

Governing the Ban: The Canadian Security Certificate Initiative and management of non-citizen terror threats

by

Shannon Theresa Speed

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Examining Committee Membership

The following served on the Examining Committee for this thesis. The decision of the Examining Committee is by majority vote.

External Examiner	GEORGE PAVLICH Full Professor, Department of Sociology and Faculty of Law, University of Alberta, Edmonton, Alberta, Canada
Supervisor	DANIEL O’CONNOR Associate Professor, Department of Sociology & Legal Studies, University of Waterloo, Waterloo, Ontario, Canada
Members	PHILIP BOYLE Assistant Professor, Department of Sociology & Legal Studies, University of Waterloo, Waterloo, Ontario, Canada KATHRYN HENNE Assistant Professor, Department of Sociology & Legal Studies, University of Waterloo, Waterloo, Ontario, Canada KIM RYGIEL Associate Professor, Department of Political Science, Wilfrid Laurier University, Waterloo, Ontario, Canada
Internal-external Member	EMMETT MACFARLANE Associate Professor, Department of Political Science, University of Waterloo, Waterloo, Ontario, Canada

Author's Declaration

This thesis consists of material all of which I authored or co-authored: see Statement of Contributions included in the thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

Statement of Contributions

For this dissertation, I independently carried out all interviews, document collection, and drafted all content. My supervisor, Dr. Daniel O'Connor, and I collaborated on the analysis.

Abstract

Security certificates were designed to act as orders for the immediate detention and expedited deportation of persons deemed to be threats to national security. Legislated during the Cold War when espionage was a heightened threat, the deployment of certificates as a counter-terrorism strategy is complicated by the resistance of persons named as threats to national security (“named persons”), legal counsel, and popular movements. This has resulted in protracted detention and delayed deportation for named persons. The failure of deportation objectives has resulted in a complex governing assemblage, one that enfolds procedures and personnel from various registers. Extended detainment has led to the borrowing of various technologies from the disciplinary apparatus, such as provincial detention centres, federal prisons, and conditional release strategies that make use of sureties. Elements of the legal apparatus are also incorporated: Special advocates are invented to deal with the issues of secrecy surrounding national security process as intelligence is introduced as ‘evidence’ in courts that are tasked with the problem of determining the reasonableness of certificates and associated detention. This blurring of intelligence and evidence risks the establishment of troubling precedent for immigration and criminal proceedings. An examination of the spatial-temporal (chronotopic) dimensions of certificate processes reveals how a state of insecurity can morph into an improvised assemblage combining security and legality. This examination of certificate proceedings provides insight into how non-citizen terrorism threats are managed in Canada and the implications of failing governance operations for justice.

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List of Abbreviations

ATI/FOI	Access to Information/Freedom of Information
CBSA	Canada Border Services Agency
CEA	Canada Evidence Act
CI	Confidential Informant
CIA	Central Intelligence Agency
CIC	Citizenship and Immigration Canada
CIDT	Cruel, Inhuman or Degrading Treatment
CSC	Correctional Service Canada
CSIS	Canadian Security Intelligence Service
FBI	Federal Bureau of Investigation
IRCC	Immigration, Refugees and Citizenship Canada
IRPA	Immigration and Refugee Protection Act
KIHC	Kingston Immigration Holding Centre
PRRA	Pre-removal Risk Assessment
PSC	Public Safety Canada
SAP	Special Advocate Program
SCC	Supreme Court of Canada
SCI	Security Certificate Initiative
SIR	Security Intelligence Report
VOICE	Victims of Immigration Crime Engagement

Introduction

This dissertation provides an analysis of various facets of the Canadian Security Certificate Initiative (SCI). Created as an administrative immigration process to respond to threats such as Soviet espionage, organized crime, and terrorism in 1978, the SCI is currently in use to remove non-citizen, terrorist threats from Canada. The initial SCI process involved the issuance of the certificate by designated Ministers on the recommendation of government agencies regarding the inadmissibility of the individual named in the certificate. Certificates were designed to act as expedited deportation orders. They have succeeded as such in some cases, but the process has faced more resistance from ‘named persons’ and their legal counsel and has become more protracted over time. Initially, a Special Advisory Board provided oversight for the SCI, but judges have become involved in ‘reasonableness’ hearings, leading to extended detention and seemingly more thorough scrutiny of the cases made against named persons, with a movement towards protecting the rights of these non-citizens. The introduction of the courts and extended detainment have led to the incorporation of criminal tools to manage named persons as well as to establish precedent for rulings—though the SCI remains a purely administrative assemblage.

To provide an in-depth analysis of the SCI, the dissertation focuses on five recent certificates—those of Messrs. Charkaoui, Almrei, Jaballah, Harkat, and Mahjoub—as contextualized within the wider genealogy of the SCI. Each of these named persons had certificates issued against them for different reasons at different times, though respondents highlighted the temporal correlation with 9/11 and that the men are Muslim. Messrs.

Jaballah and Mahjoub had pre-9/11 certificates issued¹, while Messrs. Charkaoui, Almrei, and Harkat had their ordeals initiated in the months and years that followed. The Reasons for Decision in reasonableness determinations, detention reviews, and additional judicialized aspects of the cases provide insight into the information on which the cases are based and the rationales (legal and otherwise) for decisions, reflecting the progress of the legislation and cases overall. A significant body of literature exists on the legal intricacies of these cases, but the sociological and socio-legal literature is somewhat limited. This dissertation fills in a gap by using sociological theory to examine some societal and political corollaries of the SCI as a mechanism of governance. This investigation illuminates the powerful administrative processes at work under the SCI and the use and contestation of the SCI as a viable socio-legal mechanism for the promotion of national security. The evolution of the SCI indicates a post-9/11 political climate that prioritizes national security over honouring conventional legal proceedings.

This dissertation approaches the SCI as a problem of governance and as a problem of the ‘scale’ of governance. Focus on the notion of scale allows for conceptualization of how the SCI integrates multiple systems of legality from different ‘levels’ of governance. In other words, it considers how criminal and immigration components are appropriated, distorted, and integrated into national security administrative law and proceedings. The question driving this dissertation is: How are non-citizen national security suspects managed in Canada? As an assemblage of national security, the SCI appropriates technologies from the rule of law abiding criminal justice and immigration systems and perverts them by applying them in a way that dishonours rights and justice norms. The

¹ Mr. Jaballah had a Certificate issued against him in 1999, which was quashed by a judge and followed by another Certificate based on “new” information in August 2001.

SCI operates under some rules of exceptionality and with questionable (il)legality, as reflected in the many arguments in court that range from the conditions of detention and release to the constitutionality of the SCI. Rather than develop a theory of scale, the aim is to use a scalar analytic to understand how security detention is at work in Canada through interviews and document analysis.

Methodology

To understand the functions of the SCI, interviews were organized through email and mail with individuals working with the SCI in varying capacities. The names of lawyers and judges involved in the legal proceedings are listed in public documents and internet searches provided email addresses for these individuals. Using chain-referral or ‘snowball’ sampling (Babbie and Benaquisto, 2002) I asked interview respondents to identify others points of contact and information on SCI processes. This process produced additional names and contact information for supporters involved in the popular movement to abolish certificates as well as individuals employed by organizations advocating for human rights and migrant issues. Inquiries and multiple follow-up emails yielded a total of twenty interviews.

An interview guide was developed and utilized, but questions and the interview style were kept open and ‘active’ (Holstein and Gubrium, 1995) to allow respondents to speak to relevant issues, such as their professional experience working on the cases or within the popular movement to abolish certificates. This approach generated information on facets of the SCI that were previously not part of the project and opened fresh areas of examination such as the ‘behind-the-scenes’ struggle of special advocates and their limited access to intelligence and witnesses. The use of secret evidence complicated the

project as there were restrictions on what could be known about the cases. However, notably, more individuals who acted as special advocates and have seen the secret information were interviewed than counsel who were not constrained on what could be communicated. No classified information is used in this project, but insight from individuals who have seen the full case files offers a robust understanding of how the SCI is managed.

Interview respondents included: open counsel, special advocates, and legal professionals who have acted as both open counsel and special advocates, a member of the judiciary involved in SCI proceedings, individuals working in the area of human rights, advocacy, or as community activists,² legal scholars, a journalist who covers national security issues, and a representative of Canada Border Services Agency (CBSA). Email responses were received from a representative of the Canadian Security and Intelligence Service (CSIS). Representatives from Immigration, Refugees and Citizenship Canada (IRCC)³ and Public Safety Canada (PSC) declined interviews because of “ongoing litigation.” Correctional Service Canada declined an interview because CBSA was deemed the appropriate ‘detaining authority’ at the Kingston Immigration Holding Centre (KIHC). No response was received from those acting as Ministers’ counsel in SCI cases or from the provincial detention centres involved in SCI detention. Respondents that were interviewed indicated that there would be trouble gaining perspective on the government side, while one thought that some Ministers’ counsel likely would be willing to be interviewed. The ‘Reasons for Decision’ offer valuable insight into the perspective of

² Interview respondents are identified based on their role. Those working within the popular movement to abolish certificates are recognized by how they self-identify.

³ Previously Citizenship and Immigration Canada.

judges as two judges declined interview requests stating that “the judgments of the Court on these issues speak for themselves” and that “judges are to speak through their reasons.”

The secrecy surrounding the SCI was both a hindrance to research and a topic of exploration.⁴ While most judges provided two separate Reasons for Decision—one public, one classified—some Reasons for Decision were heavily redacted, making it difficult to understand the nuances of cases, as shown in the following redacted extract:

Page: 73

[163] [REDACTED]

[164] [REDACTED] gave evidence that [REDACTED]

[165] [REDACTED]

[166] The evidence also indicates that in [REDACTED]

2010 FC 787 (CanLII)

Illustration 1: (*Mahjoub (Re)*, 2010 FC 787 (CanLII) p. 73)

While archival research affords valuable insight into government process, this dissertation emphasizes the experiential aspects of navigating the SCI. Document analysis provides

⁴ One respondent was not comfortable being interviewed over the phone or having their interview recorded because CSIS has been known to tap phone lines—this discomfort was validated by other lawyers interviewed noting that their phone lines had been tapped in the past.

important context for interviews, and using publicly available court documents bypassed the access challenges of secret and redacted documents. Clément (2015) suggests that historical research is hindered by government secrecy. However, Access to Information/Freedom of Information (ATI/FOI) requests can provide rich databases for research when the nuances of making requests are understood (Walby and Larsen, 2011a, 2011b). Based on ATI/FOI requests, archival research on the SCI by Larsen and Piché (2009) yields important insights into SCI governance mechanisms, with significant archival research also having been carried out on the policing and surveillance of activism (See Crosby and Monaghan, 2016; Monaghan and Walby, 2012, 2016; Walby and Monaghan, 2011). Kealey (1988) suggests that it is safer for CSIS to release the files than to get a precedent-setting ruling from the court; however, “The depths of information accessed through the [Access to Information Act] can be remarkable, yet researchers continue to encounter stonewalling” (Monaghan and Walby, 2012: 138). Carrying out interviews provides a non-government viewpoint and avoided the potential downfalls of archival research on a government mechanism that relies heavily on secrecy.

Theoretical Intervention

The main theme of this dissertation is the relationship between legal norms and security exceptions as evident in the use of general suspicion leading to deportation and banishment (Bigo, 2006). The SCI could be characterized as both a pre-crime measure (Zedner, 2007) and ‘counter-law’ (Ericson, 2007a); however, the SCI is more than a pre-crime undertaking or law that undermines conventional notions of legality. Numerous legal challenges have shaped the SCI into an ad hoc assemblage whose legal failings and unconstitutional status are the subject of abundant revisions. Despite the ongoing

challenges, and being, in part, a relic of the Cold War, the SCI is continually upheld as a functional—or, at least functioning—security initiative.

The idea of counter-law has largely been focused on *criminal* sanctions and the criminalization of what has previously not been accepted as criminal behaviour. There are two forms of counter law: “passing laws that negate the traditional principles, standards and procedures of criminal law,” and “surveillance infrastructure that facilitate direct behavioral control and self-policing without recourse to legal regulation” (Ericson, 2007b: 3, citing Foucault, 1995 (1977 edition)). Authors writing on counter-law do so mostly in reference to criminality (Ericson, 2007c; Lawrence, 2017; Levi, 2009). Using this literature as a starting point, Larsen and Piché (2009: 209) expand upon the criminal concept suggesting that “The Canadian security-certificate mechanism is a textbook example of counter-law.” By framing the Kingston Immigration Holding Centre within Ericson's (2007) theory of counter-law, Larsen and Piché (2007: 16) show how the SCI reflects such neo-liberal risk management strategies despite the process deliberately being kept distinct from criminal law. While the SCI meets the characteristics of ‘law against law’ and the erosion of traditional legal standards in the face of uncertainty, the lack of criminality opens up new avenues for consideration.

