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No evidence? No problem.

What Hassan Diab's extradition and imprisonment in France tells us about Canada's casual relationship with the rule of law.

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Diab (right) in 2013 with his wife Rania Tfaily and their daughter Jena.

The Harper regime's hugely controversial C-51 "anti-terror" legislation survives unscathed 16 months into the Trudeau era. State security agencies are no doubt enjoying the capacity to target a much larger section of the population with the broad surveillance and disruption powers they were gifted in the aftermath of the 2014 shooting near Parliament Hill. The potential for abuse is clearest to

those who have suffered already under pre–C-51 practices, including indefinite incarceration without charge (as part of Canada's secretive security certificate process), overseas torture by proxy and the prohibition against boarding aircraft for people on "no-fly" lists.

Opponents of C-51, of which there are many, have presented such examples in online responses to the federal government's national security green paper, "Our Security, Our Rights." The process is the outcome of the Liberal party's election pledge to "repeal the problematic elements of Bill C-51, and introduce new legislation that better balances our collective security with our rights and freedoms." The document itself, however, is problematic and biased in that it presumes basic rights are expendable, and asks Canadians which ones can be eroded and by how much.

One topic rarely raised in the debate so far is the dangerous power wielded by Ottawa under the Extradition Act. On those rare occasions that extradition enters the public lexicon, such as when Chinese Premier Li Keqiang visited Canada last fall seeking an extradition treaty, it generates either apathetic yawns or frantic Google searches for the term's meaning. For the record, extradition entails Canada acting on requests from foreign governments to deliver suspects facing criminal proceedings abroad. Few, it would seem, would oppose the extradition of someone accused of bilking seniors for millions of dollars. But what sounds like a straightforward issue is actually a highly politicized affair fraught with potential human rights violations.

"Although Canada is a nominal parliamentary democracy, when it comes to extradition the government could not be more dictatorial in its adoption and enforcement of treaties," wrote defence lawyer and legal scholar Gary Botting in 2011. "The Vienna Convention on Treaties requires that all international treaties be ratified; however, *none* of Canada's current extradition treaties has been ratified by the Parliament of Canada, or by any parliamentary committee, or even by the Privy Council."

When another country wants someone in Canada apprehended and delivered to a foreign jurisdiction the seemingly inviolable protections of citizenship or refugee status become secondary concerns. Indeed, as Justice Freda Steel acknowledged in the 1999 case of Winnipeg's Monique Turenne, accused of murdering her Canadian Forces husband in Florida, evidence presented by the requesting country at an extradition hearing "should be accepted even if the judge feels it is manifestly unreliable, incomplete, false, misleading, contradictory of other evidence, or the judge feels the witness may have perjured themselves."

The idea that someone in Canada can be handed over to another country on such disturbingly weak grounds—potentially opening the door to a vindictive government's persecution of an expatriate political dissident—is based on a built-in assumption that the judicial systems of extradition partners conform to Canada's fair trial standards. Ultimately, as the Supreme Court has conceded, extradition is a political matter in which the justice minister must determine whether it is worth hurting diplomatic relations by rejecting the request of a foreign state.

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Nowhere have the fault lines of extradition been more clear than in the case of Hassan Diab, a mild-mannered 63-year-old sociology professor from Ottawa, who nine years ago suddenly found himself accused by French authorities of the 1980 bombing of a Paris synagogue. French investigations into this act of terror, originally attributed to far-right groups as part of a string of similar bombings across

Europe in the 1970s and ‘80s, had long since gone cold. Three decades later the crime was being pinned on Diab, a Canadian citizen of Lebanese birth, even though he did not share the finger and palm prints, or the physical description, of the original suspect.

The first French magistrate in charge of the Diab investigation wrote in 2008 that the “shreds of information” on the case that existed between 1980 and 1999 “were very vague and absolutely unusable [and] nothing allowed investigators to put a name to the Lebanese person known only by the first name Hassan.” But that changed in 1999 when France’s counterterrorism apparatus received secret intelligence that led them to believe Diab was their man, even though, as Diab’s lawyers argued, it was “based largely on intelligence reports from unnamed foreign entities, who in turn obtained information from unknown sources in unknown circumstances.”

