**

EDWARD, J.:

INTRODUCTION

[1] The Applicant Hospital has brought an application under s. 40(4) of the *Child and Family Services Act* against the Respondent Children's Aid Society. It is an unusual request brought about by a very sad circumstance. The subject child of this Application is an 11 year old girl from The Six Nations of the Grand River, named J.J.

[2] In August of this year J.J was diagnosed with acute lymphoblastic leukemia (A.L.L.). A.L.L. is a form of cancer in the bone marrow. The Applicant Hospital's position is that it is treated with chemotherapy delivered in a number of phases. In J.J.'s case the Applicant's initial testing indicated she had a 90 to 95% chance of being cured. The specialists at the Applicant Hospital are not aware of any survivor of A.L.L. without chemotherapy treatments.

[3] Although J.J. had commenced chemotherapy treatment, it was discontinued in August of this year.

[4] This case brings up a number of issues including whether this Court is the appropriate forum and what effect section 35 of the *Constitution Act, 1982* has in this Court's deliberations.

THE PARTIES

[5] When this matter was first returnable on September 17th last, only the Applicant Hospital, the Respondent Society and the Children's Lawyer were before the Court. However, this Court ordered the child's parents, D.H. and P.L.J., as well as the Six Nations Band to be added to this Application. At the time the Court added these parties it was felt there was an obvious need for input from the child's parents and the band.

[6] In fact, the band participated throughout these proceedings, however the child's mother, D.H. and the child, J.J. left the jurisdiction at or near the time of the first return of the Application to purportedly attend an alternative cancer treatment facility in Florida.

A TIMELINE OF THE EVENTS

[7] As part of the Applicant's "bullet point submissions", Applicant's counsel prepared a timeline of events that helps to frame the discussion and which I now summarize for the most part.

[8] On Monday August 11th, 2014 J.J. attended the emergency room where blood tests showed an irregularity resulting in J.J.'s admission to the Applicant Hospital for further investigation. On Wednesday August 13th, 2014 J.J. was diagnosed with high risk acute lymphoblastic leukemia, or A.L.L. On Friday August 15th J.J. began what's described as the induction phase, or, 32 days of chemotherapy treatment.

[9] Initially J.J.'s treatment was overseen by Dr. Marjerrison, an oncologist with the Applicant Hospital. However, on August 25th Dr. Breakey, another staff oncologist with the Applicant Hospital, took over J.J.'s case.

[10] On Wednesday August 27th, the Applicant Hospital indicates D.H. withdrew consent for the continuation of her daughter's chemotherapy treatment.

[11] On that same day and pursuant to s. 72 of the *Child and Family Services Act*, Dr. Breakey calls the Respondent Society to report that D.H. is not prepared to have her daughter continue with chemotherapy treatment. On Thursday August 28th the Society's intake worker, Greg Skye,

contacts D.H., a Six Nations Band Council Representative, and consults with his manager, Kim Martin.

[12] On Friday August 29th Mr. Skye returns Dr. Breakey's call, and later that same day meets with Dr. Breakey and other hospital staff, and receives an undated letter written by Dr. Breakey, addressed to the Respondent Society's director, which letter was also faxed to the director. I stop here to quote this letter in its entirety, which was introduced as part of Exhibit #1.

> To the Director of the Brant Families and Children's Services,
>
> It is with grave concern that I report the medical neglect of (J.J.). (J.) is an 11 yo girl who has been admitted for medical therapy of acute lymphoblastic leukemia since her diagnosis on August 12, 2014. Her mother, (D.H.), initially agreed to treatment with chemotherapy, but decided on August 27 to discontinue the treatment with the plan to treat (J.) with traditional medicines.
>
> As a medical team, we feel that this decision to terminate chemotherapy puts (J's.) life at risk. Given her clinical diagnosis and the genetic tests to assess her risk stratification, this leukemia has an approximately **90% cure rate with the recommended treatment**. Without chemotherapy, we are not aware of any survivors of pediatric leukemia.
>
> We are concerned that (J's.) mother is making this decision independently and under significant stress. (J.) is 11 years old and we feel she is not able to make an informed consent to withdraw from therapy. She is not feeling well from both the cancer and the treatment. We feel that even though she is unwell now, she will regain strength and improve in the coming weeks on the treatment plan. We feel that (D's.) decision to discontinue the only proven therapy will remove any chance of cure and that (J.) will die of a curable condition.
>
> Given that (J.) can not make her own decision, and that the medical team does not agree with the mother's decision, we ask that the Brant FACS intervene to ensure that (J.) gets the medicine that she needs to give her the best possible chance at survival. In our experience, children who survive this type of childhood leukemia are able to live long and independent lives with little in the way of long-term effects of therapy.
>
> Please contact me for any additional information.
>
> Vicky Breakey, MD, Med, FRCPC
> Assistant Professor, McMaster University
> Pediatric Hematologist/Oncologist
> McMaster Children's Hospital
> HSC 3N27a-1280 Main St. W.
> Hamilton, Ontario, L8S 4K1

[13] On September 2nd a series of telephone calls occur surrounding the appointment of the Children's Lawyer and the involvement of the Six Nations Band Representative.

[14] On September 4th a further telephone discussion occurs between Mr. Skye and hospital staff to discuss J.J.'s impending discharge from the Applicant Hospital. On that same day the Children's Lawyer, Sandra Harris, meets with J.J. and her family.

[15] On September 8th the Applicant Hospital says it first became aware of the plan to take J.J. to Florida to undergo the alternative treatment plan.

[16] On that same day Mr. Skye advises Dr. Breakey that the Society is aware of the travel plans and that the Society has no plans to intervene.

[17] On that same day Dr. Breakey meets with D.H. to discuss the need to complete intravenous antibiotics for J.J.

[18] Dr. Breakey then faxes another letter to the Society dated September 8, 2014, and also introduced as part of Exhibit #1, which re-states the family's refusal of chemotherapy for J.J. and further expressing concerns about the need for J.J. to complete the course of treatment for the intravenous infection prior to the family travelling to Florida.

[19] On September 8th D.H. agrees to postpone the trip to Florida for one week and J.J. is discharged from hospital with follow up visits planned for September 11th and 15th. In fact J.J. missed the September 11th appointment but attended the next day for the follow up.

[20] On September 12th the Society manager spoke to Dr. Breakey about the Applicant's undated letter delivered to the Society on August 29th. Specifically the conversation focused on J.J.'s incapacity.

[21] On September 15th J.J. attended the Applicant Hospital for her second follow up.

[22] On Tuesday September 16th the Society's executive director, Andrew Koster, and the Society's director of Native Services Branch, Sally Rivers, met with the Applicant's senior hospital administrators to explain the Society's decision not to intervene.

[23] At 4:40 p.m. Applicant's counsel faxes a letter to Society counsel and OCL regarding its intention to bring an application under s. 40(4) of the CFSA returnable on September 17th.

[24] On September 17th Dr. Breakey writes and faxes a letter to the Society but dated September 16th which addresses the issue of J.J.'s capacity from the perspective of the Applicant Hospital. On this issue I quote the following from Dr. Breakey's letter, which has been introduced as Exhibit #2.

> On Thursday September 11, 2014 I received a phone call from Ms. Kim Martin, Supervisor at Brant FACS. She voiced her concern that in my previous letter, I suggested that (J.) is not capable of making her own medical decisions. She suggested that I was incorrect to state:
>
> > We are concerned that (J's.) mother is making this decision independently and under significant stress. (J.) is 11 years old and we feel she is not able to make an informed consent to withdraw from therapy.

> I wish to be clear that based on my assessments and interactions with (J.), as well as with input from other members of our treatment team, I have found that (J.) is not capable of making an informed decision. During her time in hospital, (J's.) diagnosis was explained to her in very simple terms. She did not ask questions and deferred all discussions to her mother. She lacks the maturity even of typical children her age and did not have the capacity to understand the details of her complex therapy. She was therefore not included in the initial disclosure meeting when the diagnosis and therapy plan was discussed in more detail with her mother, who is her substitute-decision-maker. In the days that followed, she was not able to describe her symptoms and did not address questions directly asked by the medical team, but looked to mom for her responses. I have found that she lacks the ability to understand her diagnosis and its therapy, nor could she possibly fully appreciate the consequences of the decision to stop chemotherapy. During her hospitalization, (J.) did not exert any independence and looked to her mom for every answer and decision. In my experience, this is not unusual for an eleven year old child. Most of my patients at this age are scared and would do anything to feel better and leave the hospital. I feel that (J.) would not be able to give informed consent for therapy or its discontinuation. (J's.) mom was clear that this was her decision and that she felt it was "best for (J.)" to discontinue chemotherapy.

[25] As I indicated earlier, on September 17th the Applicant and Respondent and the Children's Lawyer made their first appearance before me. At that time I made an Order that J.J. not be removed from the Province of Ontario without further Order of the Court. Despite best efforts by Sally Rivers of the Society, D.H. and J.J. were already on their way to Florida and declined to return.

