Productive week for Canada's desk torturers in Harkat, Diab cases

BY **MATTHEW BEHRENS** | MAY 21, 2014

Two judicial decisions released last week remind us that the concept of national security is incompatible with democracy: the former almost always trumps the latter, and various enemies-du-jour are regularly created and then served up on the altar of "security." In each instance, profoundly disturbing decisions were dealt to Mohamed Harkat, facing deportation to torture in Algeria based on secret hearsay, and Hassan Diab, facing extradition to France on clearly trumped up allegations likely gleaned from torture.

When doubts are raised about the fragility of democratic rights, the national security state relies on its courts to provide legal reassurance that torture, indefinite detention without charge, secret trials, overseas military occupation, the iron curtain of governmental secrecy, and other crimes of state can be rationalized as necessary byproducts of certain organizations' duly-authorized mandates.

In Canada, both individual judges and courts have served this role most obediently. Their decisions almost unanimously start from the proposition that scandal-plagued bodies like CSIS, the RCMP, and the Department of Justice are composed of well-intentioned functionaries who may, in moments of excessive zeal, cross some boundaries. Although those crossed boundaries implicate Canadian officials in severe human rights violations, no one is ever held to account. Consider that despite two judicial inquiries finding Canadian complicity in the torture of four of its own citizens -- a complicity usually overseen by Justice Department lawyers -- no one has been charged, much less tried, for their involvement in torture. Rather, complicit individuals have**received promotions** or otherwise retired from public life and are now serving as**commentators for the CBC** or receiving **puff profiles in the *Toronto Star***.

In the Harkat and Diab cases, judges have again closed ranks behind the national security state, protecting the technocrats who, like the notorious *Schreibtischtäter* -- desk murderers of the Nazi era -- do not have to wipe the blood from their hands, as they simply shift paper about, blithely disconnected from the human wreckage they cause. Canada's desk torturers work at such institutions as the Canadian Border Services Agency, the RCMP, CSIS, and Communications Security

Establishment, all of whose employees operate under the rubric of internal memos that have directed them to exchange information with foreign intelligence agencies even when there is a "substantial risk" of torture. Canada's War Department is the latest to **join their ranks**. Needless to say, such memos have been given the go-ahead by Justice Department lawyers. At the same time, CSIS itself **acknowledged in a 2008 memo** that if torture-tainted intelligence were dismissed, the secret trial regime would collapse.

Harkat: Still no right to see the case

In last week's Harkat ruling, the Supreme Court clearly got it wrong. The decision appears to have been written on the run, without due consideration of last October's full-day argument by intervening groups on issues from racial and religious profiling to complicity in torture and secrecy creep undermining immigration proceedings. It is at times shockingly illogical and contradicts its landmark 2007 Charkaoui ruling that found the security certificate regime unconstitutional because it denied detainees the right to know and meet the case against them.

The secret system considered by the court in 2006 is largely the same one that exists now, with the exception of one significant change, the introduction of security-cleared lawyers called special advocates who can see some of the secret case but cannot speak with the detainee about what is revealed behind closed doors. Thus, individuals affected still cannot properly instruct counsel about what is being heard in their absence. Special advocates, which essentially saved the secret trial regime, were brought in courtesy of some high-profile, Liberal immigration lawyers and the Federal Court itself, and passed Parliament with the full backing of the Liberals. Their current leader, Justin Trudeau, spoke last week both of his love of the Charter of Rights and Freedoms and also of how he thought the **Charter-violating Supreme Court ruling was a good one**.

In Charkaoui, the Court remarked that "one cannot be sure that the judge has been exposed to the whole factual picture." That has not changed: Harkat cannot comment on, much less instruct the special advocates, on something he is not allowed to know or see. As the court said then (and seems to ignore now), "without full disclosure and full participation throughout the process, he or she may not be in a position to put forward a full legal argument," and that without disclosure (especially in this case), "the named person may not be in a position to contradict errors, identify

omissions, challenge the credibility of informants or refute false allegations." Indeed, since that named person does not know what has been put against him or her, "he or she does not know what the designated judge needs to hear." Ultimately, nothing has changed: "How can one meet a case one does not know?" the Court asked in 2007, and should have asked again in 2014.

Harkat continues to face deportation to torture in Algeria because Federal Court judge Simon Noel unjustifiably believes that Harkat lied. Noel heard things about Harkat in secret that Harkat knows nothing about, and after Harkat answered certain questions in public, Noel decided that he preferred the uncontested hearsay heard in secrecy. We know that this hearsay is uncontested because a key plank of Harkat's Supreme Court appeal was based on the fact that when his special advocates sought to cross-examine informants during a secret session -- which would seem an obvious thing to do given that one of them had failed a lie detector test, a fact CSIS deliberately withheld from the court for over a decade -- they were turned down. Noel said the informants deserved "informer privilege." As the Supreme Court noted in its decision, the polygraph test on one source "revealed him or her to be untruthful." So why wouldn't the special advocates be allowed to cross-examine someone with this mark against them? The Court replies that there is nothing to worry about, because the hearsay evidence will be accepted only if a judge concludes it is "reliable and appropriate."