The French practice of relying on secret intelligence as evidence is highly controversial, since it can give legal heft to mere hearsay, gossip and rumour. Human Rights Watch has condemned the practice for violating fair trial guarantees, noting French counterterrorism courts “appear to have allowed as evidence in some cases statements allegedly made under torture by third persons.” Yet it is common practice in French terrorism prosecutions for intelligence to become “judicialized”—granted the status of evidence simply by having police report it to an investigative judge.

The ease with which this process occurs is, according to Human Rights Watch, “the pride of French counter terrorism officials,” cemented by a close, trusting working relationship between judges and French intelligence agents. It also greases the wheels of a state security infrastructure that University of Ottawa visiting professor Wesley Wark claimed, in an expert witness statement, to have “no parallel in the Anglo-Saxon world of justice.… These investigating magistrates become, in effect, a kind of intelligence service themselves.”

As Wark points out, “intelligence is acutely fallible. The propensity for failure built into the intelligence cycle means that intelligence cannot be equated with evidence or automatically assumed, somehow because it is intelligence, to be true. Intelligence is crafted; evidence is discovered. Intelligence is a construct which involves multiple processing filters between raw data and finished conclusions.”

This places individuals like Diab in the position of being unable to inquire about the source of secret allegations. As counterterrorism prosecutor Philippe Maître noted in a 2008 interview with Human Rights Watch, “[t]he origin of the intelligence is not important, and we don't always know it." From this the group concluded, “Under these circumstances, it is difficult to see how the investigating judge can exercise any control over the legitimacy of the methods used and the veracity of the information obtained when determining whether to open an official investigation or authorize certain investigative steps.”

But that’s exactly what ignited the French investigation against Diab in 1999—secret intelligence from an unknown, unidentified source under unexplained circumstances. French officials took another nine years to approach Canada, where Diab was arrested, held for three months in custody and released under unprecedented bail conditions, including that he and his partner, Rania Tfaily, would pay the $2,000 monthly bill for Diab’s GPS monitoring system. Though Diab had not yet been charged with any crime, he was removed from a teaching post at Carleton University, prompting a complaint by the Canadian Association of University Teachers.

Given the limited role Canadian judges play in reviewing extradition requests—hearings tend to be relatively expeditious affairs followed by submissions to the justice minister—it was remarkable that Diab's hearing was so protracted, spanning over a year in an Ontario court. The proceedings at times resembled something out of a Pink Panther film, whose bumbling Inspector Clouseau painted a comic picture of the French police. Much of the case brought by French authorities, including the allegations based on the secret 1999 "intelligence," was excluded from consideration by Judge Robert Maranger, who deemed it "argument, speculation and analysis, and not evidence."

All but one of the elements of the alleged case were deemed insufficient grounds for extradition: the Canadian judge was prepared to accept a widely discredited analysis of the suspected synagogue bomber's handwriting based on five words written in block letters in a Paris hotel register. Two handwriting experts, having compared the register scrawl with Diab's PhD admission documents at Syracuse University, concluded both were made by the same hand. It didn't seem to matter that many of the Syracuse samples "matched" to the suspect's writing were written not by Diab but by his then-wife, Nawal. Embarrassed French officials withdrew their reports and replaced them with another one. But then five internationally renowned handwriting experts testified this, too, was fatally flawed and wholly unreliable, and that an objective handwriting analysis would exclude Diab as the suspect.

Judge Maranger had numerous misgivings about the final French handwriting analysis, calling it "illogical" and "very problematic." However, he still committed Diab for extradition based almost entirely on this discredited "evidence," noting that his hands are tied by the extradition treaty between Canada and France. He wrote that the "case presented by the Republic of France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial seem unlikely." Even the government of Canada admitted the weakness of the case. "If we had lost the handwriting evidence, I fairly concede, we would be facing an uphill battle," said the counsel for the attorney general.

As Diab's case made its way to the Ontario Court of Appeal, his lawyers learned he had yet to be charged with a crime in France, which is normally a precondition for extradition. But in May 2014, the higher court upheld Diab's removal from Canada anyway, dismissing concerns that torture-gleaned "intelligence" would be used against him in French court. As his legal team pointed out, "France had a special intelligence sharing relationship with Syria [which was] shown to have regularly kidnapped Lebanese individuals and tortured them to extract information on national security and terrorism matters." The lawyers added there exists "no genuine ability to challenge intelligence in French terror trials."