THE CAPACITY ISSUE

[26] In its argument the Respondent Society has stated that J.J. is not a child in need of protection but rather a child in need of a diagnosis.

[27] As such the Society argues this case should more properly be adjudicated before the Consent and Capacity Board as provided under the *Health Care Consent Act, 1996*. Moreover the Respondent Society argues J.J.'s capacity or lack thereof as argued by the Applicant Hospital was never properly assessed, nor was the finding of incapacity ever properly articulated to J.J. or D.H., the substitute decision-maker.

[28] To this argument the Applicant Hospital responds that they have determined that J.J. is not capable of making an informed decision, that they have concluded D.H. is J.J.'s substitute decision-maker and that by deciding to discontinue J.J.'s chemotherapy that decision has placed J.J. at medical risk and thus a child in need of protection.

[29] To properly assess these competing arguments we need to consider the evidence raised at the hearing. The hearing of evidence on the application took place on September 17th, 18th, 22nd and 25th, October 2nd, 3rd and 8th, and the argument was heard on October 16th and October 24th.

[30] The scheduling was piece-meal, owing to the urgency of the matter. Counsel were most accommodating in making sacrifices to make themselves available. It's fair to say this issue of urgency was recognized by counsel who were, for the most part, very focused on their questioning. One worries whether this urgency affects the fulsomeness of evidence that witnesses were able to provide.

[31] The Court heard from Dr. Stacey Marjerrison who was the first doctor to diagnose and treat J.J. Dr. Marjerrison is a duly qualified paediatric oncologist who holds a blood cancer specialty. She was qualified as an expert to give opinion evidence on the nature of A.L.L., the expected outcomes of A.L.L. with and without chemotherapy treatment and the side effects of treating A.L.L. with chemotherapy.

[32] We learned that what triggered J.J.'s admission to the Applicant Hospital on August 11th was her low blood cell count and that further testing confirmed J.J.'s diagnosis of A.L.L. on August 13th. We heard from Dr. Marjerrison that when discussions occurred regarding the treatment procedure J.J. would look to her mom. And when the side effects were described; that she would feel unwell and that her hair would fall out, again J.J. would look to her mom.

[33] When discussing whose decision it was to stop chemotherapy Dr. Marjerrison's evidence was unequivocal. It was absolutely mom's decision. In quoting D.H., Dr. Marjerrison testified, "I (being D.H.) have decided this with (J.)".

[34] In cross-examination by the Society counsel, Dr. Marjerrison acknowledged no one explained the role of the substitute-decision-maker to D.H. Nor did Dr. Marjerrison ever note in the hospital chart whether she felt J.J. was capable or incapable. Nor did Dr. Marjerrison ever tell J. about her lack of capacity to give consent.

[35] Nor, however, did Dr. Marjerrison resign from her firm belief that it was abundantly clear J.J. was not able to make her own decision on this life or death issue of whether to continue with her chemotherapy treatment. When specifically asked why she felt J.J. was not capable Dr. Marjerrison replied, "she did not believe J.J. understood the details". And in response to the Children's Lawyer's questioning Dr. Marjerrison indicated she never had a discussion with J.J. without D.H. in the room, saying, "it didn't seem appropriate" and that J.J. was not interested in a discussion without her mom being present.

[36] In re-examination Dr. Marjerrison reminded the Court she was treating an 11 year old child with a disease, which, if left untreated, would cause her death. Dr. Marjerrison also reminded the Court there was never any question from J.J. or her family surrounding the issue of capacity. And finally at no time did J.J. ever disagree with the involvement of her mother in this decision making.

[37] Dr. Breakey was the second pediatric oncologist called by the Applicant Hospital. She took over the care of J.J. on August 25th. She observed J.J. to be somewhat introverted and that D.H. was the active participant in medical discussions. She, like Dr. Marjerrison, concluded D.H. was making the medical decisions for J.J. Again in cross-examination by Society counsel, Dr. Breakey also acknowledged she made no notes regarding J.J.'s lack of capacity. Yet, Dr. Breakey firmly maintained that J.J. lacked the capacity to make life and death decisions. Dr. Breakey's view also appeared to be a belief shared with D.H. when Dr. Breakey described their

relationship as follows: "You talk to me I'll talk to (J.)".

[38] In assessing the evidence of the two doctors on the issue of J.J.'s lack of capacity, I simply cannot conclude Dr. Breakey's conclusion as set out in Exhibit #2 is anything but accurate. Some of Dr. Breakey's letter bears repeating:

> In the days that followed, she was not able to describe her symptoms and did not address questions directly asked by the medical team, but looked to mom for her responses. I have found that she lacks the ability to understand her diagnosis and its therapy, nor could she possibly fully appreciate the consequences of the decision to stop chemotherapy.

[39] I find that the Applicant's treatment team was correct in concluding J.J. lacked capacity to make such a life and death decision as to the discontinuation of chemotherapy. Within the foregoing quote Dr. Breakey reminds herself of the test to determine capacity as codified within s.4(1) of the *Health Care Consent Act, 1996*, and at common law. Certainly the doctors may be criticized for not making chart entries on the issue of lack of capacity, but this letter certainly makes clear their findings of incapacity.

[40] Even having concluded that J.J. lacks capacity, counsel for the Society would still urge the Court to dismiss the Applicant's claim and send the matter to the Consent and Capacity Board for them to determine whether D.H.'s decision to discontinue chemotherapy treatment is an appropriate course of treatment for a substitute decision-maker to make.

[41] Conversely the Applicant argues that D.H's decision to discontinue chemotherapy treatment is a child protection issue and its proper adjudication is before this Court under the *Child and Family Services Act*.

[42] I would agree with the Applicant Hospital for these reasons. In 1995 in the case of T.H. v. Children's Aid Society of Metropolitan Toronto, et al, a case on appeal to Madame Justice Wilson from both the Ontario Court (Provincial Division) as this Court was previously called, and the Consent and Capacity Review Board, as the Consent and Capacity Board was previously called, Justice Wilson wrote, at page 33 of her decision:

> This case persuasively exhibits the need for one forum to determine whether a child is in need of protection for the purposes of medical treatment. Often these cases are emergencies. As in this case, it may well be a matter of life and death, with very short time frames. One forum should be determining all of the issues relevant to the inquiry with the benefit of the entire context and hearing all of the evidence. That forum is the Ontario Court (Provincial Division). Apart from the costly, and confusing procedures for the parties if a bifurcated proceeding was adopted, there are significant adverse cost consequences for the health system, the justice system, the Board and the child involved.

[43] In 2010 my colleague Justice Katarynch in the case of CAS of Toronto v. L.P. and N.P. succinctly summed up the debate as follows, at paragraph 123:

> This court's duty is to find coherence between the two statues. It would be frank

> mischief to interpret the Health Care Consent Act, 1996 as an "over-ride" or "nullification" of the scheme of the Child and Family Services Act for management of a parent's refusal or inability to provide consent to medical treatment of a child.

[44] These two cases need further elaboration. Both cases saw medical evidence being led to the effect the subject child in each case needed blood transfusions to survive and in both instances consent from the parents was not forthcoming because as Jehovah Witnesses authorizing blood and blood product treatment for their child would be breaking an important tenet of their faith. Both justices were provided with detailed argument on why their respective cases ought to be placed before the Consent and Capacity Board and both justices as noted above, declined to do so. These decisions find support with other cases such as Children's Aid Society of Ottawa v. C.S. and J.S., a decision of the Ontario Divisional Court where at paragraph 14 the Court stated:

> The Parents also argued that there is reason to doubt the correctness of the decision in that the motions judge failed to consider a remedy under the *Health Care Consent Act, 1996* ("HCCA") as being the least intrusive alternative. Section 27 of that Act permits a doctor to administer emergency treatment to an incapable person despite the refusal of that person's substitute decision-maker, if the refusal was not made in the best interests of the incapable person. It is clear from the transcript that the application of that Act was considered by the motions judge. We agree with the Society, however, that the Act is ultimately irrelevant to an application under the CFSA.

[45] Based on the precedents I conclude this Court is the appropriate forum to decide this case.

THE SOCIETY QUANDRY

[46] This is not to say the Court is unsympathetic with the situation Mr. Koster, the Executive Director for the Respondent Society, found himself in at the end of August of this year.

[47] To its credit the Respondent Society spent time investigating the situation. Their investigation revealed D.H. to be a devoted mother and concerned only with what was best for her daughter. This was a view even shared by the Applicant Hospital's doctors. Dr. Breakey testified she felt D.H. was an excellent mother and felt she was doing the best for J.J.