The connection between counter-law and pre-crime traces back to the Vagrancy Act of 1824 in the United Kingdom (Lawrence, 2017). Such legislative and enforcement practices are also characterized as the difference between the talk of law (law on the books) and the walk of law (law in practice) (Calavita, 2010). The suggestion that there is a “long history of the power to arrest and convict on suspicion and intent” (Lawrence, 2017: 526), supports Levi's (2009) analysis of 1992 ‘Gang Congregation Ordinances’ in

Chicago, and Ericson's (2007c) assertion that counter-law is not a product of 9/11.⁵ Rather, vague legislation and broadly defined police powers and discretion characterized (self-) policing and Anti-Social Behaviour Orders (Ericson, 2007b), as well as stop and search abilities as terrorism precaution in London dating back to 1994 (Lennon, 2015). In exemplifying the integration of national security into criminal justice, McCulloch and Pickering (2009) suggest that criminalizing preparatory acts for an offence is actually too late—national security advances a temporal shift to criminalizing intent and therefore a movement towards “pre-pre-”crime. Such a temporal shift appropriately characterizes the SCI where intelligence seemingly does not even offer enough proof to mount a legitimate pre-crime charge under conventional rules of evidence.

Counter-law is a pre-crime crime strategy to the extent that it treats “everyone as if they were guilty of criminal intent” (Ericson, 2007c: 6). Where security initiatives tend toward ‘pre-crime’ (Zedner, 2007) by securitizing intent (McCulloch and Pickering, 2009) and acting in advance of an actual offence, conventional criminal justice systems tend to be ‘post-crime’ and reactionary to offences already committed. Counter-law as used for national security and to manage the risks of terrorism often invokes criminalization strategies⁶ (McCulloch and Pickering, 2009) in addition to war and militarization strategies (Welch, 2007).⁷ Under the SCI, counter-law treats persons named in certificates as if they are criminals guilty of intent, but maintains the assemblage under administrative law; ideas of pre-crime and counter-law that emphasize policing and criminality are

⁵ Though post-9/11 examples exist in legislation such as the 2001 USA Patriot Act and the Canadian Anti-Terrorism Act.

⁶ Though the “terrorist” label is pre-emptive and political rather than criminal (McCulloch and Pickering, 2009).

⁷ The Supreme Court invalidated Bush’s use of war and militarization to combat terror in 2006 (Welch, 2007).

complicated by the lack of formal reference to criminal justice and emphasis on administrative immigration measures. Law may shape the appearance of governing powers (sovereignty) (Pavlich, 2013) with the SCI evidencing precluding and hybrid governance. The nuances of criminality come out in the treatment (detainment) of individuals and some of the proceedings and motions utilized, however there is no officially recognized connection between the SCI and the criminal justice system.

Rather than the discretionary policing of counter-law (Ericson, 2007c), broad judicial powers enable judges under the SCI to transgress the high standards of evidence and procedure associated with criminal justice, with vague standards (not) defined by legislation leading to fewer rules to constrain CBSA enforcement agents. Both Lennon (2015) and Welch (2007) write of counter-law initiatives that have not passed judicial scrutiny. The SCI differs in that it was ruled unconstitutional in a 2007 Supreme Court of Canada ruling (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC9), but was left in place and the government was allowed one year's time to make it constitutional.⁸ Despite acknowledging the 'law against law' features of the SCI, it was allowed to continue under the auspices of national security.

The premise of counter-law under the SCI and national security, is addressed by McCulloch and Pickering (2009: 634) who suggest that a "legal framework that tries to see into the future inevitably blurs the line between evidence and intelligence." Under the SCI, intelligence is used in the place of evidence to support detention and, ultimately, the banishment of terror suspects. Such undertakings, founded on the need to protect state secrecy, push the SCI beyond the limits of conventional legality into a space of exception.

⁸ This was done through the creation of the Special Advocate Program and upheld as constitutional in 2008 (*Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 SCR 326, 2008 SCC 38 (*CanLII*)).

Actions in this space are carried out in an ad hoc manner. The temporal premise attempts to designate an act as “pre-pre- crime,” however, both the legislative premises and the detention practices that they enable are subject to continual revision and prolonged legal battles. Much of the literature on Ericson's (2007a) counter-law connects with Agamben's (2005) state of exception, as a provisional governing strategy. Both focus on the suspension of the (legal) norm and the exception becoming the norm. In this instance, the SCI is best characterized by the twin processes of the securitization of legality and the legalization of security forming a hybrid national security assemblage. In other words, under the SCI, the urgency of securing led to compromises in rights standards typically honoured by the law, while at the same time security practices by intelligence agencies are subject to more legal rigour as CSIS agents find themselves in court. The ongoing contestation reflects the struggle between rights and security being far from zero-sum, but a complicated assemblage that incorporates many compromises that satisfy few actors.

Here, the research contribution elucidates some of the inner working and assumptions of the SCI as a legal assemblage that indicates the ongoing shift of governance. Detention, court practices, and SCI spacetimes make up parts of a governance network. This dissertation shows the progression of how actors operating within ‘nodes of governance’ (Burriss, Drahos, and Shearing, 2005) adapt to the complexity of national security and manage problems that arise. The contestation within these more recent SCI cases exposes the lapse of broad legal principles within democratic society—a core consideration of Critical Legal Studies (Calavita, 2010); both undefined detention and the use of intelligence in the courts lack clear legislative precedent, while the SCI spacetimes demonstrates the problem of unworkable conditions and knowledge deficits for actors.

The governance processes that have developed within these nodes reflect a hybrid use of legal and (il)legal/exceptional measures within the SCI.⁹ This project offers a careful investigation of how practices of governance have transformed with regards to suspected national security offenders.

Chapter Outline

This dissertation carries out a genealogy of security detention in Canada—security detention is understood as the detainment of non-citizens on the grounds of national security concerns. Certificates are a problem of government as evidenced by the maneuvering involved in their perpetuation.¹⁰ The constant re-working of the SCI reflects the governmentality conception of government as a “congenitally failing operation” (Miller and Rose, 2008: 17) and shows the ongoing debate of the relationship between security and liberty (Dean, 2010: 138) as shaping an ‘art of government’ that emphasizes national security in order to shape conduct (Walters, 2012) of citizens and non-citizens alike. The ad hoc nature of the proceedings and ‘make-it-up-as-you-go’ approach results in a protracted process that was initially devised to expedite deportation. Evident in interviews and court documents is an ongoing tension between security and justice complicated by being administrative (immigration) proceedings with seeming criminal consequences. The chapters provide insight into different aspects of the SCI as a governance assemblage. Each uses different framing, but all are indicative of a

⁹ Trubek and Trubek (2005) tout the benefits of hybridity in law using the example of combining ‘hard’ and ‘soft’ law. The incorporation of otherwise unacceptable legal practices into the SCI has created both ‘problems’ and ‘goods’ for the SCI as a governance network (Burris, Drahos, and Shearing, 2005).

¹⁰ Recognizing Latour's (2010) Actor Network Theory, this dissertation exhibits ‘following the file,’ identifying both human and nonhuman actants “required for law to remain in place” (Levi and Valverde, 2008).

governance tool that faces obstacles in attempts to translate or transpose ideas, information, and practices between criminal and security environments.

The first chapter offers an analysis of the detainment and conditional release of named persons and offers an analysis of the SCI as a hybrid security assemblage. Acknowledging risk management literature, this chapter suggests that measures previously reserved for low-level criminal offenders are being utilized to neutralize national security threats. Through a combination of sureties and CBSA monitoring, named persons became subject to community-based surveillance following prolonged detention. The ‘cimmigration’ literature suggests that the SCI operates discretely from common, criminal, and immigration law, but incorporates characteristics of each under the guise of ‘speculative risk.’ Use of preventative, rather than punitive, measures such as common law peace bonds justify release and associated conditions. However, the seriousness of allegations and harshness of restrictions is suggestive of punishment that uses emotionally and financially invested loved ones as jailers.

The second chapter probes the use of intelligence in the place of evidence within courtrooms. As an example of Baudrillardian simulation, grounding cases in ‘secret evidence’ constitutes a political structure (*homo sacer*) of ‘simulated justice’ that creates a zone of indistinction at the threshold between potentiality and reality and the norm and the exception, acting upon the figure of ‘bare life.’ Court documents and interview excerpts highlight the problem of using duplicated, translated, and transposed intelligence in place of evidence. Under the SCI the ‘proof’ threshold is significantly lower than that of criminal law and, even with the introduction of special advocates, the possibility of rigorously testing the information is limited. By elucidating the (unclear) path of summary

information, the ‘inequality of arms’ in court, and the overclaiming of national security privilege by Ministers, reliance on intelligence obscures reality and presents problems for governance.

The third chapter uses a genealogical approach to explore the spatial and temporal aspects of the SCI. The scalar dimensions of SCI involve ideas of affect, time, space, and jurisdiction to constitute a form of legal chronotope that explains some of the more obscured components of the SCI as a governance process. Mood pervades the SCI in its entirety and acts as context for the examination of the spatial and temporal confines of characters working on the court cases. Approaching the SCI as a spatiotemporal event reveals that the SCI works as an ad hoc assemblage. This impromptu quality is reflected in the series of legal challenges that work to defuse terrorist threats via spatial and temporal manoeuvring. The necessity of spatial and temporal manipulation, as well as the affect of unease, is a consequence of efforts to manage secrecy.

Summary

Providing national security for Canada is the intent of the SCI. Understood as for the common good in a democratic state, security enterprises are often left unquestioned by citizens. Fueled by anti-immigrant, racist, and terrorist threat rhetoric¹¹, there exists a powerful opinion that ‘they must have done something’¹² to initiate the removal process. However, the SCI, applicable to only non-citizens, has acquired a popular movement of

¹¹ (Anderson, 2013; Bell, 2011b; Benhabib, 2004; Buck-Morss, 2003; Goldberg, 1993, 2009; Mamdani, 2004; Mills, 1997; Mountz, 2010; Pratt, 2005; Razack, 2002, 2008; Said, 1979, 1997; Stasiulis and Bakan, 2005; Sullivan and Tuana, 2007)

¹² One respondent noted that “sometimes, yes, there can be smoke without fire” when it comes to security accusations (Interview with Community Organizer, Ottawa, July 2015).

citizens campaigning against it.¹³ Concerns with security measures are largely due to the countering of security with freedom, rights, and justice. Opposition to the SCI is rooted in the violation of rights of named persons and secrecy surrounding the proceedings.¹⁴ Suspicion centred on secret knowledge, the introduction of intelligence in the place of evidence, and the goals of deportation and banishment complicate the SCI process for which inventive solutions are posed. While named persons languish under improvised detention release conditions, the legal process continues within liminal spaces with special advocates serving as intermediaries of security and justice.

As a collection, these three chapters address diverse but connected aspects of the legal-exceptional nature of the SCI. This dissertation presents a sociological and socio-legal analysis by offering insight into two main institutional spaces in which the SCI is implemented—those of confinement (exceptional detention in institutions and the community) as addressed in the first chapter and those of decision-making (the courts) as addressed through a consideration of intelligence as evidence in the second chapter. The in-depth consideration in the third chapter provides a spatial-temporal context (the bunkers) for the distinctive judicial and advocate roles. Together, these chapters show how the governing of non-citizen suspects involves the interaction and interplay of judicial norms and security exceptions through consideration of conditional release, courtroom, and legal spatial-temporal practices. The precariousness of non-citizen governing in pursuit of national security in Canada requires reconsideration to ensure a cohesive and

¹³ Some organizations that have taken a public stance against the SCI include: Amnesty International, Canadian Civil Liberties Association, Canadian Council for Refugees, Homes Not Bombs, and International Civil Liberties Monitoring Group.

¹⁴ Palmer (2012: 524) suggests that opposition to illiberal practices by criminologists and ‘academic elite’ come from the privileged position of not being “held accountable should a bomb explode killing and maiming innocent civilians.”

just process due to the ongoing negotiation of the ambiguity between the legal norm and exception.