Supreme Court sides with CSIS

But how can a judge independently come to that conclusion when hearing only one side of the story, without the benefit of a fully briefed lawyer cross-examining the source of that hearsay? The deference shown to CSIS here is remarkable: the Supreme Court worries that if CSIS sources had to testify, even in secret session, this may have a chilling effect on the agency's "ability to recruit new sources." This despite ongoing reports from targeted communities indicating that most potential CSIS "sources" would hardly be reliable since they are coerced into spying in exchange for status in Canada. Indeed, one source in the Harkat case appears to have had special inspiration to continue producing "intelligence" because he carried on a torrid affair with the CSIS agent handling him.

While the Supreme Court found that CSIS sources did not enjoy informer privilege, they try to have it both ways by then declaring there is no "unlimited ability to interview and cross-examine human sources." The ruling states that such examination should rarely if ever be allowed and, without any explanation whatsoever, concludes there is no reason to allow Harkat's special advocates to cross-examine the secret informants whose allegations were used against him. The Court is satisfied that "the admission of hearsay evidence or the denial of the opportunity for special advocates to cross-examine sources do not render" the scheme unconstitutional.

Further, the Supreme Court ruled in a remarkably illogical moment that while the destruction of all original notes and transcripts of recordings in the Harkat case violated his Charter rights, there was no problem, because Judge Noel "reasoned that the summaries of the conversations were prepared in a way that ensured their accuracy." Yet how would he know this if he had not seen the original documents, examined the translator, and had cross-examination to test for reliability, accuracy, and the biases inherent to the process?

The court also criticized the government for wanting a secret hearing at the Supreme Court level, complaining "it only served to foster an appearance of opacity of these proceedings, which runs

contrary to the fundamental principles of transparency and accountability." Fine words, but why has the court not released a transcript of the closed proceedings for all to see?

Why not charge him if a case exists?

Like other secret trial detainees, Harkat has always argued that if the government actually has a case, he should be charged in an open court with a fair trial. The government claimed Harkat's lack of citizenship prevented them from charging him under the Criminal Code (with its higher standards of proof and procedural protections), yet the recent Via Rail plot (alleged to have been planned by two non-citizens) is proceeding under the auspices not of the immigration act's security certificate regime, but under the Criminal Code.

The Supreme Court is well aware of this glaring difference, even acknowledging in last week's decision that the secret trial regime is "in some respects more advantageous for the state than criminal proceedings. It has a lower standard of proof and is more protective of confidential national security information than the criminal law." The Court even acknowledges but does not act on the fact that a citizen facing such serious allegations is entitled to a balancing act that considers state secrecy and individual rights, but this does not exist for non-citizens. There is no further comment on this two-tiered justice, other than to adopt a Father Know Best approach that tells Harkat: you have to trust the judge, who has broad discretion to look after your rights and make sure you are "reasonably informed" of the case. Ironically, that is exactly what the Federal Court judges were saying before this process was found to be unconstitutional: trust us. Thus, the Supreme Court has taken a major step backwards, concluding Harkat knows the case because the judge says he does. End of story. When so much rides on a discretion that can only be exercised on a case-by-case basis, the lack of solid legal precision means whether one wins or loses may come down to the pick of the judge.

Harkat has a long legal road ahead of him, and his ultimate fate will once again rest with the Supreme Court, which will have to decide whether Canada will respect the absolute prohibition on deportation to torture, a legal obligation that the Supreme Court refused to uphold in the infamous 2002 Suresh decision by claiming certain "exceptional circumstances" could justify sending someone to face electric shock on the genitals.

Diab enters Kafka land

Both the security certificate regimes of 2007 and of 2013 contain the exact same section that allows a judge to admit into evidence and base a ruling on anything not normally admissible in a court of law. This means, therefore, that Harkat and anyone else subject to the secret trial process never has been and never will be in a court of law. It's a problematic netherworld that also seriously impacts Dr. Hassan Diab, whose battle to stop extradition to France for a crime he did not commit suffers from similarly low legal standards that are ultimately based on the political prerogatives of Canada's national security state. How else to explain the fact that he continues to face an uphill legal battle even though finger and palm prints, handwriting, and physical descriptions of the alleged suspect in a 1980 bombing do not match those of Dr. Diab?

Last week's dreadful Ontario Court of Appeal (OCA) decision dismissed the well-reasoned arguments of Diab's legal team with remarkably similar reasons to those of the Supreme Court: judges must be

allowed major discretion; the intelligence agencies of our extradition partners do not engage in nefarious activities because they have signed treaties; and even though Dr. Diab has yet to be charged with an offence, he is told to trust the French and sort things out from an overseas prison.