[48] Aside from the medical decision the Society's investigation concluded there was no protection concern as it related to D.H.'s care of J.J. As such the Society decided not to apprehend J.J. under the provisions of s.40(7) of the CFSA which reads:

> (7) Apprehension without warrant – A child protection worker who believes on reasonable and probable grounds that,
>
> (a) a child is in need of protection; and
>
> (b) there would be a substantial risk to the child's health or safety during the time necessary to bring the matter on for a hearing under subsection 47(1) or

obtain a warrant under subsection (2),
may without a warrant bring the child to a place of safety.

It is acknowledged that the Applicant Hospital is considered a place of safety within the meaning of this section.

[49] At the risk of over-simplifying Mr. Koster's dilemma, if his reason for not apprehending J.J. was his doubt as to the appropriate course of medical treatment, was he not able to do what any prudent parent would do in a similar circumstance and travel 60 miles to the west of Brantford to get a second opinion from Western University's pediatric oncology department.

[50] The situation which now presents itself is untenable. J.J. has been discharged from the Applicant Hospital, we have heard of the fractured doctor-patient relationship and if the Court makes an Order under s.40(4) one Order that can be made is that one of the Respondent Society's workers would have to bring the child to a place of safety. As revealed in the Band's cross-examination of the Respondent Society's intake manager, Kim Martin, that will have its challenges given the support the Six Nations community has shown this family.

THE SECTION 40(4) APPLICATION

[51] Section 40(4) of the *Child and Family Services Act* reads as follows:

> (4) ORDER TO PRODUCE OR APPREHEND CHILD – Where the court is satisfied, on a person's application upon notice to a society, that there are reasonable and probable grounds to believe that,
>
> > (a) a child is in need of protection, the matter has been reported to the society, the society has not made an application under subsection (1), and no child protection worker has sought a warrant under subsection (2) or apprehended the child under subsection (7); and
> >
> > (b) the child cannot be protected adequately otherwise than by being brought before the court,
>
> the court may order,
>
> > (c) that the person having charge of the child produce him or her before the court at the time and place named in the order for a hearing under subsection 47 (1) to determine whether he or she is in need of protection; or
> >
> > (d) where the court is satisfied that an order under clause (c) would not protect the child adequately, that a child protection worker employed by the society bring the child to a place of safety.

[52] It is common ground that certain of the conditions in sub-section 4 have been met. "On a person's application" is obviously the Applicant Hospital. No issue was raised as to whether a hospital is equated to a person and in any event Dr. Breakey initially commenced the

Application.

[53] Nor is it contested that the Society was served, or that the matter had been reported to the Society, as evidenced by the correspondence previously referred to and introduced as Exhibit #1. Nor is it disputed that the Society has not made an application under subsection 1 of s.40, nor has a child protection worker sought a warrant under subsection 2 or apprehended the child under subsection 7.

[54] The real issue in this Application is whether the Court is satisfied there are reasonable and probable grounds to believe J.J. is a child in need of protection.

[55] It is not contested that the only applicable paragraph under the s.37(2) definition section of child in need of protection is subsection (e), which reads as follows:

> (e) the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment;

[56] Again to be clear no one including the Applicant Hospital is suggesting D.H. is anyone but a caring loving parent.

[57] The Applicant Hospital's contention is simply that D.H.'s decision, as the substitute decision-maker, to discontinue chemotherapy for J.J. has made her a child in need of protection.

[58] The evidence is also clear that at the August 27th meeting with the hospital staff, and as testified to by Dr. Marjerrison, D.H. had expressed her strong faith in her native culture and was discontinuing her daughter's chemotherapy treatment to pursue traditional medicine which she and her family believed would help heal J.J.

[59] In referring to the intake manager Kim Martin's evidence, we learn her investigation revealed J.J. is one of a number of children born to D.H. The family are committed traditional longhouse believers who integrate their culture into their day to day living. In short, their longhouse adherence is who they are and their belief that traditional medicines work is an integral part of their life.

[60] It is at this juncture that the Band argues the Court must consider the application of s.35(1) of the *Constitution Act 1982* which reads as follows:

> s.35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby reorganized and affirmed.

[61] To understand the implications of this section it's instructive to consider Professor Hogg's Constitutional Law of Canada, 5th edition and specifically chapter 28.8 sub-paragraph (b), where the author writes:

> Section 35 is outside the Charter of Rights which occupies sections 1 to 34 of the Constitution Act, 1982. The location of s.35 outside the Charter of Rights provides certain advantages. The rights referred to in s.35 are not qualified by s.1

of the Charter, that is, the rights are not subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" although, as we shall see, they are subject to reasonable regulation according to principles similar to those applicable to s.1. Nor are the rights subject to legislative override under s.33 of the Charter. Nor are the rights effective only against governmental action, as stipulated by s.32 of the Charter. On the other hand, the location of s.35 outside the Charter carries the disadvantage that the rights are not enforceable under s.24, a provision that permits enforcement only of Charter rights.

[62] With this overview we need to start our analysis by determining whether D.H.'s decision, as J.J.'s substitute decision-maker, to pursue traditional medicine is in fact an aboriginal right to be recognized and affirmed. For this the Court looks to the Supreme Court of Canada's decision in R. v. Van der Peet 109 CCC (3d) 1. The majority opinion was delivered by our former Chief Justice Antonio Lamer. A statement of the facts in Van der Peet is set out at page 7 of the decision as follows:

> II. Statement of Facts
>
> 5. The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. At the time at which the appellant was charged s. 27(5) read:
>
> > 27 (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.
>
> 6. The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982*.

[63] At page 11 of his decision Chief Justice Lamer succinctly gets out the questions that "lies at the heart of this appeal: how should the aboriginal rights recognized and affirmed by s.35(1) of the *Constitution Act, 1982* be defined?"

[64] But before delving into defining what an aboriginal right is Chief Justice Lamer made what I consider to be an incredibly important statement as to why aboriginal rights exist at all. At paragraph 30 he reminds us all of the following:

> In my view, the doctrine of aboriginal rights exists, and is recognized and

> affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

[65] So how did Chief Justice Lamer propose an aboriginal right was to be defined? At paragraph 46 of his decision he writes:

> In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[66] In the discussion preceding the recital of this test Chief Justice Lamer emphasized the importance of the activity being integral to the culture of the aboriginal group claiming the right. He reiterated the importance of this factor at paragraph 55 of his decision:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.

[67] And further at paragraph 59 the Chief Justice writes:

> A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

[68] Another important consideration for Chief Justice Lamer in determining whether an aboriginal right existed was the time when the practice started. As he writes at paragraph 60:

> The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

[69] By way of a summary the Chief Justice sets out the following at paragraph 63:

> … Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

[70] The issue of the practice having its roots in pre-contact times led the Chief Justice to suggest the rules of evidence to establish such facts would have to be relaxed. To this end he writes at paragraph 68:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[71] Before leaving the Van der Peet case its instructive to note Chief Justice Lamer upheld Ms. Van der Peet's conviction by concluding she could not demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society prior to European contact.

[72] Can this Court conclude, to paraphrase Chief Justice Lamer's summary, that the Six Nations' practice of traditional medicine is integral to its distinctive culture today, and that this practice arose during pre-contact times, so that the community will have demonstrated that the practice is an aboriginal right for the purposes of s.35(1)?

[73] To begin with, did the practice of using traditional medicine for the Six Nations exist in pre-contact times?

[74] Professor Dawn Martin-Hill, currently holds the McPherson Indigenous Studies Research Chair in the Anthropology Department at McMaster University. At the hearing of this Application Professor Martin-Hill was found by this Court to be an expert in the area of First Nations' traditional medicine and was therefore qualified to provide opinion evidence on the history of traditional medicines, the procurement of traditional medicines and the use of traditional medicines to treat First Nations communities.

[75] As part of her testimony Exhibit #27 was introduced on consent of all parties. This exhibit consists of two papers; the first being the Haudenosaunee Code of Behaviour for Traditional Medicine Healers, published by the National Aboriginal Health Organization, headquartered in Ottawa, and the second being a paper written for that organization by Professor

Martin-Hill entitled Traditional Medicine in Contemporary Contexts. The reliance of the Court on these materials recognizes Chief Justice Lamer's decision in Van der Peet to relax our application of the rules of evidence in understanding the history supporting First Nations' claims.

[76] As part of its introduction the first paper describes one of the Haudenosaunee's stories of creation. I stop here to indicate that what is often referred to as the Iroquoian Confederacy is more properly called the Haudenosaunee, meaning people of the longhouse, with whom the Six Nations is a part.