Chapter I: Speculative Risk: Legal hybridity and the management of terror suspects

Introduction

This chapter considers the risk assessment and release of migrants detained under the Canadian Security Certificate Initiative (SCI) for suspicion of involvement in terrorist activities. As an administrative assemblage designed to manage terror threats, the SCI incorporates some, but not all, of the logics and legal practices used to manage risk in criminal cases. Assemblage refers to a collection of techniques used to govern populations (Foucault, 2007a).¹⁵ ¹⁶ In this case, risk assessments are carried out by members of the judiciary who render decisions about the release and release conditions of suspected security threats. Release decisions are based largely on the trust accorded to community and familial sureties, rather than suspects, and bonded community functionaries are enlisted to act on behalf of the state in managing terror threats. These functionaries are tasked with providing ‘soft’ surveillance of suspects with the Canadian Border Services Agency (CBSA) providing additional ‘hard’ oversight of suspects and their bonded sureties.¹⁷ This strategy for managing terror threats involves ‘speculative risk,’ a hybrid risk regime utilizing selective and rescaled common, criminal, and immigration law conventions to enact a form of community-based surveillance.

¹⁵ Following Rabinow, Walters (2012: 77) suggests that apparatuses are “stable and enduring”, while assemblages are “highly experimental, fluid and possibly ephemeral”; “Assemblages either crystallize into apparatuses, or they fragment and disappear.” The Charkaoui II decision and the creation of the Special Advocate Program has entrenched the SCI, however subsequent decisions have made significant changes to the SCI and its future utility has not yet been realized.

¹⁶ Legg (2011: 131) suggests that “apparatuses be considered a type of assemblage” and that they exist in a dialectical relationship both as concepts and things. Following Deleuze, assemblages are useful for conceptualizing opposing forces and re-/de-territorialisation that exist in continual resistance and can lead to order or disorder, though without resolving the opposing forces (Legg, 2011: 129).

¹⁷ The terms ‘hard’ and ‘soft’ denote different kinds of surveillance, rather than differences in the degrees of surveillance. That is, soft surveillance is not easier than hard surveillance; it is different in intensity. Hard surveillance is ‘top-down’ from government agencies, while soft surveillance is ‘bottom-up’ from familial connections.

Through inadmissibility determinations, the SCI attempts to manage the future and to prevent potential security offences from occurring. The decision that someone is a potential security threat is supposed to result in their speedy deportation and banishment from Canada. While such preventative threat management strategies typically contrast with conventional criminal justice logics and procedures, they nevertheless enfold some key aspects of criminal justice risk management. The remedial management of security threats suggest a ‘scaling-up’ of legal and administrative logics and practices and their incorporation in a national security assemblage of the SCI. Such scaling operations are reflective of what some scholars call ‘crimmigration,’ the blurring of the differences between criminal and immigration law and proceedings. Notwithstanding the position of the SCI within the rubric of immigration law, a technical immigration infraction does not have to occur for a certificate to be issued.¹⁸ The combinatory nature of these legal practices indicates legal hybridity which does not require the government to choose a single approach (Trubek and Trubek, 2005). The perspective of this chapter is that the SCI is a distinct and transforming national security assemblage that operates separately from common, criminal, and immigration law while appropriating aspects of each. As a problematical intersection of security and legality, the SCI assemblage is subject to ongoing revision (see Walters (2017) on the instability of governmental assemblages).

Due to the undefined nature and indefiniteness of SCI detention, varying technologies are incorporated to manage the risk believed to be posed by named persons, which is neither immigration or criminally based. The unique circumstances of the SCI have resulted in a form of speculative risk management that occurs alongside other

¹⁸ The Global Detention Project (2012: 6) states, “Because this ground for detention is not related to questions about a person’s status, the Global Detention Project does not consider it to be a form of immigration-related detention.”

calculative forms of risk management such as ‘fluid’ and ‘categorical’ risk (see Brown, 2000), and to which it bears a kind of family resemblance. This form of risk management seems unique to crimmigration and the national security context. With preventative, rather than punitive, aims and grounded in suspicion rather than immigration or criminal offences, the release of non-criminal, non-citizens from national security/immigration detention combines hard and soft surveillance by state and community agents to manage national security threats.¹⁹

This chapter looks at the use of administrative detention in cases of national security that utilizes elements of both immigration and criminal law for its implementation and rationalization. The increasing use of detention as a technology of citizenship for governing associates immigration with criminality, regardless of the basis for detention (Rygiel, 2012). The framework of ‘crimmigration’ is used to understand how legal hybridity created by the marrying of these governance nodes is conceptualized, and then the chapter builds upon that to demonstrate the SCI as a unique hybrid legal assemblage. A consideration of the historical use of peace bonds in civil and criminal proceedings suggests that the conditional release of national security offenders is an extension of this already existent method of pre-emptive social control. The way in which risk assessment strategies are implemented (and perhaps fail) in these cases are examined, and indicate that while the dynamics of circumstances are acknowledged, the subjectivity of the

¹⁹ The conditional release of suspects detained under the Security Certificate Initiative include:

- Mr. Charkaoui (released in 2004 following his fourth application);
- Mr. Harkat (released in 2006 following his second application and after the government’s appeal of the release decision was dismissed);
- Mr. Mahjoub (released in 2007 on his third application. He was subsequently returned to detention and released again in 2009);
- Mr. Jaballah (released in 2007 after his third application); and
- Mr. Almrei (release in 2009 after is fourth application, having appealed the dismissal of his third application).

suspects endures as a static risk. The difficult position that judges are placed in when making decisions based on an amalgamation of laws is noted, and aids in demonstrating a potential pitfall of hybrid governance assemblages as a way of managing the threat of terrorism.

Methodology

This chapter is part of a project that investigated the SCI through interviews and court records. Twenty interviews were carried out with individuals working in varying capacities within the SCI. Interview respondents included: open counsel, special advocates, and legal professionals who have acted as both open counsel and special advocates, a member of the judiciary involved in SCI proceedings, individuals working in the area of human rights, advocacy, or as community activists, legal scholars, a journalist who covers national security issues, and a representative of CBSA. Email responses were received from a representative of the Canadian Security and Intelligence Service (CSIS). Representatives from Immigration, Refugee and Citizenship Canada (IRCC)²⁰ and Public Safety Canada (PSC) declined interviews because of “ongoing litigation.” Correctional Service Canada declined to interview because CBSA was deemed the appropriate ‘detaining authority’ at the Kingston Immigration Holding Centre (KIHC). No response was received from those acting as Ministers’ counsel in SCI cases or from the provincial detention centres initially involved in SCI detention.

Interviews for this project were open in structure with the respondents being asked to speak to what they believed to be important, but followed an ‘active’ interview guide (Holstein and Gubrium, 1995). The questions posed to respondents varied somewhat

²⁰ Previously Citizenship and Immigration Canada.

based on their work with regards to the SCI. Each interview opened with questions about how the respondent is involved with the SCI and what their experience has been. The questions that followed asked about: the respondent's experience within Canadian (or International) legal systems and how the SCI is similar or dissimilar; what the respondent believes is, and is not, working under the SCI; and what changes could be made and what should remain in place under the SCI. Questions were also posed about policies, regulations, and legislation that may apply to the respondent's work, as well as what their experience and interactions have been with regards to following such government guidelines. Further, questions were posed about characterizing the individuals who have been detained under the SCI. Finally, respondents were given the opportunity to add anything that they felt was not covered by the interview questions. The duration of the interviews ranged from twenty minutes to two hours, with most lasting approximately one hour. With permission, all interviews except one were recorded and transcribed verbatim for purposes of analysis.

Open and axial coding yielded key themes from the interviews, which were: concerns over the blurring of distinctions between intelligence and evidence; the impact of preventative detention on rights; and the 'slippage' between immigration and criminal justice both in terminology and process. This chapter is also based on court records concerning applications for release from immigration detention in five recent certificate cases. Federal Court Justices were tasked to determine whether deportation was imminent, the risk to public safety posed by suspects, and whether and how this risk could be managed if the suspect were to be released from immigration detention.

Taken together, the datum show a governing assemblage about which there is a significant amount of disagreement and ongoing alterations. Most respondents expressed unease over the secrecy of the SCI proceedings, indicating this as a foundation for how the SCI has transformed. Some respondents were staunchly opposed to the system, while another believed that with the introduction of special advocates the SCI can be useful if properly managed, despite having self-proclaimed “bitchiness” towards the system (Interview with lawyer, Toronto, April 2015). Similarly, Craig Forcese finds that following the latest Harkat ruling²¹ “it’s quite a good system”²² (Interview, Ottawa, October 2014). Another respondent believes that the process has been refined and the Special Advocate Program (SAP) is “now well established and it works smoothly” (Interview with Judge, Ottawa, December 2014). A prominent perspective among the legal professionals interviewed was that they are doing their best to work within an imperfect system (Interview with lawyer, Toronto, October 2014). One respondent noted that there are many legal tools available for dealing with security and immigration, but the SCI is akin to using a sledgehammer to hang a picture (Interview with lawyer, Ottawa, April 2015).

Additionally, the datum reflect diverse perspectives; there is no consensus on the ‘correctness’ of judicial processes or decisions—even the members of the judiciary express trepidation about the one-sidedness of the cases they are presented with within their Reasons for Decision. The chapter also includes excerpts from Reasons for Decisions in SCI reasonableness hearings interspersed with the views of respondents on SCI legal assemblage in general, legal procedures, and specific comments on national security

²¹ *Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII).

²² This assertion is made in comparison to ‘regular’ immigration proceedings that involve fewer rights protections being used for security matters.

detention. Before explaining those analytic findings, the chapter considers what certificates are, the practices they entail, and their stated aims.

Security Certificates: National security, immigration, and criminality

Issued and managed by the CBSA and co-signed by the Minister of Immigration, Refugees, and Citizenship and the Minister of Public Safety and Emergency Preparedness, certificates are immigration mechanisms used to designate non-citizens inadmissible to Canada on grounds of national security. Those subject to certificates are detained in an immigration or criminal facility pending their deportation. The legislation was initially developed under the Immigration Act of 1976 and currently exists under the Immigration and Refugee Protection Act (IRPA) of 2001. Certificates are not post-9/11 creations to respond to those acts of terrorism,²³ nor have they been used extensively.²⁴ The first certificate was issued in 1991 and only twenty-seven have been issued to date (Public Safety Canada, 2015). Immigration law is an important antiterrorism tool as it offers broader liability rules, lowers the burden of proof, increases periods of investigative detention, and enables fewer rights and protection safeguards than criminal law (such as the 2001 Anti-Terrorism and the 2012 Combating Terrorism Acts (See Roach, 2011: 41, 2012)).

According to PSC, certificates are a purely administrative immigration proceeding with the objective of removing non-Canadians who pose a serious security threat to Canada and Canadians (Public Safety Canada, 2015). Under IRPA, the specific concern is with security, the violations of human or international rights, serious criminality or

²³ Whitaker (2002: 30) argues that refugee policy in Canada was framed as a national security issue prior to September 11, 2001, suggesting that “September 11 simply accelerated a process already well in place but not fully up to speed.”

²⁴ Six new persons have been named in Certificates since the events of 9/11—two of which are accused of acts other than terrorism.

organized criminality (Immigration and Refugee Protection Act, 2001: Division 9, 77(1)). These claims allow for the SCI procedures to be carried out through purely administrative channels that reduce the onerousness on the government to show cause for inadmissibility determinations. Pursuing security threats and serious criminality under immigration law creates exceptionality vis-à-vis criminal procedure and legal protections. Under this exceptionality, selected logics and technologies are ‘scaled-up’ from the conventional criminal justice and immigration systems. The decisions and conditions involved in the release of SCI detainees from immigration custody brings to the fore the complex relationship of common, criminal, and immigration law and policy. Despite the government stance that SCI proceedings are purely administrative and immigration based, this chapter suggests that the SCI yields a more complicated, hybrid assemblage of security governance. Specifically, gaps in written law (Calavita, 2010) are filled by laws playing different, but mutually reinforcing roles (Trubek and Trubek, 2005). Rather than selecting immigration *or* criminal law to govern security, techniques from both may be used through legislative amendments and discretion.