In November that year, less than 48 hours after the Supreme Court refused to hear his appeal, Diab was swiftly removed from Canada. His lawyer, Donald Bayne, said the case was a perfect prescription for "wrongful conviction," but Canadian officials appeared more concerned not to insult the French by rejecting the request. (France itself does not allow the extradition of its citizens.) Diab has been in prison in Paris ever since and remains "under examination" (not yet charged) by a French magistrate who is allowed to rely on the discredited, withdrawn handwriting analyses and secret intelligence that were, even under Canada's notoriously low extradition standards, deemed unworthy of consideration.

Canadian officials refused to seek assurances from the French that information gleaned from torture would not be used against Diab. In 2009, a landmark report by the respected International Commission of Jurists (ICJ) raised serious concern about this practice: “States have publicly claimed that they are entitled to rely on information that has been derived from the illegal practices of others; in so doing they become ‘consumers’ of torture and implicitly legitimize, and indeed encourage, such practices by creating a ‘market’ for the resultant intelligence. In the language of criminal law, States are ‘aiding and abetting’ serious human rights violations by others.”

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With the cards stacked against him, Diab has steadfastly maintained his innocence, condemned the 1980 synagogue attack and tried to make the most of his time in jail. He is even learning French. Diab’s family, and a large community of supporters in Canada, were hopeful when he was released on bail in May 2016. But the French Court of Appeal had him returned to prison 10 days later.

In October, the investigative magistrate in charge of his case ordered Diab again released on bail. “At this stage of the inquiry, there exists consistent evidence tending to establish that Hassan Diab was in Beirut late September, early October 1980,” he said. “[T]his calls into question information implicating him in the attack since this relies on his presence in France during this period.” Then, again, a French prosecutor blocked his release, with the Court of Appeal overruling the release order and renewing Diab’s detention. William Bourdon, Diab’s lawyer in France, noted that, “after 36 years and since no one else was indicted, the Court of Appeal is clinging on to Hassan Diab. He is detained because of the judges’ fear to be accused of laxity in the context of today's fight against terrorism in France. Such a situation would be inconceivable in an ordinary law procedure.”

While the next steps in Diab’s case are unclear, his extradition, and the manner in which Canada has expressed confidence in the French counterterrorism regime, raises profoundly disturbing questions for those engaged in the federal government’s national security consultations.

While the French and Canadian systems are different, they do share similarities. For years, individuals subject to security certificates in Canada endured similar ordeals to those faced by Diab. They were in prison without charge, facing deportation, based on secret intelligence they could not contest and which, as former Canadian Security Intelligence Service (CSIS) director Jim Judd acknowledged in 2008, could very well be the fruit of torture. Information not normally admissible in a court of law could be received by the security certificate judge as evidence and then discussed with government lawyers and CSIS in the absence of the detainee and their lawyers. It is no wonder the Supreme Court of Canada recognized, in a 2007 ruling on the process, “one cannot be sure that the judge has been exposed to the whole factual picture.”

With the C-51 anti-terrorism omnibus legislation now in place, concerns continue to grow that Canadian state security agencies will get their wish to use intelligence as evidence in *any* legal procedure. In 2009, the UN Special Rapporteur on Human Rights and Counterterrorism warned about the blurring of intelligence and evidence, noting that it leads to an increasing reliance on secret processes instead of open courts, where proof beyond a reasonable doubt ensures a more accountable examination of the case. In addition, the use of intelligence tends to invoke a greater degree of secrecy over any judicial procedures, as governments argue their sources must be protected.

While Diab and his supporters continue working to return him home to Canada, the very legal infrastructure that landed him in a Kafkaesque nightmare continues to operate relentlessly, and quite often secretively, under Harper's C-51 expansion of state security powers—all in the name of protecting the very freedoms that have proven so elusive in his case.

Indeed, the experiences of security certificate detainees and individuals like Hassan Diab, among others, will certainly cast a shadow on the federal government's response to the green paper consultation. At the same time, a major obstacle to combating C-51is the relative lack of information on who has been most affected, and how, by its sweeping reach. Given the secrecy that continues to envelop the world of Canadian intelligence, and the dearth of accountable oversight mechanisms, organizations such as CSIS and the RCMP may continue, like agents of the French counterterrorism system, to make problematic claims about alleged threats while those being targeted remain in the dark.

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