[77] At page 4 of the first paper the following is recited as part of the Haudenosaunee story of creation:

> Soon after this new world had begun its transformation, the Sky Woman gave birth to a baby girl. The baby girl was special for she was destined to give birth to twins. The Sky Woman was heartbroken when her daughter died while giving birth to her twin boys.
>
> The Sky Woman buried her daughter in the ground and planted in her grave the plants and leaves she clutched upon descending from the sky world. Not long after, over her daughter's head grew corn, bean, and squash. These were later known as the Three Sisters. From her heart grew the sacred tobacco, which is now used as an offering to send greetings to the Creator. At her feet grew the strawberry plants, along with other plants now used as medicines to cure illnesses. The earth itself was referred to as Our Mother by the Creator of Life, because their mother had become one with the earth.
>
> There is much more to our oral traditions, but the crux of this story explains how the Haudenosaunee received their knowledge of traditional medicines—medicines that are used by the traditional healers in ceremonies and healings to this day. Traditional medicine, as practiced by Haudenosaunee people, is key to the health and survival of Haudenosaunee as a nation.

[78] Certainly this creation story supports the conclusion the use of traditional medicines by Six Nations was practiced prior to European contact. Secondly, as to the <u>integral</u> nature of the practice Professor Martin-Hill in her paper quotes from Christopher Jock's article "Spirituality for Sale: Sacred Knowledge in the Consumer Age":

> Traditional ceremonies and spiritual practices… are precious gifts given to Indian people by the Creator. These sacred ways have enabled us as Indian people to survive – miraculously – the onslaught of five centuries of continuous effort by non-Indians and their government to exterminate us by extinguishing all traces of our traditional ways of life. Today, these precious sacred traditions continue to afford American Indian people of all [nations] the strength and vitality we need in the struggle we face everyday; they also offer us our best hope for a stable and vibrant future. These sacred traditions are an enduring and indispensable "life raft" without which we would be quickly overwhelmed by the adversities that still threaten our survival. Because our sacred traditions are so precious to us, we cannot allow them to be desecrated and abused (CSPIRIT, 1993 IN Jock,

2001:66).

[79] Although it may be argued this is a general statement as to the integral role traditional ceremonies and spiritual practices play for First Nations communities, it is important to note that Dr. Karen Hill testified during the hearing. Dr. Hill is from Six Nations and is a duly qualified medical doctor, practicing family medicine on Six Nations. But despite being schooled in "western medicine" she operates a medical practice on Six Nations with Alba Jamieson, who practices traditional medicine. The point is traditional medicine continues to be practiced on Six Nations as it was prior to European contact, and in this Court's view there is no question it forms an integral part of who the Six Nations are.

[80] One of the issues raised by the Court during the hearing was the issue of integrity. To this end I would reiterate how the evidence points to D.H. as being deeply committed to her longhouse beliefs and her belief that traditional medicines work. She has grown up with this belief. This is not an eleventh hour epiphany employed to take her daughter out of the rigors of chemotherapy. Rather it is a decision made by a mother, on behalf of a daughter she truly loves, steeped in a practice that has been rooted in their culture from its beginnings.

[81] It is this Court's conclusion therefore, that D.H.'s decision to pursue traditional medicine for her daughter J.J. is her aboriginal right. Further, such a right cannot be qualified as a right only if it is proven to work by employing the western medical paradigm. To do so would be to leave open the opportunity to perpetually erode aboriginal rights.

[82] Further, as Professor Hogg reminds us, section 1 of the *Charter* does not apply to a s.35 analysis. Nor am I satisfied that there has been an extinguishment of D.H.'s right to practice traditional medicine apart from the dark history of our country's prosecution of those who practiced traditional medicine as described by Professor Martin-Hill.

CONCLUSION

[83] In applying the foregoing reasons to the Applicant's section 40(4) application I cannot find that J.J. is a child in need of protection when her substitute decision-maker has chosen to exercise her constitutionally protected right to pursue their traditional medicine over the Applicant's stated course of treatment of chemotherapy.

[84] The Application is dismissed. This is not an appropriate case to consider costs.

[85] I wish to thank all counsel for their efforts in this very difficult case.

Dated at Brantford, Ontario
This 14th day of November 2014.

The Honourable Justice G.B. Edward

Court File No: C287/14E

ONTARIO COURT OF JUSTICE

THE HONOURABLE	)	April 28th, 2015
	)	
JUSTICE EDWARD	)	

BETWEEN:

HAMILTON HEALTH SCIENCES CORPORATION

Applicant

- and -

D.H., P.L.J., SIX NATIONS OF THE GRAND RIVER CHILD AND FAMILY SERVICES DEPARTMENT AND BRANT FAMILY AND CHILDREN'S SERVICES

Respondents

- and -

THE ATTORNEY GENERAL OF ONTARIO

Moving Party

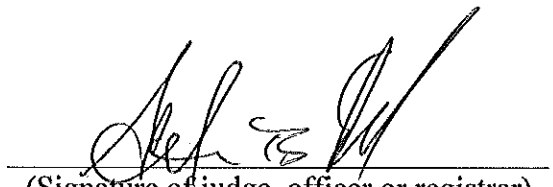
ORDER

THIS MOTION to clarify this Court's reasons for decision dated November, 14, 2014, was heard on April 24, 2015, at 44 Queen Street, Brantford, Ontario.

ON READING the Notice of Motion, and on receiving the joint submission of the parties,

1. **THIS COURT ORDERS THAT** the Reasons for Decision, dated November 14, 2014, be amended by adding paragraphs 83(a) and 83(b) as follows:

> [83(a)] *But, implicit in this decision is that recognition and implementation of the right to use traditional medicines must remain consistent with the principle that the best interests of the child remain paramount. The Aboriginal right to use traditional medicine must be respected, and must be considered, among other factors, in any analysis of the best interests of the child, and whether the child is in need of protection. Taking into account the Aboriginal right, and the constitutional objective of reconciliation and considering carefully the facts of this case, I concluded that this child was not in need of protection.*
>
> [83(b)] *In law as well as in practice, then, the Haudenosaunee have both an Aboriginal right to use their own traditional medicines and health practices, and the same right as other people in Ontario to use the medicines and health practices available to those people. This provides Haudenosaunee culture and knowledge with protection, but it also gives the people unique access to the best we have to offer. Facing an unrelenting enemy, such as cancer, we all hope for and need the very best, especially for our children. For the Haudenosaunee, the two sets of rights mentioned above fulfill the aspirations of the* United Nations Declaration on the Rights of Indigenous Peoples, *which states in article 24, that "Indigenous peoples have the right to their traditional medicines and to maintain their health practices... Indigenous individuals also have the right to access, without any discrimination, to all social and health services."*



(Signature of judge, officer or registrar)

Court File No. C287/14E

HAMILTON HEALTH SCIENCES CORPORATION	and	D.H., P.L.J., SIX NATIONS OF THE GRAND RIVER CHILD AND FAMILY SERVICES DEPARTMENT and BRANT FAMILY AND CHILDREN'S SERVICES	and	THE ATTORNEY GENERAL OF ONTARIO
Applicant		Respondents		Moving Party

ONTARIO
COURT OF JUSTICE

Proceeding commenced at Brantford

ORDER

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THE FAMILY LAW PERSPECTIVE

By Vanessa Gruben[1]

There is little doubt that the question of whether J.J.'s parents could refuse chemotherapy on the basis of D.H.'s aboriginal right to practice traditional medicine is an extraordinarily difficult decision. Indeed, as Justice Abella stated in *A.C. v Manitoba (Director of Child and Family Services)* 2009 SCC 30:

> "One of the most sensitive decisions a judge can make in family law is in connection with the authorization of medical treatment for children. It engages the most intensely complicated constellation of considerations and its consequences are inevitably profound."

When considering this case from a family law perspective, two key issues arise. First, what is the appropriate process for resolving this difficult issue? Second, how should the best interests of the child principle apply in child protection cases involving aboriginal rights?

PROCESS: CHILD PROTECTION PROCEEDING OR CONSENT AND CAPACITY PROCEEDING?

Generally speaking, a custodial parent has the right to make decisions regarding how to raise his or her child, including the child's medical treatment. However, the courts may overrule a parent's decision under certain circumstances. A preliminary issue that arose in this case is whether the question of D.H.'s refusal to consent to J.J.'s medical treatment should be decided as a family law matter by the court under Ontario's child welfare legislation (*Child and Family Services Act*, *CFSA*) or by the Consent and Capacity Board (*Health Care Consent Act*, *HCCA*).

Part III of the *CFSA* authorizes a court to intervene where it finds that a "child is in need of protection." There are a number of circumstances where a court can conclude that a child is in need of protection,including where a parent fails to provide necessary medical treatment. Importantly, the *CFSA*, in recognition of the historical mistreatment of aboriginal children by the State, explicitly requires the court to consider the aboriginal heritage and culture of the child in its decision-making (*CFSA*, s. 37(4)). It also permits the participation of additional parties, such as the Band, in child protection proceedings.

In contrast, the Consent and Capacity Board's jurisdiction is rather limited. The Board, pursuant to the *HCCA* (s. 27), may authorize a physician to administer emergency treatment despite the refusal of that person's substitute decision-maker where that treatment is in the person's "best interest".

