

Blunt Instruments

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Among the government's tools in countering terrorism are three particularly blunt instruments: coercive detention, forced testimony and security certificates. The last can be distinguished from the first two in two significant ways. Unlike coercive detention and forced testimony, both products of the post-9/11 rush to update and strengthen Canada's security-related legislation, security certificates have been embedded in our Immigration Act since the 1960's. Moreover, their constitutionality is being challenged in the Supreme Court of Canada this week.

All three legislative provisions have provoked concern, particularly among those quick to defend against any erosion of the rights and freedoms guaranteed to Canadians in our constitution. Equally, and commendably, security organizations in Canada have been most frugal in resorting to these provisions in their counter-terrorism activities. For example, security certificates have been invoked fewer than 30 times during the last 16 years.

Why resort to security certificates at all? Why do they remain part of the counter-terrorism arsenal?

Security certificates came into being as the 1960's brought increasing information to Canadian authorities about immigrants or visitors who posed security threats to the country or had links to organized crime. A cardinal rule within the intelligence community is that the sources of such information will not be made public in the courts or through the media, except under the most exceptional circumstances. To do otherwise is to run a grave risk of cutting off that information source. The same may be said with respect to the protection of domestic sources, whose identification could very well result in physical harm or loss of life.

Beyond the relatively few times security certificates have been used, they cannot be used, and have not been used, capriciously. First, they cannot be used against Canadian citizens. Second, not one but two federal ministers must approve a proposed certificate: first, the Minister of Immigration and second, the Minister of Public Safety. Even these signatures are not enough to validate the certificate which must then be presented to a judge of the Federal Court for his decision whether the information the certificate contains is reasonable. In making his decision, the judge may hear evidence from the person named in the certificate. Only after the judge has decided that the certificate is reasonable, does it become a removal or deportation order.

Given the above, it is clear that security certificates do not by any means ignore the rights of persons named in the certificates. However, does this process abridge their rights as essentially defined by the courts? Of course. Does it do so unnecessarily? This is the essence of the question coming before the Supreme Court. In short, where does the balance lie between counter-terrorism legislative provisions which may restrict the civil rights of Canadians and the

need to protect national security and the safety of the Canadian public at large? **On a more process-driven level, the Court may also address the open-endedness of the certificates and the timeliness of judicial and ministerial decisions under current certificate procedures.**

In my view, security certificates, blunt instrument though they are, have an essential place in the counter-terrorism legislative fabric. Their sparing use over the years strongly suggests that they are invoked as measures of last resort when governments have been reluctant to implement or enforce other legislative provisions, especially with respect to immigrants or refugee claimants.

Immigration policy has always been a hot potato for governments, especially for the Liberal Party which has traditionally drawn considerable electoral support from immigrant communities in Canada. Until the tragedy of 9/11, the Chrétien government placed security issues near the bottom of their political agenda. After 9/11, they were forced to pay greater heed to security threats but, even then, moved only with the greatest reluctance, whether in removing those posing a risk to the country or banning so-called charitable organizations which were fronts for terrorist groups.

To date, lower courts including the Federal Court of Appeal have upheld the legitimacy of security certificates. I hope that the Supreme Court will do likewise in finding the balance between civil rights and the security of the state and its citizens collectively. Those on both sides of the argument have filed their written briefs with the Court. The one upholding a purist view of the individual's rights and freedoms, the other maintaining that the dangerous world that has evolved around us justifies some curtailment of those rights. In part, the government's factum states, "it is most frequently in the most dangerous cases, constituting the greatest threat that the state is obligated to use evidence that, if divulged, would endanger its national security or that of another".

Those other blunt instruments, coercive detention and forced testimony, were statutorily to be reviewed by Parliament five years after the passage of Bill C-36. That review was cut off by the recent election campaign but the current government will apparently now go forward with the review. Assuming that the Supreme Court decides to uphold security certificates, the government could decide to tack the modalities of security certificate issuance (**e.g. timeliness and current lack of procedural guidelines**) onto that review. This would ensure that all these nine pound hammers serve their essential purpose of protecting this country while not unnecessarily trampling on the values which lie at its foundation.

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