Through various articulations, crimmigration (Stumpf 2006) has become a common frame for understanding the nexus of criminal law, immigration policy, and security regimes to deal with contemporary migration concerns (Aas, 2011, 2014; Beckett and Evans, 2015; Bosworth and Kaufman, 2011; Eagly, 2010; van der Woude, van der Leun, and Nijland, 2014: 562). The convergence of crime and immigrations controls is also characterized as “ad hoc instrumentalism,” where, in the face of particular problems, “officials are encouraged to use whichever tools are most effective” (Sklansky 2012: 161). Using immigration law for criminal circumstances is a way for states to

“launder...criminal sanctions/punishments through a civil law narrative” because deporting someone is easier than pursuing criminal justice sanctions (Koulish 2012: 91).²⁵ While immigration law absorbs some of “the theories, methods, perceptions, and priorities” of criminal enforcement, it also explicitly rejects the procedure of criminal adjudication (Legomsky (2007: 469). Crimmigration is seen to result from the “criminalization of immigration,” (Stumpf, 2006; Bosworth and Kaufman, 2011) as much as it is the result of the “immigrationization of criminal law” (Legomsky, 2007; van der Woude et al., 2014). Others argue that the blurred boundary of the criminal law and immigration enforcement nexus is a reflection of an “escalating cultural obsession with crime and security” Sklansky (2012: 195). This may explain why crimmigration, as an approach, did not develop prior to the twentieth century (Cuauhtémoc and Hernández, 2013).

In general, the literature suggests that criminal and immigration processes have converged around the problem of non-citizen transgressions or potential transgressions, and that this convergence is largely driven by securitization processes. While much of the crimmigration literature focuses on the criminalization of non-citizens, the SCI is concerned with the detention/deportation and subsequent conditional release of suspects who are considered security threats but not criminals. As a consequence, the SCI provides a unique vantage point from which to examine the nexus of contemporary crimmigration and securitization processes.

Assessing the Threat: How the SCI constructs dangerousness

²⁵ President Donald Trump’s 2017 “Victims of Immigration Crime Engagement” (VOICE) reinforces the problematic ideas behind such approaches (Nixon and Robbins, 2017).

Ideas of ‘risk’ and ‘threat’ are prominent in discussions of national security. It is thus important to understand how these terms are operationalized and made technical and practical by Canadian security officials. The Royal Canadian Mounted Police asserts that risk assessment “is a method by which the probability of generally violent behavior is estimated for an individual based upon his membership in a particular at-risk group” (Meloy et al., 2011: np). Conversely, threat assessment “is concerned almost wholly with the risk of targeted violence by a subject of concern, and has a behavioral and observational policing focus” (Meloy et al., 2011: np). The type of violence (estimated or purposive) may distinguish risk and threat assessments, but both assessment protocols share a primary concern of managing the future so as to prevent events from occurring. It is noted that securitization routinely employs a ‘family’ of security strategies (see O’Connor, Boyle, Ilcan, and Oliver, 2017) for managing the future. In sum, both risk and threat are suggestive of an anticipatory and pre-emptive approach to managing violent acts as is the purpose of the SCI.

Threat assessment under SCI incorporates aspects of the risk assessment strategies as outlined by Bonta and Andrews (2007). Risk assessment strategies appear at key custodial decision points, in pretrial detention, sentencing, and custodial release determinations. Early or ‘first generation’ risk strategies involve the subjective assessments of criminal justice practitioners and experts who, drawing insights from witnesses, records of past offences, and interactions with offenders, assess, on a case-by-case basis, the character and culpability of offenders. Expressive qualities such as ‘remorse’ serve as a means of insight into an offender’s character and as an index of their risk (Duguid, 2000). Conversely, ‘Second generation’ risk assessments involve statistical

estimations of the probability of offending or reoffending based on membership in an at-risk group while moderating practitioner judgments (Bullock, 2011). Such evidence-based models of reoffending are said to be better at predicting criminal behaviour than first-generation assessments on character (Miller and Morris, 1988). ‘Third-generation,’ or dynamic risk, assessments incorporate criminogenic needs into static risk predictive models. Systematic monitoring and interventions aimed at assessing and reducing criminogenic needs also serve to reduce the risks of reoffending, thus enabling both the attenuation of risks and levels of supervision over time (Hannah-Moffat, 2005). Conventional custodial and community-based supervision mechanisms, like probation and parole, have been augmented by risk strategies to form a carceral continuum where variations of risk are met with variable levels of supervision. However, under the SCI the information required to carry out assessments such as past records, reliable statistics, and trustworthy witnesses are largely absent making it complex to determine the level of intervention required in these cases.

The generational progression of assessments is presented as a refinement and improvement of each generation upon the last, however, this ‘progress’ misrepresents the multifaceted nature of risk assessment and omits the fact of the deployment of often contradictory and conflicting risk rationalities, conceptions, and responses within the justice system²⁶ (Bonta, 1996; Brown, 2000; Valverde, Levi, and Moore, 2005). Brown (2000) proposes two models of risk in relation to dangerous offenders, putting forward the ideas of ‘fluid’ and ‘categorical’ risk as ideas about risk itself.²⁷ Categorical risk

²⁶ Valverde (2010) makes a similar argument with regards to security projects generally.

²⁷ Brown (2000: 96) notes that this model describes risk itself whereas discussions in the literature on risk generally attempt to sort or categorize ‘risk factors’ or the assessment and prediction methods used to combine them.

assessments are generated by associating behaviour with “established categories of human virtue and character,” resulting in binary classifications system, while fluid risk is considered as “something that exists independently of the assessment system” and is assessed on a continuum (Brown, 2000: 96-97). Attempts at applying such tidy ideas of assessment to the complexity of the SCI results in haphazard decision making, as discussed below.

While criminal justice custodial/release decisions take place under the rubric of one or more risk management strategies, the release of suspected national security threats from custody generally reflects the “ad hoc instrumentalism” characteristic of crimmigration (Sklansky 2012). Evidence-based risk tools developed and deployed to estimate and manage risk within criminal justice are notably absent in SCI cases. The difficulty in applying such risk tools is establishing a known risk group or category in which to enrol the suspect. The application of risk metrics relies on calculations of known risks based on aggregated offence patterns of similar known offenders to estimate the probability of future offences (and the corresponding level of supervision required) (Miller and Morris 1988: 266). When employing professional judgement of risk, practitioners/experts often use the nature of the offence (as an index of the offender’s character) to support determinations of risk. Each of the five SCI cases involves allegations that the suspect is or was a member of a terrorist organization. Substantiation of such allegations is largely drawn from repositories of secret information that is restricted from public/procedural scrutiny in the interests of national security. Detention and deportation are based on suspicion of involvement in terror activities instead of an offence having been committed, making it difficult to initialize conventional forms of risk

assessment, and making the transposition of risk assessments from criminal to the immigration/national security scale problematic. Without a clear offence to enrol the suspect into an existing statistical or categorical risk category, judges are forced to translate (scale-up) conventional risk management tools to atypical cases.

The suspects considered in this chapter applied for release from national security detention and were eventually released under supervision with their conditions of release modified over time.²⁸ As a consequence, these SCI release decisions can be seen as managing dynamic risks. Dynamic risk assessments typically include needs, or areas in the offender's life/lifestyle, which, if changed, reduced the risk of re-offending (Hannah-Moffat 2005: 35). In certificate cases, judges considered changes in 'preventative means' as criminogenic modulations. For example, Mr. Mahjoub was released from security detention once he was able to satisfy conditions that that he would have an appropriate surety in place, that is, once his step-son was old enough to serve in that role (*Mahjoub v. Canada (Citizenship and Immigration), 2007 FC 171 (CanLII)*, para. 149). Mr. Mahjoub's case suggests a shift in risk/needs assessment to the social scale, rather than changes to the risk subject; while the risk posed by named persons is dynamic based on their circumstances, as a risk subject they are considered static.²⁹

Conducting risk assessments on uninformed individuals while relying on secret information puts judges in a precarious position, regardless of their decisions being

²⁸ Many post-release hearings took place to change the conditions of release for suspects. In changing the conditions of release, judges acknowledged shifting circumstances.

²⁹ Within literature on risk and criminal penalty there are two 'scales' to which risk is often applied: the 'risk subject' (Hannah-Moffat, 2005) and 'risk society' (Shearing and Johnston, 2005). Risk is multiform and amenable to various forms of governance (O'Malley, 2004).

equated to national security measures.³⁰ One lawyer noted that “when the Service [CSIS] gets up and says, ‘this is insecure,’ the judges are scared” (Interview with lawyer, Toronto, April 2015). Much of the information used in judicial determinations would not count as evidence in criminal court. The limited ability to cross-examine the information supporting the detention of suspects in certificate cases challenges notions of justice observed in the criminal system and undermines liberal notions of risk as it does not provide the opportunity for informed choice or advised response (see O’Malley, 2009). Presented only with intelligence summaries, suspects and their open counsel are not privy to classified intelligence information and are less able to refute the suspicion levied against them. This same, unknown and non-vetted information is used to measure the risks they pose to public safety.³¹ And, it is on this information that judges base their decision of whether to release and, if so, what release conditions to impose to manage that risk. The standard for assessing ‘release risk’ is whether it is *reasonable to believe* that there is a danger or serious threat, whether direct or indirect, to national security or the safety of any person, similar to the civil and criminal law ‘balance of probabilities’ standard for pre-trial release (Criminal Code, 1985b). However, the overall SCI case standard of ‘reason to believe’ is in stark contrast with the civil standard of ‘balance of probabilities’ and the criminal standard of ‘proof beyond a reasonable doubt.’

With less than thirty certificates having been issued to cover various circumstances, SCI proceedings do not present information about risk in a manner amenable to actuarial judgment. The lack of statistical data means that risk assessments

³⁰ Multiple respondents noted that judges in Certificate cases work under difficult circumstances (Interview with Lawyer, Toronto, January 2015; Interview with Judge, Ottawa, December 2014; Interview with Lawyer, Ottawa, February 2015).

³¹ Some Certificates have been quashed because special advocates have identified inconsistencies in the secret information.

are not based on past behaviours and known correlations of the causes of actions (Feeley and Simon, 1992, 1994). Judges must use their expertise as practitioners while relying on threat assessments provided by CSIS. Respondents characterized CSIS assessments as troublesome: “it’s sort of layers upon layers of problem because we have leaps that are being made by CSIS in terms of coming to conclusions and in a sense working backwards [by seeing their mandate as building a case against Mr. Mahjoub...] And we know that they disregard information” (Interview with Yavar Hameed, Ottawa, June 2015; supported by Interview with lawyer, Canada, August 2015). This was in addition to one respondent who noted with regards to neglected disclosure and retention obligations that CSIS “ought to have known or it ought to have guessed that this was a profound failure of imagination” for CSIS to be in a position to conduct itself in a way that proceedings would be meaningful (Interview with lawyer, Toronto, January 2015). Practices such as working backwards and the destruction of information provided open counsel with opportunities to challenge the ways in which cases were built and executed, and claim due process rights for named persons.

CSIS, the Ministers’ counsel, and arguably judges, measure the detention and release of suspects in terms of worst-case scenarios. When conventional risk management is perceived to be inadequate for securing, imagining the worst is a key alternate strategy (O’Malley 2011: 6-7). Imagining the worst entails ‘precautionary,’ ‘pre-emptive,’ or ‘preventative’ security strategies aimed at warding off that potential (Aradau and van Munster 2007: 91; Zedner 2007; O’Malley 2011: 7-10).³² As a result, SCI risk

³² Other measures in family of security strategies, such as resilience, assume that the ‘the worst’ can’t be predicted and the only appropriate counter-measure is to foster the capacity to ‘bounce back’ from catastrophes (see O’Connor, Boyle, Ilcan, and Oliver, 2017)).

management tends toward preventative measures based on speculative rather than calculative logics and upholds a static risk subject.