In my view, the Ontario Court of Justice was correct in concluding that this case was properly brought as a child protection proceeding for a number of reasons. Courts have consistently held that disputes regarding medical decisions for children should proceed under child welfare legislation.[2] Further, the *CFSA* process does not set the rather high "emergency treatment" standard for intervention. Most importantly, the *CFSA* requires the court to consider the aboriginal heritage and culture of the child and authorizes the participation of the Band, which offers a critical perspective in these cases.

Although a child protection proceeding was the preferable forum in this case, it is important to highlight other procedural avenues that may be available. One option is for the Band to administer its own child protection schemes pursuant to the Band by-laws. Jocelyn Downie, in a 1994 article[3], considered this possibility and the British Columbia court has confirmed the Spallumcheen Band's authority to enact such a by-law.[4] While no such by-law was available to the parties in the case of J.J., the inclusion of a child protection scheme in a Band's by-laws may be an important consideration in future.

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2 See, e.g.: *Children's Aid Society of Niagara Region v S (M)*, 2011 ONSC 4718; *Children's Aid Society of Toronto v LP and NP*, 2010 ONCJ 320.

3 Jocelyn Downie, "A Choice of K'aila: Child Protection and First Nations Children" (1994) 2 Health L.J. 99.

4 *S(EG) v Spallumcheen Band Council*, [1998] BCJ No. 3268.

CHILD WELFARE PROCEEDINGS IN ONTARIO: ABORIGINAL CHILDREN

As mentioned, the *CFSA* explicitly recognizes the importance of aboriginal culture, heritage and traditions in the context of child protection proceedings. In particular, the *CFSA* requires the court to "take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity"(s. 37(4)). In a recent case, the Ontario Court of Appeal ruled that an aboriginal child's cultural identity is just one factor to be taken into account by the court.[5] The child's aboriginal identity is not to receive greater weight than other factors. Most notably, the Court of Appeal concluded that "all considerations, including First Nations' issues, are subject to the ultimate issue: what is the best interests of the child."

THE APPLICATION OF THE BEST INTERESTS OF THE CHILD IN THE CONTEXT OF LIFE-THREATENING ILLNESS

To date, the courts have overwhelmingly concluded that a parent's right to make decisions concerning the medical treatment of his or her child is subject to the best interests of the child principle. What factors are relevant in determining what is in the best interests of the child? The courts have considered a number of factors including: the seriousness of the medical issue; the immediacy of the proposed treatment; the efficacy of the proposed treatment; and, the availability of other viable, less intrusive treatments.

With respect to a parent's religious beliefs, the Supreme Court of Canada has ruled that a parent's right to choose religious-based medical treatments or to refuse certain treatments for his or her child is guaranteed by section 2(a) of the *Charter* which protects an individual's right to freedom of religion. However, the Court has concluded that this right is not absolute: it can be restricted when it is contrary to the child's best interests (see, for example, *BR and Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315). As such, courts have consistently overridden parental beliefs where a child's life is at stake.

The DH decision represents a departure from these earlier cases that do not involve First Nations people in two important respects. First, the Court does not consider the efficacy of the proposed treatment, the alternative treatments, nor does it privilege the conventional medical experts. Second, there is no discussion of the best interests of the child. The Court justifies this departure on the basis of D.H.'s aboriginal right to pursue traditional medicine for her daughter J.J. In doing so, this decision appears to introduce a new, and perhaps needed, flexibility in the law for parents exercising aboriginal rights protected by s. 35 of the *Constitution Act*.

In my view, this case raises a number of questions that require further exploration. First, are comparisons between conventional treatment and traditional indigenous medicine appropriate? Or, as the Court concluded, do such comparisons "leave open the opportunity to perpetually erode aboriginal rights"? And, second, should the best interests of the child principle ever limit (and, if so, to which extent) the aboriginal rights of the parent(s) as this principle has limited the religious freedom of the parent(s) in earlier cases? In short, is the best interests test modified by s. 35 of the *Constitution Act?*

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5 *Algonquins of Pikwakangan v Children's Aid Society of the County of Renfrew*, 2014 ONCA 646.

ON THE CONCEPT, CONTENT AND RELEVANCE OF CAPACITY

By Darren O'Toole[1]

What seems to be at stake in the decision is whether, pursuant to subsection 40(4)(c) of the *Child and Family Services Act (CFSA)*, the court can order the person having charge – in this case, Teiehkwa's (a.k.a. J.J.) parents – to produce Teiehkwa before the court to determine whether Teiehkwa is in need of protection, or under subsection 40(4)(d), basically force the Brant Family and Children's Services to apprehend Teiehkwa[2]. What is interesting about this case is the extent to which it has provoked reactions that are a mirror of Western attitudes toward Indigenous people, childhood and death, in particular the issue of *capacity*.

For example, Asher Honickman – a Toronto-based lawyer at Matthews Abogado and president of the Advocates for the Rule of Law – argued in favour of an equality right under s.15 of the *Charter*.[3] He claimed that "the necessary implication of *Hamilton Health [Sciences Corporation]* is that native children are not afforded the same protection under the statute as non-native children."[4] But there is no question here that children are children, that is, they are presumed not to, and do not, possess the rational capacity of adults and, thus, may neither be afforded liberty nor held responsible for decisions or actions. In a rather ironic twist, Honickman's argument basically justifies depriving Teiehkwa and her parents of their freedom – an authoritarian State intervention to apprehend Teiehkwa and force her to continue her chemotherapy – in the name of her right to equality.

Kelly McParland of the National Post suggested in the November 17th, 2014, edition that "cultural protection can't include the needless and short-sighted endangerment of life of people born into it, nor rejection of the most modern and effective means of protecting it." McParland asked rhetorically if "J.J. deserves a lesser chance to live because her mother rejects the medicine that can lead to a long and healthy life?" The presumption here is that this was not J.J.'s choice, nor could it be. Similarly, an editorial in the *Globe & Mail* on November 14th, 2014, found that the judge's "decision is appalling and cries out for reversal. It is tainted by an overwrought defensiveness about the value of aboriginal *culture*. It runs counter to *the traditions of Canada*, whose statutes and court rulings have consistently placed the protection of children above the rights and personal beliefs of parents. And it leaves *any rational person* aghast." [Emphases added.]

Surely, the anonymous editorialists knew that their own paper had reported that "[a]pplause broke out in a Brantford, Ont., courtroom filled mainly with supporters of the girl, known as J.J, and her mother, known as D.H." when Justice Gethin Edward rendered his decision. True to the "traditions of Canada", the editorial implies that the Indigenous people who applauded in the courtroom – both Haudenosaunee from Six Nations and Anishinaabeg from nearby New Credit – are not rational persons. This is the underlying premise of the entire *Indian Act* and Indian policy in Canada since the *Darling Report* of 1828. The figure of the barbarian has a long history in the Western mindset that can be traced back to the Cyclops in Homer's *Odyssey*. Aristotle infamously distinguished between the logos (reason, speech) of humans and the phonè (voice) of animals, such as the bark of a dog. For the Stoics, the end of man is reason (*logos*). Slaves, women and children were deemed to participate in reason, but not fully possess it. During the infamous Valladolid Controversy in 1550, the Spanish theologian Juan Ginés Sepúlveda used Aristotle's arguments to maintain that Indigenous Peoples were "natural slaves" (i.e. not in full possession of reason). While McParland recognized that "Judge Edward noted there was no indication J.J.'s mother was anything other than a concerned and loving parent", he immediately qualified this with a rhetorical query: "True as that may be, does J.J. deserve a lesser chance to live because her mother rejects the medicine that can lead to a long and healthy life?" Thus, for McParland, D.H. may be (to

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2 'Teiehkwa' is the Latin script transliteration of the girl's original Mohawk name, which she uses in her open letter dated 25 September 2014 (written in original language with accompanying English translation) published in the Two Row Times of 29 September 2014; see https://www.tworowtimes.com/news/local/family-child-battling-leukaemia-releases-statement-asserts-sovereignty/

3 *National Post*, 21 November 2014: http://fullcomment.nationalpost.com/2014/11/21/asher-honickman-a-questionable-judgment-on-traditional-medicine/

4 *Ibid*.

be sure) a well-meaning Indigenous parent, but she is evidently (and utterly?) incapable of deciding what is in the best interest of her own child. Even as the *Truth and Reconciliation Commission*[5] wraps up its hearings, it appears that white man still knows what is best for red children and should apprehend their children and force them into white man's advanced institutions, if need be. After all, one cannot reason with barking dogs.

Leaving aside the above observations, there are in this case two issues that, although interrelated, are being conflated: 1) the right to pursue traditional medicine; and 2) the right to refuse treatment. It is the latter that concerns me here. The language of s. 40(4) of the *CFSA* – "Order to produce or apprehend child" even without a warrant – is basically a variation on *habeas corpus*. Under this section of the Act, "the court may order: c) that the person having charge of the child produce him or her before the court [...] to determine whether he or she is in need of protection."