France has been trying to flex its anti-terrorism muscle with respect to the 1980 Rue Copernic bombing, pursuing a case against Diab that a Canadian judge found "weak," "suspect," and "confusing," and "the prospects of conviction in the context of a fair trial, seem unlikely." Unfortunately, that same judge ordered the extradition of Dr. Diab because the standards are so low and inconsistently applied in different Canadian jurisdictions. Indeed, the appeals court quotes the reality that "trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions," which is what appears to have occurred here.

Diab sought without being charged

Equally problematic is the fact that, as the OCA points out, "It is well settled that the [Extradition] Act does not allow the extradition of a person for mere investigative purposes. Extradition is not to be used as a tool by foreign states to question people as potential witnesses or suspects." Yet that is precisely the position in which Diab finds himself. The OCA also notes the case against Diab is "circumstantial," and that four of the five pieces of evidence offered to demand his extradition were "insufficient" to justify uprooting his life, with the fifth piece a highly discredited handwriting report almost dismissed by the trial judge because it was "highly susceptible to criticism and impeachment" and relied on "questionable methods and on an analysis that seems very problematic."

So why has the case proceeded? Because under Canada's extradition law, the duty of a Canadian court and the Minister of Justice is, first and foremost, to the government seeking an individual's extradition, and as the Supreme Court of Canada has found, extradition is, in the end, not a legal issue, but a political decision: is the government of Canada willing to risk its relations with one of its extradition partners, or is it willing to sacrifice one of its citizens (or a refugee or permanent resident who is also sought) in the name of maintaining happy diplomacy?

In the same manner that Mr. Harkat has been told by the Supreme Court that he needs to trust in the judge hearing the case without him, Diab is similarly instructed to grin and bear it because Canada cannot be seen to mistrust the judicial system of a democratic country. Yet Human Rights Watch has criticized French counter-terrorism courts for relying on secret intelligence from countries known to routinely use torture. When the Canadian Minister of Justice was asked to seek assurances that the French did not in fact carry on in such a manner, he instead figured he needn't ask because he concluded Diab had not made a "plausible connection" to the fact that torture-derived intelligence from the close working relationship between the French and Syria intelligence agencies in the 1980s (when Diab lived in Lebanon) was connected to his case. (Notably, the French officials clearly state they have no idea where the intelligence came from, in the same way Harkat had no access to original documents or individuals who could be cross-examined).

In the same show-trial way Harkat is given "an opportunity to be heard," we are told Diab should trust the French since he will be provided a similar "opportunity." But in addition to the secret allegations he faces, the French courts, as Diab's team argued, "cannot properly determine the reliability of the intelligence allegations made against him because they are not allowed to know the

sources of the allegations but, rather, presume that all information received from intelligence officers is reliable; the defence cannot effectively probe or question the underlying material in an intelligence report, and intelligence officers are not required to answer when cross-examined; and French courts use intelligence as evidence to prosecute [alleged] terrorists and have admitted torture-derived statements as evidence in the past." The OCA says since France is a party to the Convention Against Torture, no such thing could occur (even though it does occur with regularity in Canada, also a party to the treaty).

While much of the Diab decision deals with the complexities of extradition law and interpretation of this seriously flawed regime, we also are reminded that this is not about law. In making submissions to the Minister of Justice following judicial committal for extradition, the OCA says this stage of the process is "viewed as being largely political in nature…the nature of this decision is clearly not of central importance to the legal system or outside the Minister's area of expertise," which is why the Minister must be granted deference by the court.

The Court's impermeable bubble

The bubble in which the Ontario Court of Appeal judges live is impermeable. After quoting from a European Court of Human Rights decision deploring the use of torture evidence, the judges smugly state, "Canada shares these values," adding the Minister should decline to extradite someone where the case they face will include torture-derived evidence. In the spirit of the Suresh exceptional circumstances case of deporting to torture, the OCA says if there is a "real risk" torture-derived evidence will be used, the Minister should "generally [not always] refuse to order surrender." The problem here is that the Department of Justice is the same agency approving the use of torture information here in Canada; why would the Minister think twice about France's use of such information when it has been so firmly accepted as part of the Canadian discourse?

"There may be rare and exceptional circumstances where deportation or surrender to face a substantial risk of torture or a real risk of the use of torture-derived evidence could be justified; generally, however, as we have said, the Minister should refuse to surrender in such circumstances," the OCA concludes.

The rulings in both the Harkat and Diab cases do not bode well for the men, their families, and their communities. The courts have clearly said they are prepared to violate international and domestic legal commitments with respect to torture, and to sacrifice both of these men's lives for the national security state. The response that such violations demand from the rest of us is a challenge we must commit ourselves to meeting.

In the interim, get involved by contacting **Justice for Mohamed Harkat** and **Justice for Hassan Diab**.

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