In the face of challenges and opposition, preventative logics tend to hold steadfast the certainty of the threat (O'Malley, 2011: 10). Prevention does not require a "juridical decision for which careful consideration of evidence is necessary, but becomes an administrative decision, where the rule of zero-risk takes precedence" (Aradau and van Munster 2007: 106). As Massumi (2009) argues, non-events can never be proven, that is, it is impossible to know the ramifications of plots not carried out or even if suspects would have actually followed through. Pre-event logic "fails to respect the moral autonomy of the individual to choose to do right" (Zedner 2007: 273; see also Anderson, 2010; Miller and Morris, 1988). Speculative risk assessments are not based on the conventions of calculative risk, that is, predicting future behaviour based on the evidence of past actions of similar groups, nor are they based on thorough character assessments. Imagined catastrophes tend to overrule conventional approaches because, "where national security is involved, we must do everything possible to avert catastrophe" (*Charkaoui, Re, 2004 FC 107 (CanLII)*: para. 19). The lacking precedent, technical offence, and limited information available due to the merging of administrative and criminal processes reflects legal hybridity where judges are not bound by 'hard' law, but are able to introduce 'soft' elements (Trubek and Trubek, 2005) to their decisions; while this made arguing the cases difficult for open counsel, it also opened up new avenues for resisting untested law and precedent. The added urgency of national security and need for pre-emption supports the ad hoc decision making.

SCI suspects were initially detained in provincial jails despite *habeas corpus* applications, some in solitary/segregated for a significant portion of their detention, the nuanced conditions of which were heavily adjudicated. The duration of their detention eventually surpassed the two-year maximum for such facilities, which was challenged by their counsel. Following hearings on the indeterminate nature of the detention and the conditions of detention, the suspects were moved to the KIHC, a cluster of trailers erected on the grounds of Millhaven Institution, a maximum security criminal prison located in Bath, Ontario. The KIHC was specifically designed and constructed to hold certificate detainees.³³ It is from this facility that four suspects were eventually granted conditional release.³⁴ Despite the alarm raised by government actors advocating for the continued detention of the named persons, judges eventually decided that changing circumstances reduced the risk posed. Judges acknowledged past decisions for detention as correct and binding, but used dynamic situations to justify release conditions while upholding the impression of a static risk subject.³⁵

Risk and Release under the SCI

Despite being administrative immigration processes, the management of SCI cases resembles the logic and practice of criminal justice, which, as discussed, should come with rights and protections not found under the SCI. The detention of suspects within criminal custodial facilities reinforces the spatial alignment of immigration and criminal processes. Several of the suspects' legal counsels filed motions typically reserved for criminal proceedings in efforts to improve the condition of detention for their clients, in addition to

³³ For detailed analyses and explanation of this facility see Larsen and Piché (2007, 2009) and Wala (2014).

³⁴ As a permanent resident, Mr. Charkaoui's right to conditional release existed under the original SCI legislation; he was released under conditions from detention prior to the creation of the KIHC.

³⁵ Calavita (2010) acknowledges this as a legal strategy for politically based decisions.

habeas corpus applications. In some cases, immigration lawyers enlisted criminal lawyers as co-counsel to help navigate the SCI crimmigration procedures (on the importance of expertise in criminal and immigration law in crimmigration cases see Lasch (2014) and Lee (2015)). The work of these dedicated lawyers was important for resisting the legitimacy of the SCI. One respondent stated: “I would say that the successes that we have had were largely to the extent to which we could analogize these proceedings to criminal proceedings” (Interview with lawyer, Toronto, January 2015). Within SCI hearings, judges used criminal law and criminal detention as analogues to make sense of SCI proceedings and detention review practices (See for example (*Almrei (Re)*, 2009 FC 3 (*CanLII*)). These determinations varied depending on the facts of the case and arguments, but willingness to engage criminal law attests to the ‘slippages’ and hybridity characteristic of crimmigration.

In some release hearings, using criminal case analogues failed because such ‘criminal arguments’ were deemed ‘inappropriate’ (as in Mr. Jaballah’s first release hearing, see *Jaballah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 299 (*CanLII*) para. 47). In other cases, the conditional release of suspects was referred to as ‘bail’ (*Mahjoub (Re)*, 2013 FC 10 (*CanLII*), para. 46). One respondent characterised SCI release hearings as “bail reviews writ very, very large” (Interview with lawyer, Toronto, January 2015). On Mr. Harkat’s first application for release from detention the conditions proposed were claimed to be “analogous to house arrest” (*Harkat v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1740 (*CanLII*) para. 31). Conventional risk logic dictates that high-risk and dangerous offenders be subject to high levels of surveillance to prevent further harm. In criminal justice, house arrest, even with strict conditions, is

typically reserved for low-risk offenders.³⁶ Here, there is an interplay³⁷ where suspects who would typically be subject to heightened security are being released under conditions meant for minor offences with added strictness due to national security concerns.

Ten of thirty-five federal judges have national security designations though none are assigned to national security cases on a full-time basis (Interview with Judge, Ottawa, December 2014). National security designation certifies that judges are experienced with, and understand, national security issues (Interview with Judge, Ottawa, December 2014; Hugessen, 2002; Mactavish, 2013). SCI legislation requires that judges with national security designations assess the threat posed by suspects, doing so with the help of correctional practitioners and expert witnesses (who have not necessarily interacted with suspects). A lawyer, acting as open counsel and special advocate at different times, suggests that the assessment of threat is based largely on “mere speculation” (Waldman, 2009: 153).

Experts testifying against suspects couch their assessments in erstwhile benign threat indicators, such as travel history and former associations, without sufficient data or statistics to support their assertions. While travel history is not statistically significant predictor of acts of terrorism outside of a risk profile involving additional factors, travel history was used in SCI release deliberations as circular referents in support of the presumption of threat with regards to Mr. Jaballah:

³⁶ Detailed research on house arrest is largely limited to criminal cases (see Ball, Huff, and Lilly 1988; Bagaric 2002; Keay 2000; Maxfield and Baumer 1990; Baumer, Maxfield, and Mendelsohn 1993; Mazey 2002; Gibbs and King 2003; Martinovic 2010), though expanded use of ‘immigration bail’ is increasingly noted in literature see for example Ryo (2016).

³⁷ This interplay is also evidence of a “co-social ethos” (Pavlich, 2001b) characterized by a shifting terrain of governing rationales; for a specific discussion of the shifting terrain of social governance and governmentalities with regards to punishment practices see O’Malley (2001).

...it is argued that the Ministers' position regarding the Respondent's alleged presence in Afghanistan is grounded on circular reasoning. That is, the Ministers' assertion that the Respondent is a member of A[1] J[ihad]³⁸ is, in part, based on his alleged travel to Afghanistan. However, at the same time, [CSIS's] conclusion that the Respondent travelled to Afghanistan is based, in part, on the belief that he is a member of AJ. (*Reference re subsection 77(1) of the Immigration and Refugee Protection Act (IRPA)*, 2016 FC 586 (CanLII) para. 50)

The case against suspects involved compiling indices, each nonthreatening in themselves, into a predictive risk profile based on suspicion (rather than an initiating act) and the semblance of statistical predictability. It is in this sense that SCI cases expose the limits of transposing and scaling-up the criminal justice conventions in national security immigration cases. Aradau and van Munster (2007: 106) suggest that “when the limits of technical or scientific knowledge are exposed, politics discloses its own necessary decisionism, its immanent limit.” Knowledge is still relevant for risk management, but practitioner decisions are exposed as politically expedient. One respondent spoke of “gaps” in “a case that’s really just cobbled together with a lot of speculation [and] innuendo” (Interview with Yavar Hameed, Ottawa, June 2015). The necessity of probing the problematic content of the cases was recognized and resulted in the introduction of advocates to act on behalf of named persons.

A 2007 decision from the Supreme Court of Canada (SCC) rendered some properties of the SCI process unconstitutional (*Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 SCR 326, 2008 SCC 38 (CanLII); see also Forcese and Waldman 2007). Referred to as ‘Charkaoui I,’ this decision resulted in the introduction of ‘special

³⁸ An organization that has engaged in terrorism.

advocates' in SCI cases. Special advocates are permitted access to the intelligence information used to make the case against the suspect, but are not permitted to reveal the information to the suspect or their open counsel without judicial leave to do so. Only a summary of the intelligence information is made available to the suspect and their open counsel. A special advocate noted that their responsibility is “to protect the interests of the [suspect], but once we’ve seen the intelligence we can’t communicate it... [This] creates ... a distortion in the way we normally do law” (Interview with lawyer, Toronto, April 2015). The same advocate noted that, when functioning as *amicus curiae* (impartial advisor) in criminal cases or special advocate in other immigration proceedings, they are permitted to communicate with the defendant without judicial leave. “The concept of requiring leave is an artifact of the incubator of national security litigation” (Interview with lawyer, Toronto, April 2015), limiting the disclosure of information deemed to endanger either the safety of a person or national security. A recent SCC ruling stated that there should be robust communication between suspects their special advocates (*Canada (Citizenship and Immigration) v. Harkat, [2014] 2 SCR 33, 2014 SCC 37 (CanLII)*). One respondent noted that this “judgement is important because [it] removes the sort of underlying distrust of special advocates”³⁹ (Interview with lawyer, Toronto, April 2015). A more robust involvement of special advocates will hopefully rectify some of the one-sidedness of any future cases, as both named persons and their counsel struggle with presenting a case without a full understanding of the accusations.

Multiple respondents commented on the importance of the accused testifying (or not) during their hearings and what should not be held against them, given that they were not privy to the secret information used against them (Interview with Judge, Ottawa,

³⁹ There has been no case yet put forward to test the implications of this decision.

December 2014; Interview with Lawyer, Toronto, January 2015; Interview with Lawyer, Ottawa, February 2015). Putting an individual on the stand that was unaware of the case against them was hazardous as there are new intermediaries that do not allow individuals to directly challenge the claims made by accusers, further complicating the ‘displacement’ or ‘othering’ already present.⁴⁰ One respondent described themselves as being “completely hamstrung” as a result of heavily redacted disclosure in a national security case (Interview with Lawyer, Ontario, March, 2015), while another characterized it as “shadow-boxing” (Interview with Lawyer, Toronto, April 2015). Not being privy to the case against them, they were uncertain whether their client’s testimony would alleviate suspicion or make the situation worse by “stepping in it” (Interview with Lawyer, January 2015). One lawyer noted:

In the criminal law [judges] are not entitled to draw an adverse inference. You’ve got the right to remain silent. The fact that you don’t testify can’t be held against you. On the IRPA side, there’s a compelling argument, although differently constructed, that you shouldn’t draw an adverse inference...because the person’s choice whether to testify is uninformed. (Interview with Lawyer, Toronto, April 2015)

One respondent suggested that for the accused, “if you testify you’re a liar, if you don’t testify you’re hiding something. So, you’re screwed [either way]” (Interview with Activist, Ottawa, May 2015). The impression of one respondent was that such testimony might be “at best, completely irrelevant, and, at worst, contrary to your client’s interest” (Interview with Lawyer, Toronto, January 2015). The tools and information available to

⁴⁰ Pavlich (2007) theorizes the “Lore” of criminal accusation (rather than “law”) suggesting that both the accuser and the accused provide narratives that are often overlooked as criminalizing processes. Such nuanced aspects of judicial processes are culturally reinforced assumptions that may be in need of reframing.

open counsel and special advocates were varied and contributed to their abilities and inabilities to protect the rights of named persons.

Based on Mr. Charkaoui's third hearing the judge noted that, because Mr. Charkaoui did not testify, it was unknown if he was willing to comply with the conditions of release. The judge concluded that: "it is important...to have the full participation of the parties in the presentation of evidence" (*Charkaoui, Re, 2004 FC 1031 (CanLII)*, para. 41). Testifying in their own defence became a *de facto* condition of a suspect's release even though this testimony would be tainted by suspicion.⁴¹ In their testimony about past travel and their history of associations, Mr. Harkat was believed to have lied to the court, Mr. Mahjoub was found to be untruthful, Mr. Jaballah's credibility was questioned, and Mr. Almrei was seen to be self-serving and not forthright.⁴² In all five cases examined, suspects were released once they were willing to testify even though their testimony was not to be believed—their subjectivity is unalterably risky.⁴³

While trust is a key element in being released from SCI detention this does not necessarily mean trust in the character of terror suspects. There are multiple factors that could contribute to this, but the main difference between criminal suspects and terror suspects is knowledge of their case. Named persons were unable to speak to the allegations against them, explain or justify their actions, or demonstrate their innocence, and, consequently, were unable to gain the trust of the Court. Instead, trust is vested in sureties under the auspices of Canadian Immigration and Refugee 'performance bonds.'

⁴¹ In the criminal justice system remorse is an important risk marker (an index of good character), in SCI proceedings testimony denouncing terrorism and associated ideologies served a similar function. During his release hearing, Mr. Mahjoub expressed his opposition to violence and claimed to lack extremist views—he had not expressed his opposition in the past because, simply, he had not been asked for his views (*Mahjoub v. Canada (Citizenship and Immigration), 2007 FC 171 (CanLII)*).