Habeas corpus – "you may have the body" – is often celebrated as a fundamental liberty against arbitrary arrest, mentioned in the *Magna Carta* of 1215. What *habeas corpus* meant was that judges could order, in the name of the king, a custodian to produce in court a *body* to ensure that it was being lawfully detained. This was not (as is often thought) a matter of a subject's freedom, but rather the king claiming sovereignty over the bodies of his subjects. To understand how deeply embedded *habeas corpus* is in the hierarchical, centralized, patriarchal, authoritarian structure that we today know as 'the sovereign State', one must go to the foundational premises of Western civilization. An early example can be found in Plato's *Protagoras*, where the Sophist speaks of how individuals living scattered in a state of nature eventually grouped together and built cities to fend off wild beasts. The idea would be taken up by the Stoics and Epicureans, repeated by Roman thinkers, rediscovered by Jesuits during the Renaissance and find its way into modernity in the writings of Hobbes, Locke and Rousseau. While the Roman Republic deemed that the *pater familia* possessed *vitae necisque in aliquem potestas* – power over life and death – the Empire transferred this power to the Emperor. When Jean Bodin theorized the notion of "sovereignty" in the 16th Century, he believed that the family was the model of the republic and saw the sovereign as a "bon père de famille". What was implicit in this patriarchal representation of the sovereign was that he held power over the life and death of his subjects. Similar to *Protagoras*, Hobbes used the myth of a state of nature where life is "poor, nasty, brutish and short" to justify the social compact (subsequently developed through Lock and then Rousseau's 'social contract'). In other words, the foundational underpinning of the sovereign State is the fear of death and it requires nothing less than we hand over ultimate power for both our lives and our bodies to the sovereign. If *habeas corpus* is about liberty from arbitrary arrest by the sovereign's agents, it is also about subjection to the sovereign.

In terms of capacity, we again see a Western cultural bias that has been with us since at least the ancient Greeks: children (along with women and barbarians) do not fully possess reason. This runs entirely counter to a worldview where all animate beings are deemed to have volition. To be sure, the Western outlook may be catching up a little. Under the *Heath Care Consent Act*, any child – not just Indigenous – is recognized as a participant in the decision-making. In the English-language translation of her letter, dated 25th September 2014, Teiehkwa stated "I want to tell you myself what I think should happen to my body. I know lots of people are trying to decide what should happen but I want to decide myself."[6] It is clear, then, that this was not an authoritarian parental decision imposed unilaterally on a child. But the issue of capacity is even clearer in a similar case involving an eleven-year-old Anishinaabekwezens (Ojibwe girl), Makayla Sault. When she decided to withdraw from chemotherapy, she stated in a letter that she read on YouTube, "I have asked my mom and dad to take me off the treatment because I don't want to go this way anymore. [...] *I know that what I have can kill me*, but I don't want to die in a hospital on chemo, weak and sick. [...] So, *if I live or if I die, I am not afraid*. [...] So, it doesn't matter what anybody says. God, the Creator, has the final say over my life. [...] I wish that the doctors would listen to me, 'cause I live in this body and they don't." [Emphases added.][7]

In a few elegant phrases, Makayla tears to shreds the very foundations of the Hobbesian social compact. She courageously refuses to give in to the underlying premise that justifies the very existence, structure and logic of the authoritarian, centralized, hierarchical, patriarchal, sovereign State: the fear of death. Moreover, she refuses to cede sovereignty

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5 http://www.trc.ca/websites/trcinstitution/index.php?p=3.

6 *Two Row Times*, 29 September 2014: https://www.tworowtimes.com/news/local/family-child-battling-leukaemia-releases-statement-asserts-sovereignty/

7 http://www.youtube.com/watch?v=NrF5wWQ4hIU

over her own body to the industrial-medical complex that is basically asking the sovereign (NB judges are appointed by the sovereign to render *his* justice and maintain his peace) permission to take hold of her body. But who "owns" this girls body? Makayla refuses the logic of *habeas corpus*: "I live in this body and they don't." And if anyone or thing holds the power of life and death over her, it is no human being or institution, but *Gichi Manidoo* – the Great Mystery – itself.

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If there is noble cause in the white man's worldview and logic, it should at least be consistent. And I can't help but wonder where the outrage will be if this Indigenous girl grows up to be an Indigenous woman and she ends up among the murdered and missing Indigenous women whose bodies do not seem to enjoy equal protection of the sovereign's laws.[8]

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8 In this respect, see "Missing and Murdered Indigenous Women in British Columbia, Canada", report of the Inter-American Commission on Human Rights, Organization of American States, OEA/Ser.L/V/II., Doc. 30/14, 21 December 2014, available at: http://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf

ABORIGINAL RIGHTS AND PARENTAL REFUSAL OF LIFESAVING TREATMENT

By Bryan Thomas, SJD[1]

To the chagrin of many commentators, myself included, the outcome in *Hamilton Health Sciences Corp. v. D.H.*[2] turns entirely on aboriginal rights (s.35), sidestepping altogether any 'best interests of the child' analysis. In the abstract, the logic may appear understandable: if traditional medicine is an aboriginal right, there is no onus on Six Nations people to justify their medical decisions to Ontario courts. It is up to Six Nations governments to regulate these matters, according to their own values and traditions. As I will explain, my concern is that this s.35 analysis proves too much, too quickly. To date, s.35 jurisprudence has centred on rights to occupy and use land—rights whose exercise does not, in any direct way, have life and death consequences for third parties.

Even if we accept and support aboriginal self-governance over issues of family law and medical decision-making, it seems imperative, at the very least, that children's rights are protected throughout the transition to that regime. J.J.'s best interests have not been entrusted to a responsive governance system—i.e., something along the lines of a Six Nations' Consent and Capacity Board, combining relevant expertise with Mohawk values and traditions. J.J.'s care has instead been entrusted directly to her mother, D.H., whose judgements are meant to serve as a proxy for self-governance. The results have been erratic, in ways that seem tenuously connected to J.J.'s best interests: chemotherapy was initially halted, at the mother's request, in favour of alternative therapies from a massage clinic in South Beach Florida. Some weeks after the court victory, J.J. was brought to a new paediatric oncologist, to resume chemotherapy. What changed? "This time," D.H. explained at a recent conference, "I will be respected...The Court decision gave that to me."[3]

There are bound to be problems and blind spots on the way to self-government, but here it appears that J.J.'s interests have dropped into a legal void. The problem, I've suggested, has partly to do with an overreliance on s.35 doctrine, which developed in relation to land and resource use and therefore does not wrestle fully with the challenges of protecting the rights and interests of individuals in the transition to self-governance.

* * *

This brings me to a related concern with Justice Edward's s.35 analysis, which may persist even beyond the transition stage. In the leading Supreme Court decision, *R. v. Van der Peet*,[4] Chief Justice Lamer emphasizes that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition *integral* to the distinctive culture of the aboriginal group claiming the right." It is an objective, historical question whether a given activity has continuity with longstanding cultural traditions. Thus, in applying this test in *Hamilton Health Sciences*, Justice Edward draws on anthropological evidence, quoting passages from Six Nations' creation stories where traditional medicines are mentioned, and expert testimony that traditional medicines have been a 'life raft' through the daily adversities faced by aboriginal peoples. Justice Edward then moves from group cultural integrity to a discussion of D.H.'s personal integrity, explaining "how the evidence points to D.H. as being deeply committed to her longhouse beliefs and her belief that traditional medicines work."[5]

The difficulty elided here is that the protection of group integrity and personal integrity are distinct, and potentially conflicting, aims. Aboriginal rights are of course generally conceived as group rights, reflecting the political independence of Canada's *first peoples*.[6] One can easily imagine scenarios where

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2 2014 ONCJ 603 [hereafter, *Hamilton Health Sciences*].

3 Sandra Martin, "First Nations, culture clash and the role of the Consent and Capacity Board" (*Globe and Mail*, 5 December 2014).

4 [1996] 2 S.C.R. 507.

5 Supra note 1 at para. 80.

6 Will Kymlicka, "Citizenship, Communities, and Identity in Canada" in James Bickerton and Alain-G Gagnon, eds., *Canadian Politics* (University of Toronto Press, 2014) 21 at 24.

the exercise of group rights interferes with personal integrity. Suppose for example that the Six Nations establish their own Consent and Capacity Board, with bylaws stipulating that substitute decision-making will be guided by the findings of 'Western' science. Will parents in D.H.'s position have recourse to provincial courts, under s.35, to argue that this conflicts with their *personal* beliefs and integrity about traditional medicine? To allow this would undermine Six Nations' self-governance.[7]

Or imagine instead a scenario where a Six Nations' legal framework is established which reflects D.H.'s beliefs and values at the time of trial—prioritizing traditional healing methods, to the exclusion of chemotherapy. (Some of the commentary around this decision has stressed that indigenous cultures do not share Western science's supposed infatuation with avoiding death at all cost.) Under this hypothetical, should Six Nations' parents wanting to pursue chemotherapy for their children have recourse to Ontario courts? I suspect most people will answer 'yes' to this question, reflecting a judgement that an individual's right to life has priority over group rights to self-government.

What I'm getting at here is that these issues cannot be resolved by simply adverting to the legitimacy and importance of aboriginal self-government. It is possible to respect, and even to *want*, aboriginal self-government in matters of family law and medical decision-making, while insisting that the door be kept open to the protections offered by Ontario law and the Canadian *Charter*. There is room for debate, obviously, as to how the competing claims of individual, band, province, and country should be reconciled—but the answer *cannot be* that one trumps all others.

* * *

To this point, I have raised doubts as to whether s.35 jurisprudence provides us with the doctrinal tools necessary to adjudicate the complex balancing of human rights and interests at play in *Hamilton Health Sciences*. Many commentators have therefore looked to religious freedom jurisprudence—under s.2(a) and s.7 of the Charter—in search of guidance. Comparisons have been drawn particularly to earlier cases involving refusal of live-saving blood transfusions by Jehovah's Witness parents. In such cases, the Supreme Court has held that the State's interest in protecting the best interests of the child outweighs the liberty interests of the parents.[8] Pursuing this frame of analysis, some have suggested that the parental liberty interests at play in *Hamilton Health Sciences* are comparatively less weighty: while Jehovah's Witnesses officially recognize a categorical prohibition on blood transfusions, Mohawk beliefs about the interplay of modern and traditional medicine are less clear-cut. As one commentator puts it, "[t]here was no evidence before the court that eschewing scientifically-based medicine is itself an 'integral' aspect of aboriginal culture..."[9]

The first thing to clarify here is that current doctrine on religious freedom does not require claimants to demonstrate that their beliefs are grounded in 'official' religious dogma; nor is it required that the conduct be perceived, by the claimant or her faith community, as strictly obligatory. All that is required to trigger the *Charter's* protection of religious freedom is a sincere personal belief, having some 'nexus' with one's religion.[10] It seems to me that D.H. meets this test, though her subsequent comments (quoted above) suggest that what drove her to refuse treatment was not a belief that chemotherapy is wholly incompatible with traditional healing, but a sense that her traditional practices were not being adequately *respected* by hospital staff.

To me *this* is the tragic failing here—that apparently through some combination of miscommunication, intransigence and a lack of accommodation, a young girl's life has been put at risk, perhaps irretrievably. It is reasonable, and indeed required under the *Charter*, that traditional healing should be accommodated in hospital settings. Analogous accommodations have been established in other contexts, as when the

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7 The courts have wrestled with this sort of conflict in other contexts. In *Lakeside Colony of Hutterian Brethren v. Hofer [1992] 3 S.C.R. 165*, for example, the Supreme Court applied administrative law review to overturn a Church's decision to excommunicate a member—finding that the process was defective from the standpoint of natural justice.

8 *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315. Indeed, some have argued that a balancing analysis is inappropriate, as parents cannot legitimately claim a liberty interest in making decisions that threaten the life of their child. The idea that one person has a liberty interest in controlling what happens to another is emphatically rejected in other contexts, as when slave owners assert a liberty interest in what happens to their slaves, or husbands in their wives. See Michael David Jordan, "Parents' Rights and Children's Interests" 10 C.J.L.J. 363; James G. Dwyer, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights" (1994) 82 Cal. L. Rev. 1371.

9 Asher Honickman, "A questionable judgment on 'traditional medicine'" (*National Post*, 21 November, 2013).

10 *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551.

Supreme Court ruled that orthodox Sikh students have a right to wear a *kirpan* (ceremonial dagger) in public schools.[11] It is unclear from the decision what reasonable accommodations were offered to D.H. Having avoided this question in favour of a s.35 analysis, *Hamilton Heath Science* missed an opportunity to provide guidance for the future.

While the legal analysis in this case traces back to pre-contact traditions and beliefs, it seems increasingly clear that D.H.'s concerns are rooted in modern aboriginal knowledge and experience—notably lessons hard learned from the disaster of residential schools, the 'Sixties Scoop' that saw thousands of aboriginal children placed for adoption in middle class white homes, and so on. It is imperative that the law find ways of respectfully accommodating traditional healing in the health care context, while protecting children's best interests (as rights-holders who are not the property of parent, band or State). For reasons I've explained, it seems unlikely that this challenge can be met simply by clarifying the boundaries of aboriginal self-governance. I've also expressed concern that minors in J.J.'s position will continue to fall into a legal void. A solution, as some have suggested, might be for the province to launch a reference case, seeking more fulsome guidance from the Ontario Court of Appeal.

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11 *Multani v. Commission scolaire Marguerite-Bourgeoy* [2006] 1 SCR 256.

DECIDING MEDICAL TREATMENT FOR A FIRST NATION'S CHILD: IS IT SIX NATIONS OR ONTARIO AUTHORITY THAT SHOULD GOVERN?

Larry Chartrand

On November 14th, 2014, Justice Edward of the Ontario Court of Justice decided that a mother acting on behalf of her 11 year old child did not have to comply with provisions under s. 40(4) of the *Child and Family Services Act* which allows for an applicant (in this case the Hamilton Health Sciences Corporation) to obtain a court order for apprehension of a child in "need of protection". The Hamilton hospital medical staff who were looking after the child recommended that she take chemotherapy treatment for a form of bone marrow cancer. When the mother refused on the grounds that she would rather treat her child according to Mohawk cultural practices, the Hospital tried to force treatment by declaring the child was in need of protection. The provisions of the *Child and Family Services Act* have been used successfully by health and child welfare authorities in previous cases where, for example, a parent refused treatment because of religious beliefs.[1] It was believed by many that this case should be treated no differently. However, to do so implicates the collective interests of the Mohawk nation to determine health matters according to Mohawk practice and not Ontario practice. Thus, unlike the religious rights cases, the issue is not just about whether the religious convictions of the family outweigh the right of the child to life-saving medical treatment, but about who has the right to make that decision.

We must keep in mind that there are two distinct issues in this case.

1. The right of the Six Nations of the Mohawk nation of the Haudenosaunee Confederacy to have its health and healing practices and authority constitutionally protected, and

2. The individual decision of the mother, acting on behalf of the child, to opt out of "Western" medicine in favour of Mohawk medicine.

I will first speak to the constitutional issue. In doing so, I will explain why, in my opinion, Justice Edward was correct in rejecting the application by the hospital. I will then consider the decision of the mother to reject the chemotherapy treatment notwithstanding having the benefit of relying on her community's right to maintain the integrity of Mohawk medical treatment. I will briefly explain why I respect the decision of the mother under the circumstances.

The constitutional issue (as opposed to the choice given to the mother because of the Constitution) is not really about a conflict between cultures, but one of a conflict between powers – between governments and their respective jurisdictions. It is not a right to land or a right to use a resource on the land (i.e. the issue is not one of harvesting medicinal plants on Crown lands, for example) but rather a general right to maintain the integrity of Mohawk healing practices in the face of Ontario policies seen as unjustly encroaching on that integrity. In this sense the right is more like a contest between two jurisdictions that have different perspectives and policies regarding compliance with treatment under certain circumstances.

In this case, section 35 that recognizes existing Aboriginal and Treaty rights behaves more like a constitutional provision concerning a division of powers analysis between competing Mohawk (Six Nations) government authority and Ontario government authority.

The Six Nations' jurisdiction over health treatment decisions does not necessarily require compliance with cancer treatment because it interprets the health status and situation differently – through Mohawk eyes rather than Canadian eyes. But there is nothing that prevents modern cancer treatment procedures from being an integral part of Mohawk healing if the adoption of such procedures became accepted within a Mohawk cultural healing paradigm.[2] Indeed, there

1 E.g. *Richard B. and Beena B. v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315.

2 Indeed, many Mohawk community members no doubt embrace both "Western" and "Mohawk" healing practices. Doing so does not make them less Mohawk, although some who are more fundamental in their need to embrace Mohawk tradition without compromise might disagree. The issue then becomes what is legitimate Mohawk culture and what is not. That is a complex debate beyond the scope of this paper.

is nothing inherently contradictory. It is a matter of choice.[3] That choice, however, is not undertaken detached from the negative impact of Indigenous colonial subjugation that marks this country's history.