⁴² On truth telling and 'criminal' accusations as components of gatekeeping practices and identity formation see (Pavlich, 2016).

⁴³ For an analysis of courtrooms as a colonized space see (Razack, 1998).

Like other instruments used to manage the future, performance bonds are technologies to manage the risks posed by suspects. Performance bonds enlist community and family members as overseers with the aim of ensuring that former detainees meet release conditions by holding them responsible if they do not.

As early as 1952, the Canadian Immigration Act authorized the conditional release of migrant detainees and subjected them to reporting requirements, which were supported by payment of a security deposit. The latter could be forfeited for failing to comply with any of the conditions under which the migrant was released from custody or detention (Immigration Act, 1952). A 1985 revision to the Immigration Act authorized performance bonds for the conditional release of persons from immigration detention to ensure their “compliance with the Act and associated regulations” upon release (*Gayle v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 335 (CanLII), para. 13); failure to comply could also result in the forfeiture of any deposit made as a condition of the bond.

Instruments designed to secure the conduct or performance of citizens to prevent untoward futures from actualizing have long existed under common law and, more recently, in criminal law. Such security technologies share a preventative logic. Like the performance bond, peace bonds are common law instruments that empowered justices to place persons considered to be threats to peace under bond. At its core, the common-law peace bond was a legal obligation to pledge monies or otherwise provide security (by bond or surety) in order to secure a subject’s good behaviour (*R. v. Siemens*, 2012 ABPC 116 (CanLII)). Considered instruments of ‘preventative justice’ rather than of redressing an offence (*R. v. Siemens*, 2012 ABPC 116 (CanLII)), in 1997 the power of the common law peace bond was codified under section 810 of the Criminal Code (without negating

common law jurisdiction over peace bonds). Section 810 peace bonds vest criminal courts with the power to order a person to enter a recognizance to keep the peace when there are reasonable grounds to believe there is a risk of committing a violent offense. Typically granted in cases of where domestic violence or sexual offences are deemed probable, peace bonds are also used as instruments for managing the threat of terrorism, whereas:

A person who fears on reasonable grounds that another person may commit a terrorism offence may...lay an information before a provincial court judge...Satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance, with or without sureties, to keep the peace... The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant.... (Criminal Code, 1985: S. 810.001 (1-6)).

Conditions of recognizance can include electronic monitoring, house arrest or the requirement “to return to and remain at their place of residence at specified times” (Criminal Code, 1985: S. 810.011 (6)(c)), as well as restricting geographical boundaries (Criminal Code, 1985: S. 810.011 (10)). These provisions are deemed to enable potential offenders to lead “a reasonably normal life” (Humphrey and Gibbs Van Brunschot, 2015: 388).

Consistent with national security objectives, peace bonds are couched as preventive rather than punitive measures. Where conventional actuarial methods in criminal law use criminal records to enrol offenders in risk categories to predict future criminality, peace bonds do not require a criminal record or even a criminal charge.

Moreover, the requirement of a criminal record or some other offending conduct as a condition of a peace bond is seen to be at odds with its preventive purpose. In the case of potential child sex offenders, “insisting on a previous record for sexual offences against children before a recognizance can be ordered would undermine the preventive purpose of s. 810.1 and would require a child to be victimized before the Crown could act” (*R. v. Budreo*, 2000 CanLII 5628 (ON CA), Summary). With the aim of aiding political authorities in the prevention of imagined sources of harm, the test of applicability of a peace bond is based on a balance of probabilities rather than the conventional standard of reasonable doubt. Peace bond also relax the rules around evidence by allowing hearsay and statements not subject to cross-examination. While they are encoded in criminal law, peace bonds do not entail findings of guilt, they do not result in a criminal conviction, nor do they give rise to a criminal record. The duration of the statutory peace bond is limited to one year, though renewable. Common law peace bonds have no defined limit (*R. v. Musoni*, 2009 CanLII 12118 (ON SC))⁴⁴. Common law peace bonds have a much broader scope than their statutory counterpart in that they do not have to involve concern for a person’s safety and can include a concern for general breaches the peace (*R. v. Musoni*, 2009 CanLII 12118 (ON SC)). But, both forms of peace bonds enlist sureties to take responsibility for supervising an accused in the community to ensure that they do not engage in acts against the peace. Sureties are required to support the promise of good conduct (the non-event) with pledges of money. They are also responsible to obey the condition of the recognizance. It is up to judicial authorities to decide whether a member of the community is fit to act as surety, based on finances, personal character, background, and the cross-examination of their qualifications.

⁴⁴ In *R. v. L.B.* a 20-year common law peace bond was ordered (*R. v. L.B.*, 2011 ONCA 153 (CanLII)).

The transposition of the logic of common/criminal law peace bonds into the performance bonds of immigration security is further evidence of SCI as a crimmigration process, that is, a reciprocal process of enfolding criminal (and common) law measures into national security immigration functions. The adoption of preventative security bonds by criminal law also speaks to the securitization of crime control functions and the general blurring of common law, criminal law, and security governance functions. Under SCI performance bonds, members of the community are enlisted to act as sureties and help manage the risk or threat of terrorism. Each of the men had a group of supporters behind them campaigning to raise awareness of the SCI and advocating on their behalf through political activities such as peaceful protests, petitions, and court submissions. In addition to family members, some of these individuals also pledged money to support the release of the named persons. The measure of trust attributable to sureties is based on the veracity of their testimony, their understanding of the nature of the threat (albeit limited by the secrecy of security intelligence), and their capacity to manage that threat.

In Mr. Harkat's release hearing, Justice Dawson argued that the "terms and conditions for release must be based upon something other than Mr. Harkat's assumed good faith or trustworthiness" (*Harkat v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 321, 2006 FC 628 (CanLII) para. 76). Both Mrs. Harkat and her mother were found to be credible sureties, but were not viewed as having "sufficient controlling influence over Mr. Harkat" (*Harkat v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 321, 2006 FC 628 (CanLII), para. 81). Mr. Harkat was released from custody based on the sureties provided by Mrs. Harkat and seven other individuals. Collectively, they posted \$133 000 in support of Mr. Harkat's performance

while on conditional release from immigration detention, with the understanding that “if Mr. Harkat breaches any terms or conditions contained in the order of release, as it may from time to time be amended, the sums guaranteed by the performance bonds shall be forfeited”⁴⁵ (*Harkat (Re)*, 2010 FC 1242 (*CanLII*), Appendix A, 3.). Release conditions included the equivalent of house arrest (see also *Jaballah v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 379 (*CanLII*)), continuous electronic monitoring, weekly reporting to CBSA (accompanied by a surety), refraining from all electronic communication, allowing random CBSA visits to his residence, and that all other occupants of the residence agree to abide by these terms (*Harkat (Re)*, 2010 FC 1242 (*CanLII*)). In Mr. Harkat’s successful second application for release, dynamic risk assessment is evident in the consideration of changing circumstances. In criminal cases, dynamic risk typically involves evidential changes in the criminogenic needs of risk subjects, which changes their risk of reoffending. In SCI cases, the risk of a terrorist offence is maintained as a speculative potential and the subject is maintained as a static risk and a perpetual threat to peace. The dynamic character of risk assessment and management is tied to surveillant functions, both of official agencies and the community sureties willing to serve as bonded functionaries of risk management. Within the SCI cases it is not a matter of managing the causes of potential engagement in terrorist actions, but of adequate monitoring to prevent acts and unauthorized communication.

Take for example the risk mitigation considerations undertaken for Mr. Jaballah: At his release hearing, having been in security detention for more than 5½ years, Mr. Jaballah’s wife was not considered a credible surety, nor suited to act as primary

⁴⁵ IRCC and CBSA managers and officers have discretionary power to decide whether a breach of conditions is severe enough to warrant the forfeiture of the deposit or the guarantee.

supervisor, having, under cross-examination, “previously lied to the court regarding her husband’s travels” and having “not been honest regarding Mr. Jaballah’s association with certain individuals before coming to Canada” (*Jaballah v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 379 (CanLII), para. 61). The court also held that, because Mr. Jaballah’s wife was supported by public assistance, she “did not have the means to post a cash bond to secure her husband’s release” (*Jaballah v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 379 (CanLII), para. 59). The judge in the case concluded that “I need to be able to trust her to properly supervise Mr. Jaballah to ensure his compliance with the conditions of release. My capacity to repose such trust in her is severely compromised” (*Jaballah v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 379 (CanLII), para. 64). In the end, however, the judge concluded that onerous release conditions went a long way to counter-balancing this “supervisory deficiency” (*Jaballah v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 379 (CanLII), para. 69). Mr. Jaballah was released on conditions ‘equivalent to house arrest,’ video surveillance of his property, electronic monitoring, random CBSA visitations, restricted home visitations to listed parties, and \$99 250 in forfeitable funds posted, including seven individuals executing performance bonds.

In Mr. Mahjoub’s third and successful release hearing, Mr. Mahjoub’s wife and step-son were believed in their testimony and were found to be credible sureties. Previously, the court found that, other than his wife, none of the other sureties had “known Mr. Mahjoub well, or for a long period of time” (*Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2004] 1 FCR 493, 2003 FC 928 (CanLII) para. 77). In Mr. Mahjoub’s case, affidavits from multiple community supporters aided his application for

release from security detention with \$58 000 raised in performance bonds, on top of \$32 500 deposited cash bonds. While the threat was not sufficiently redressed by sureties, it was found that it could be managed through a combination of surveillance by the bonded functionaries, and additional technological monitoring by CBSA.

Mr. Almrei had more trouble obtaining release because he did not have any family in the country. Despite having multiple sureties, none could reside with Mr. Almrei and provide round-the-clock supervision that were conditions of Messrs. Harkat, Mahjoub, Jaballah, and Charkaoui's conditional release.⁴⁶ Upon his fourth application, Justice Mosely granted Mr. Almrei release based on the assumption that performance sureties would be sufficient to manage the risk when bolstered with technological monitoring.

The enlistment of community members in support of national security (and crime control) efforts is well documented and community vigilance is seen as a key component of contemporary risk management strategies (Aradau and van Munster, 2007; Reeves, 2012). This vigilance is often linked to publicity strategies to make the community aware of risks (as in Megan's Law and the publication of known offender registries)⁴⁷ so that entire neighbourhoods and community networks can serve as instruments of soft surveillance. Enlisting members of the public as security-bonded functionaries adds a measure of responsiblization (Aradau and van Munster, 2007; Reeves, 2012) to these preventative efforts. While responsiblization may be seen as the government avoiding its obligations, it is also an expression of political agency on behalf of the individuals taking on such roles. Familial bonded functionaries have an additional stake in the conformity of

⁴⁶ Being a permanent resident, Mr. Charkaoui had a right to conditional release with less-stringent conditions than the provisional release afforded the other suspects under immigration security performance bonds.

⁴⁷ For a discussion of risk knowledge and Megan's Law see Valverde, Levi, and Moore (2005).

suspects as they agree to share in managing risks to national security on threat of financial penalties (forfeiture of bonds). That is, supporters in the community and family have put forward significant amounts of money and family members make significant personal sacrifices in lifestyle and privacy in order to ensure the continued release of their loved-one (see Larsen, Harkat, and Harkat, 2008). Judicial authorities may employ their professional judgement in determining the risk thresholds of their bonded functionaries, but they also see sureties as important instruments in managing public security through ‘soft surveillance.’

Key to the successful SCI release from immigration detention is the ability to provide trustworthy and monetarily invested sureties. This reflects a significant emphasis on soft surveillance (rather than changes in the riskiness of suspects) as a condition of release. The testimony of suspects, while a de facto condition of their release, is set against their position as static risk-subjects, as not credible, and insufficiently remorseful. Though trustworthy domestic/familial bonds are important, the oversight of a broader collection of community functionaries plays a significant role managing national security. Release considerations also involve overt ‘eyes-on’ surveillance by the CBSA and forms of physical surveillance of their person, premises, and communications. However, noting the fallibility of technological monitoring, several judges consider hard surveillance as only bolstering the soft surveillance of bonded functionaries.

In all SCI cases, release conditions slowly eased over time. Cameras were removed, CBSA monitored computer access and cell phones were permitted, and Messrs. Harkat, Mahjoub, and Jaballah were eventually allowed to remain unsupervised in their residences. The easing of surveillance reflects the significance of ongoing risk

assessments and the dynamic nature of circumstances, as well as continued advocacy by open counsel. In rulings on their release conditions, judges claimed that trust was being rewarded by less stringent conditions. Trust plays an important role in the economy of national security threats. Attempts to reduce soft surveillance by relinquishing performance bonds were less successful. In 2010, Mr. Jaballah's release conditions were relaxed, but the performance bond remained in force. The court agreed to the removal on one surety with the provision that a replacement be found given the opinion that "the execution of performance bonds continues to provide an additional incentive for Mr. Jaballah to comply with all of the conditions of release" (*Jaballah (Re)*, 2009 FC 284 (*CanLII*) para. 77). In 2015, a judge in the case of Mr. Mahjoub ruled that "the danger to the security of Canada has not evaporated; it remains latent, perceptible, and factual" (*Mahjoub (Re)*, 2015 FC 1232 (*CanLII*), para. 78). While some of release conditions were relaxed, the conditions of keeping the peace and being of good behaviour and the conditions associated with performance bonds were to remain in force (*Mahjoub (Re)*, 2015 FC 1232 (*CanLII*)).

Conclusion

The implementation of speculative risk can be considered a success in that thus far no released named persons have engaged in terrorist activity. However, the cost of pre-emptive security is not isolated to the accused. One respondent referred to release conditions as a "death by a thousand cuts" (Interview with Lawyer, Toronto, January 2015): the intrusions in the lives of their families were incredibly difficult. Acting as surety, Mr. Harkat's wife has likened herself to a jailer, having to be in constant supervision of her husband, while at the same time living in constant fear of being in

breach of release conditions (Larsen et al., 2008; Wala, 2014). She would be unlikely to consider her oversight functions as easier to manage than the hard surveillance of CSC or CBSA. While judges claim that house arrest conditions do not infringe upon the liberty of individuals as significantly as detention, Mr. Mahjoub had his sureties voluntarily withdraw their bonds because the release conditions were too intrusive on his family (*Canada (Citizenship and Immigration) v. Mahjoub, 2009 FC 439 (CanLII)*). He was subsequently returned to the KIHIC.⁴⁸ These stringent release conditions are preventative, pre-event undertakings that appropriate crime control technologies, like house arrest, and deploy them within immigration proceedings without the corresponding logic related to managing low-risk populations and rehabilitation needs. Instead, risks and threats to national security are managed in the community through bonded functionaries. Based in immigration law, but combining elements of common and criminal law peace bonds, performance bonds are attempts to “‘tame’ the limit and govern what appears to be ungovernable” (Aradau and van Munster, 2007: 107), that is, “incidents that have a low level of frequency of occurrence” (MacAlister, 2005: 38).

In this case, the hybridity of the SCI as a national security assemblage is reflected in the merging of conventional civil, administrative, and criminal law practices. Evident is the movement of “ideas and practices across discrete sites and institutional boundaries” (Walters, 2017: 9). The use of bonded functionaries to manage the future in cases of suspected terrorism shows the shifting use of community sanctions as risk assessments are implemented in civil, criminal, and immigration/administrative cases; it only follows that peace bonds would be used in legal hybrids created by yoking these legal systems (Trubek

⁴⁸ One respondent made the remark that: “my spousal relationship would not survive, I am quite confident, if my partner had to be with me all of the time” (Interview with Lawyer, Toronto, January 2015).

and Trubek, 2005). Community supervision seems a soft form of intervention for persons suspected of acts of terrorism, but is nevertheless the preferred option in cases where a breach of national security is suspected but no offence is made known or proven by conventional judicial standards. This approach to risk management is evidence of the unique assemblage of crimmigration proceedings, non-events, suspicion and intelligence, combined with the bypassing of rights and recycled forms of criminal case management. In this assemblage, SCI judges are precariously cast as petty sovereigns (Butler, 2004) to the extent that the release outcome is an administrative decision, not a typical judicial decision arrived at after careful consideration of evidence derived by conventional rules (See Aradau and van Munster, 2007). Instead of evidence, the administration of risk takes on a speculative form, neither completely actuarial or categorical, and renders the future actionable and manageable by responsabilizing members of the community to manage the threat of terrorism. Rather than speculative risk being in a binary relationship with other forms of risk, it incorporates several competing risk logics.

Trubek and Trubek (2005: 361) view components of legal approaches as not mutually incompatible and argue that “perhaps the most promising ideas” would come from combining legal methods. However, there must be an awareness of the ‘problems’ as outcomes of governance, in addition to the ‘goods’ (Burriss et al., 2005). The SCI provides a recent example of hoc instrumentalism (Sklansky, 2012) where judges reluctantly set precedent for acts that are not technically immigration-based, could fall under the criminal code, but are not being pursued as crimes. This is not to suggest that the criminal justice system and use of the Anti-Terrorism Act (2001) is a remedy for unrestrained governing in the post-9/11 environment as law increasingly becomes securitized and justice is lost in

an age of security without punishment (Shearing and Johnston, 2005). However, ‘function creep’ (Legomsky, 2007) is a concern with the creation of this new type of crimmigration proceedings. Under function creep, governing technologies are used for purposes outside of its initial conceptualization (as is the case with criminal enforcement in immigration law and immigration enforcement in criminal law). The expanded use of offence-less risk assessments and peace bonds could/should be a problem, but when they are being used to ameliorate conditions of indeterminate detention they appear as a good. While the SCI’s governance of detainment and release has succeeded in preventing named persons from engaging in terrorist acts, the efficiency of legal hybridity comes at the expense of compromised access to justice for the risk subject and unreasonable responsibilities for trustworthy sureties.

Chapter II: Simulated Justice: Intelligence as evidence in immigration security

Introduction

The Security Certificate Initiative (SCI) is an immigration administrative counter-terrorism measure applicable to non-citizens; it makes use of ‘inadmissibility’ designations on the grounds of national security concerns to permanently banish non-citizens from Canada. The process is initiated by the issuance of a certificate signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Immigration, Refugees, and Citizenship Canada (IRCC).⁴⁹ The issuance allows for long-term detention pending deportation and banishment (Bigo, 2006) of non-citizen terror suspects based on ‘secret evidence’ (Diab, 2015) and requires that there be “reasonable grounds to believe they have engaged in terrorism, are a member of an organization that has or will engage in terrorism, or that they generally pose a danger to the security of Canada” (Diab, 2015: 98). Used to expedite the deportation and banishment of non-citizen terror suspects, lawyers and social justice advocates have challenged certificates in protracted legal battles, resulting in proceedings dropped by the Government or quashed by judges. The failure to ensure the swift and certain deportation of suspect non-citizens is due in part to attempts at using secret or classified intelligence as evidence in court proceedings—what is referred to as the judicialization of intelligence. Through analysis of interviews and court documents, this chapter offers an examination of the use of intelligence as evidence in efforts to enact simulated justice. Specifically, it argues that using intelligence in the courts perverts just outcomes typically sought in such spaces.

⁴⁹ Previously Citizenship and Immigration Canada (CIC).

In criminal law, evidence is a crucial component of justice processes. It is the threshold used to determine whether a crime has taken place. Moreover, criminal charges are not laid unless prosecutors, acting on behalf of the government, believe there is sufficient evidence to prove, 'beyond a reasonable doubt' that a crime has been committed. While there are significant parallels between criminal law and certificate cases, there are also key differences. These differences are reflected in the simulation of evidence. SCI cases are not supported by evidence in the conventional sense, and references to evidence are nostalgic appreciation of what is no more. Simulation is pretending to have what you do not have and involves the negation of the real (Baudrillard, 1994). It signifies the absence (of an offence) and substitution by something else ('reasonable grounds to believe' that a future offence is possible). In this way, simulated evidence references the demise of real evidence in a post-event system of justice made obsolete by pre-event security initiatives. Certificates aims to act on that which has not happened, that is, on imagined sources of harm. Under the SCI, simulation generates 'zones of indistinction' (Diken and Laustsen, 2003) where stand-ins for accepted legal processes no longer represent the real as they have been so thoroughly transformed.

This chapter suggests that there exists a zone of indistinction, generated by potentiality, that makes reality imperceptible from mimicry. Baudrillard's (1994) idea of simulation offers a framework for understanding how the rule of law and the judicial order of the SCI is comprehended. Building upon these ideas allows for elaboration on how intelligence is understood (and misunderstood) as evidence in court proceedings. It is clear that summarized information has limits within the court, though special advocates extend

some of those limits, they are frustrated in some of their powers of doing so. This chapter offers a discussion of why intelligence has been judicialized and taken up in the courts, in addition to why it is seen to be necessary within these cases. A discussion of how the limited abilities (inequality of arms) of the special advocates contribute to the zone of indistinction due to rules around CSIS witnesses is then offered. Finally, the chapter proposes an explanation of why secrecy is necessary for national security and the limitation and negative ramifications of the SCI for citizens and non-citizens alike. This chapter's main contribution, thus, is to provide a framework for understanding the role of intelligence in the courtroom and how the SCI has transformed evidentiary rules with concerning results for rights.

Methodology

This chapter is part of a project that investigates the SCI through interviews and document analysis. Twenty interviews were carried out with individuals working in varying capacities within the SCI. Interview respondents included: open counsel; special advocates; individuals who have acted as both open counsel and special advocates; a member of the judiciary; individuals working in the area of human rights, advocacy, and/or as community activists; legal scholars; a journalist who has extensively covered national security issues; and a representative of the Canada Border Services Agency (CBSA). A representative of the Canadian Security and Intelligence Service (CSIS) replied to questions through email. Representatives from IRCC and Public Safety Canada (PSC) declined interviews because of "ongoing litigation." Correctional Service Canada (CSC) declined to interview because CBSA was the appropriate 'detaining authority' at the Kingston Immigration Holding Centre. No responses were received from the

provincial detention centres involved in the immigration detention nor from those who acted as Ministers' counsel. The court documents considered are the Reasons for Decision in the certificate cases of Adil Charkaoui, Mahmoud Jaballah, Hassan Almrei, Mohammad Mahjoub, and Mohamed Harkat.

Theoretical Intervention

Emergency measures are a part of the everyday exercise of powers that work cohesively with, rather than in opposition to, the rule of law (Neocleous, 2006). Using Agamben's (1998) idea of the exception as a constant biopolitical structure that has existed since antiquity and intensified during modernity, Lundborg (2016) emphasizes a zone of indistinction between potentiality and actuality. Understood as a political structure,⁵⁰ homo sacer is beyond both penal law and divine law where the homo sacer's killing is unpunishable, yet not a sacrifice; however, the figure of 'bare life' is subject to the rule of sovereign power (Agamben, 1998). The emphasis on potentiality is evident in the suggestion that "If today there is no longer any one clear figure of the sacred man, it is perhaps because we are all virtually *homines sacri*" (Agamben, 1998: 115, emphasis in original). The potential to be excluded from a political existence by means of the exception is a consequence of the goal of biopolitical forms of control that seek to preempt the *potential* of dangerousness (Dillon, 2003; Lundborg, 2016; Peerenboom, 2004). Here, potentiality is understood as "the presence of an absence" or the "potential to not-do" rather than something that is had (Agamben, 1999: 179-180). In other words, it is recognized that there is a capacity for terror suspects to not act dangerously (Dillon, 2003) just as there is a the potential for sovereign acts to not actualize exclusion. It is important

⁵⁰ Or what Agamben (2005) refers to as a 'paradigm of government.'

to note that all members of Western political communities are marked by the potential for exclusion. Baudrillard's (1994) idea of simulation poses that copies of copies create a disconnect between copy and model leading to a distorted perception of the reality of dangers and causes a “vicious circle of increased security/insecurity” (Lundborg, 2016).