The court, in reliance on expert evidence, found that Mohawk healing practices were and remain integral to the distinctive culture of the Mohawk nation.[4] Thus, provincial law that infringes upon the right will be found in violation of s. 35 of the Constitution unless the government can justify the infringement. It is critically important to recognize that the applicant did not argue and the court did not address the issue of whether the public policy interest of securing the health of the child, by force if necessary, outweighed the interests of the Mohawk nation to maintain the integrity of their health and healing protocols. Before turning more fully to this issue of justification, I would like to examine briefly the initial question of proof of the right and whether it was infringed by the request for a court order under the *Child and Family Services Act*.

In terms of whether the Six Nations proved the existence of a right to continue to practice traditional medicine, the court, in my opinion, correctly and properly applied the appropriate legal test set out in the case law for proving an Aboriginal right. In terms of infringement, the court should have explicitly asked whether the Ontario legislation (which allows for a court order to force treatment against a parent's wishes) infringed the Aboriginal right. Although lacking analysis on this point, the threshold for infringement is low.

The denial of a Mohawk right beneficiary's preferred means of exercising the right would qualify as sufficient evidence of infringement according to *Sparrow*.[5] While not addressed by the court, it would not be difficult to conclude that forcing chemotherapy treatment would violate the mother's right, as a parent, her preferred means of exercising the right to undertake medical treatment as defined by Mohawk culture and tradition which may or may not include a belief of the need for "exclusive" Mohawk healing treatment plans.

The issue then becomes one of determining whether the Ontario government can justify the infringement of the right. (This is to leave aside the possible argument that Justice Edward failed to appreciate that s. 35, although outside the *Charter* and not subject to s. 1, is still nonetheless subject to a similar, but more onerous, justification test imposed by the Supreme Court of Canada in *Sparrow* and more recently affirmed and modified in the *Tshilqot'in* case.[6])

The provincial power and legislation might be paramount if the government intrusion is considered to be of a compelling and substantive nature in the public interest and would have to outweigh the respect required and demanded under the constitution for acknowledging the jurisdiction of Six Nations over healing and health matters. However, the responsibility for justifying the infringing legislation falls on the shoulder of the Attorney General for Ontario who could have intervened to justify the incursion on Mohawk rights if the AG thought it necessary. It did not intervene. (It may be observed that there is no risk to loss of revenue in this case as there is in defending a mining company or a forestry company to exploit Aboriginal lands. There is just one Mohawk girl's life.)

It is important not to confuse the legal analysis regarding a parent's right to refuse medical treatment because of religious grounds from a parent's right to refuse because of his or her community's Aboriginal right. The religious belief cases involve significantly different issues and should not be relied on as precedent for cases in which Indigenous rights are being claimed. The Six Nations have an unfettered constitutional right to govern matters involving Mohawk collective rights recognized by law or agreement.

However, like *Charter* rights, Aboriginal and Treaty rights protected under s. 35 are not absolute. They can be infringed if the broader public interest outweighs the rights of the Indigenous community, but only if the non-Indigenous government can justify interfering with the decision-making inherent in a right of a collective political nature. The test is more onerous for the non-Indigenous government

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3 Ironically, however, the Aboriginal rights jurisprudence may not allow for the integration of Western medicine with Mohawk medicine. The Supreme Court of Canada has stated in *Van der Peet* [1996] 2 S.C.R. 507 that for an Aboriginal right to be recognized it must remain pure untainted from the impact of European practices. However, it should be noted that this principle has been subject to substantial criticism by legal commentators.

4 The leading case on proving an Aboriginal right is *R. v. Van der Peet* as reinterpreted by *R. v. Sappier/Gray* [2006] S.C.R. 686. It should be remembered that the Aboriginal right does not actually belong to the mother or daughter as individuals, but to the Six Nations as a collective. However, individuals can rely on the collective right of the Band or nation when provincial or federal legislation is seen as infringing their preferred exercise of the right.

5 [1990] 1 S.C.R. 1057. This case set out the legal framework for justifying an infringement of an Aboriginal right.

6 [2014] 3 C.N.L.R. 362 (SCC).

because it is not a contest between citizen and government but between two legitimate governments. Thus, consultation with the Aboriginal community or nation is a necessary pre-requisite if a non-Indigenous government like Ontario wishes to justify an infringement of the collective right of the Six Nations people. Individuals have rights vis-à-vis the State, but the State need not consult with the individual citizen as the citizen is an integral part of the State and democracy is a viable consultative vehicle for individual citizens to advocate their interests. The relationship between Aboriginal peoples, as peoples, is qualitatively different between the State and the Aboriginal community. Religious orders, like the Johavah Witnesses congregation, or interest groups or minority communities, simply do not have a collective right to govern in Canada. The Mohawks do.

Although not addressed by the court, the government would not likely have succeeded in justifying the application of the legislation against the Band because significant consultation would have been required by Ontario in terms of discussing the imposition of the child protection legislation on Mohawk interests and I am not aware of any consultation having taken place. I doubt specific consultation with the Haudenasonee Confederacy, the Mohawk nation or the Six Nations band took place.

It is interesting to note that many of the Aboriginal – Settler Treaties, especially out west, include obligations of the Crown to provide medicine and doctors to Aboriginal Treaty partners in exchange for a right of the Crown's settlers to share the land belonging to the Indigenous nation. But an obligation to provide medicine does not include a right to force medicine on the citizens of that community who are governed by their own legal regime regarding health and healing matters based on their own knowledge of healing passed down from generation to generation over thousands of years.

Because of Canada's colonized status, we should not overlook the fact that Canada has certain International obligations to correct the injustice of the past. Relevant to this issue are Articles 23 and 24 of the United Nations Declaration on the Rights of Indigenous Peoples which state, respectively, that Canada "must provide a standard of health that is equivalent to that enjoyed by mainstream Canadians", but Canada must do so on terms acceptable to Indigenous peoples including recognizing that "Indigenous peoples have the right to their traditional medicines and to maintain their health practices".[7]

With regard to the decision of the mother, let me begin by saying that I understand why the mother made the decision she did on behalf of her daughter. Thus, I will respect her decision.

I want first to point out that some opinions in the media seem to imply that Mohawk healing is less valuable than "Western" healing treatments. I would like to remind those who hold such opinions that exploiting indigenous knowledge regarding health and healing practices has always been a multi-million Dollar enterprise. There are literally hundreds of pharmaceutical companies worldwide that are right now spending enormous resources and effort to access Indigenous knowledge regarding plants and animals for pharmaceutical development purposes.[8]

Second, we must also understand the decision of the mother in the social-historical context of Aboriginal – Newcomer relations. This history of colonization has created a great deal of distrust. And there is good reason for it even within the helping domain of medicine. There is a history of medical experimentation on Aboriginal children who attended residential schools.[9] Moreover, the Eugenics movement resulted in Alberta doctors forcibly sterilizing Aboriginal women in Alberta.[10]

Justifiably, the Mohawks have always worried about protecting their way of life by the assimilative pressures and policies of Canadian governments and "well-meaning people". Chief Des-Ka-Heh of the Six Nations summarized this view in his statement before the American people on radio in 1923 after returning

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7 United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, 2007 (A/61/I.67 and Add.1).

8 Shane Greene, "Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting", *Current Anthropology*, Vol. 45, No. 2 (April 2004), pp. 211-237.

9 See Yvonne Boyer, *First Nations, Métis and Inuit Health and the Law: A Framework for the Future* (thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment of the requirements of the LLD degree in Law, Faculty of Law, University of Ottawa, 2011) wherein she devotes an entire section of her dissertation to cases where Aboriginal children were subjected to experimentation without consent.

10 *Ibid*.

from Geneva where he had sought, on behalf of the Confederacy, their acceptance into the League of Nations:

> The governments at Washington and Ottawa have a silent partnership of policy. It is aimed to break up every tribe of Redmen so as to dominate every acre of their territory. Your high officials are the nomads today – not the Red People. Your officials won't stay home.
>
> Over in Ottawa, they call that Policy "Indian Advancement." Over in Washington, they call it "Assimilation." We who would be the helpless victims say it is tyranny.
>
> If this must go on to the bitter end, we would rather that you come with your guns and poison gases and get rid of us that way. Do it openly and above the board. Do away with the pretense that you have the right to subjugate us to your will. Your governments do that by enforcing your alien laws upon us. That is an underhanded way. They can subjugate us if they will through the use of your law courts. But how would you like to be dragged down to Mexico, to be tried by Mexicans and jailed under Mexican law for what you did at home?[11]

And yes, this protective stance against "western culture" may even result in a degree of fundamentalism which can contribute to beliefs that anything Western is a threat to the very identity of Mohawk. We can't divorce this individual decision of a Mohawk mother's concern for what is best for her child from the devastating history of Indigenous colonization in Canada. So if that young girl, JJ, dies, it will not just be the mother's decision (rightly or wrongly) that caused her death. It is on all of us.

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11 Deskaheh, "The Last Speech of Deskaheh" in John Borrows, *Aboriginal Legal Issues* (LexisNexis, 2007) at 46.