Following Baudrillard's (1994) simulation provides an approach to thinking through the limits of juridical order. The rule of law is a form of juridical order under which laws are equally applied to all members of society. Within such a system as the rule of law, the juridical order is said to exist as a meaningful constraint on the authority of both state actors and the social elite (Peerenboom, 2004). This chapter suggests that the equality of the rule of law is a spectre haunting emergency measures, executive rule and discretion through a desire for the return to illusory restraints on government excess. Even within democratic states, most legislation contains provisions for exercising exceptional powers that negate the rule of law even when not enacted. While liberal governance seeks to separate emergency rule from the normal juridical order, historical evidence suggests that emergency powers are far from exceptional; rather, they are an ongoing aspect of normal political rule (Neocleous, 2006). Within colonial regimes, exceptions and the rule of law were enacted alongside each other unencumbered where rules differed, including for internment, depending on whether one was a ‘Native subject’ or a ‘French citizen’ (Le Cour Grandmaison, 2006). Such practices are indicative of a firmly entrenched foundation for the suspension of the rule of law where colonizers as rights holders live alongside the bare life of natives. Under the SCI, which is applicable only to non-citizens, simulated evidence is adequate; such degraded evidentiary standards are not acceptable in legal proceedings that apply to Canadian citizens.

The SCI reflects simulation that allows us to talk about what has not happened with there being ‘levels’ of simulation following Baudrillard (1994); pretending to have what one does not is merely one level of many forms of simulation. In addition to the non-offence being pursued, as with Baudrillard's (1994) robbery, the effects of (potentially total) security are simulated within the SCI (See Vaughan-Williams, 2010). Under the SCI security officials read pieces of intelligence as signs for terrorist acts that had the potential to occur (until the named persons were apprehended). As Baudrillard (1994: np) indicates a “fake holdup” can never be perfectly simulated because “the network of artificial signs will become inextricably mixed up with real elements” and will have real consequences.⁵¹ Here the response to the non-offence generates ‘real’ consequences of an actual offence via the detainment of named persons. For Baudrillard (1994: np) even the real “is no longer really the real” it is a hyperreal. The detainment of named persons reflects the lost referents of rehabilitation, punishment, and even prevention. While the criminal justice system involves signifiers and referents of justice, the exchange of evidence for intelligence compounds the level of the hyperreal. The rule of law is an absent presence and, as a persistent referent, a presentified absence that plagues perceptions of justice.

The publicity of the SCI indicates a level of deterrence by showing that terrorists in Canada will be detected and deported. However, this is simulation as it cannot be known what, if anything, has been prevented (See Massumi, 2009). Rather than a ‘real’ deterrent effect, the SCI acts as a political tool⁵² for simulating the *effect* of security.⁵³ One respondent noted this occurrence: “I think this was a way for the Government to

⁵¹ For a recent example of this see The Associated Press (2017).

⁵² Amicelle, Aradau, and Jeandesboz (2015) make a similar suggestion with regards to security devices having political effects.

⁵³ Security responses are just one of a panoply of images associated with 9/11 (Engle, 2009).

demonstrate: ‘look we’re doing our part. We’re using these counter-terrorism tools.’ [However,] it’s not making us any safer. It doesn’t actually prevent any actual violence” (Interview with Lawyer, Ontario, March 2015). One respondent spoke of the SCI as an expression of prowess rather than having a basis in actually securing: “I do think that there was something performative about the certificate and I think that, in part, because of the way in which they were publicized and talked about and made part of...the Government’s very public response” (Interview with Lawyer, Toronto, January 2015). The deterrent effect of the SCI is impossible to know because its effectiveness is evident only in the non-event of terrorism. Just as there is no evidentiary proof of terrorism in these cases, there is no referential for the security the SCI generates. The political positionality of homo sacer in a zone of indistinction provides us with an understanding of the legal ambiguity of the SCI while simulation offers an appreciation of the lack of ‘reality’ within these cases due to the replacement of evidence with intelligence in the court room.

Information: Intelligence v. evidence

The terminology used in reference to the material upon which certificates are based varies among those working in different capacities under the SCI as well as within government documentation. A report evaluating the SCI explains,

The security certificate process is an immigration proceeding used to detain and remove from Canada non-Canadians deemed inadmissible on grounds of security, violating human rights, serious criminality or organized criminality when the determination is based on classified *evidence* that, if disclosed publicly, would be injurious to national security or endanger the safety of any person. (Public Safety Canada, 2010; italics added)

However, Division 9 of the Immigration and Refugee Protection Act (IRPA), which lays out the SCI legislation, refers frequently to “information or other evidence” and “information and other evidence,” suggesting that there are differences between evidence and information.⁵⁴ The consistent slippage and interchangeability suggests that there is a problem with evidence as referent for what is being utilized under the SCI and exemplifies the zone of indistinction with regards to what ‘counts’ in these proceedings. Hybridity in law (Trubek and Trubek, 2005) contributes to imprecise definitions that result from intelligence being judicialized.

Under Division 9, information is defined as “security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization” (Immigration and Refugee Protection Act, 2001, S. 76). One interpretation is that information becomes evidence under the SCI proceedings when the judge receives it into evidence; Section 83.1(g) of Division 9 gives judges the power to admit into evidence anything that they deem reliable and appropriate⁵⁵—making judges the sovereign authority. Unlike criminal cases, relying on hearsay is acceptable. Precedent reflects that what is ‘appropriate’ equates to being useful and ‘reliability’ denotes trustworthiness (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 84). According to Parliament, evidence obtained through torture is not reliable and appropriate for use in certificate cases.⁵⁶ Attempts to ensure quality material is relied upon for

⁵⁴ Roach (2010: 53-55) provides a useful chart outlining the competing norms and assumptions of ideal types of intelligence and evidence.

⁵⁵ Within court documents cases are based on what is referred to as “information and other evidence.”

⁵⁶ According to Mr. Young’s court testimony, CSIS does not rely on information obtained through torture. However, information obtained from the Gauntánamo Bay detention camp has been knowingly used. It was considered reliable at the time (2004), but has since been withdrawn (See *Almrei (Re)*, 2009 FC 1263 (*CanLII*)).

decision-making is apparent, but in conjunction with the “reasonable grounds to believe” standard of proof,⁵⁷ the rigorousness of the process is uncertain. There is no strict parameter by which to determine something to be ‘evidence,’ making the process indistinct. One respondent noted: “The standard of proof in these immigration cases is...virtually meaningless: sort of; a hunch; maybe; I guess so. I mean, it’s a very, very low, almost supercilious standard” (Interview with Lawyer, Toronto, April 2015). In conjunction with concerns about the SCI process, the rigorousness of the information vetting done by CSIS was questioned by multiple respondents, suggesting that the Ministers have never had anything that qualifies as evidence; to them, information merely stands in as ‘evidence.’

While SCI proceedings take place in court, it is not widely accepted that the cases are based on evidence as it is typically understood and explicitly legislated under the Canada Evidence Act (CEA). Under the heading “International Relations and National Defence and National Security,” Section 38.06(3.1) of the CEA, the presiding judge has the power to receive anything that they find acceptable into evidence (Canada Evidence Act, 1985). Despite this legislative allowance, multiple respondents indicated that they did not accept what was being presented under the SCI as ‘evidence.’ “I don’t like to use the word ‘evidence’ because it’s not necessarily evidence as we know it. It’s material” (Interview with Lawyer, Ottawa, April 2015). Under the SCI, the parameters for what makes up the Ministers’ case is slippery at best; actors speak of ‘evidence,’ ‘information,’ ‘intelligence,’ and ‘material’ in reference to the same documents.⁵⁸ The inability to agree

⁵⁷ This standard is explained as “more than mere suspicion, but is less stringent than the criminal standard” (*Harkat (Re)*, 2010 FC 1241 (CanLII), para. 62).

⁵⁸ The difference between ‘inference’ and ‘speculation’ is key to the differentiation of intelligence and evidence. According to Justice Hansen, ‘inference’ is deduced from evidence and based on established facts,

upon what makes up the cases against named persons is indication of added abstraction to Baudrillard's (1994) already referential 'real,' where legal innovation adds to the zone of indistinction between actuality and potentiality as 'something else' stands in for evidence.

One approach to differentiating between intelligence and evidence is by how it is used: intelligence is used for advanced warning about individuals, and evidence is used for legal purposes (Roach, 2010, 2012). This differentiation is acceded to, but this chapter acknowledges that evidence and intelligence differ as processes⁵⁹ and note that intelligence is increasingly being used in criminal cases. Evidence as a "process" has a chain of custody that cannot be compromised—otherwise it no longer qualifies as evidence. This chain of custody must be carefully documented and it is only in making it public that evidence 'counts.' Intelligence is the opposite—it may have an unclear chain of custody, sometimes quite intentionally. Intelligence is compromised and loses its power when it is made public.⁶⁰ The implementation of these two opposing concepts to achieve the same end is an indication of Baudrillard's (1994) conception of simulation, where symbols replace reality and copies become indistinguishable from originals, making a space that lacks clarity and creating potentialities abound. Regardless of how it is conceptualized, it is clear that there is an active relation between evidence and intelligence

while 'speculation' requires a 'leap of faith' (*Jaballah (Re)*, 2016 FC 586, para. 14). The Ministers argued that Mr. Almrei's honey and incense business was being used to obtain funds for financing terrorism and Justice Mosely decided that "The Service then drew certain inferences from that information which, in my view, were not well-founded" (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 433). Similarly, Justice Hansen found the case for Mr. Jaballah's involvement in military conflict in Afghanistan and Al Jihad to not reach the threshold for reasonable inferences (*Jaballah (Re)*, 2016 FC 586, paras. 59, 68).

⁵⁹ Various authors suggest that intelligence is a process (See Lippert and O'Connor, 2006; Robinson, 2009; Sheptycki, 2004; Taplin, 1989; Wheaton and Beerbower, 2006). There is no singular accepted definition of 'intelligence.' This complicates theorizing (Warner, 2007) and coordinating (Wheaton and Beerbower, 2006).

⁶⁰ Intelligence under the SCI includes CSIS sources, third party reports, telecommunications intercepts, physical surveillance reports, and information from the RCMP (Royal Canadian Mounted Police), IRCC, and the CBSA. "In the present context, 'intelligence' refers to the product resulting from the collection, collation, evaluation and analysis of information with respect to issues covered under the CSIS mandate" (Government of Canada, 2015).

(Roach, 2012). Following Baudrillard (1994), the Ministers are feigning to have what they do not through summaries,⁶¹ but continue to reference it as evidence out of nostalgia for what has been lost.

Summaries of Summaries: Simulation and parity of information

As noted above, in the SCI cases, evidence is whatever the presiding judge admits as such. One respondent explains, “So there could be a variety of sources and a range of reliability of sources, from the purely conjectural up to the eyewitness-type account, perhaps by a highly reliable human source” (Interview with Lawyer, Ottawa, February 2015). However, sometimes it is merely “a summary of a summary of a summary” where the CSIS witness presenting the summary has had no firsthand contact with the named person or the material that they are presenting as evidence (Interview with Lawyer, Ottawa, April 2015). This characterization is profoundly parallel to a level of simulation where duplicates, doubles, and copies stand in, making the original indistinguishable from its mimicry. Judicial deference to the executive in cases of confidential information and national security in general is a concerning trend noted by multiple authors (See Macfarlane, 2012; Rankin, 1986) and respondents as noted later. With so much summarizing taking place the referent information may become lost as the provenance of the information already is or becomes unknown. CSIS’s function as a domestic (rather than international) intelligence gathering agency is part of this issue as it makes Canada heavily reliant on information from other domestic and some foreign intelligence

⁶¹ Baudrillard (1994) notes that simulating is not the same as pretending; with simulation, the difference between ‘true’ and ‘false’ and what is ‘real’ and ‘imaginary’ is threatened. What is real is discernable with pretending.

agencies.⁶² CSIS's foreign involvement is limited to cooperation with foreign partners and comes with caveats for how much is known about provenance and how the information is used.

Different knowledges are accepted as "legally authentic" depending on the source of information, with revelatory knowledge from investigators being more acceptable in court than offered knowledge from laypersons (Green, 1997). Such privileged knowledge of investigators is difficult to challenge according to Green (1997). A lack of offered or lay knowledge from the named person and other fully informed witnesses prevents equal presentation on both sides of the SCI cases. Layers are added to the simulation of just proceedings given the inequity of information within the courtroom. Multiple respondents noted that special advocates are supposed to challenge what is brought forward by Minister's counsel, but are unable to produce their own evidence creating a deficit in the parity of SCI proceedings. According to one respondent, "the day when that finally comes, that a special advocate asks to present evidence, is going to be a make-it-up-as-you-go-along process" (Interview with Lawyer, Ottawa, February 2015). The lack of exculpatory information is a significant concern for many respondents and was noted as an issue in some Reasons for Decisions. Not only is there no evidence brought forward by special advocates, but Ministers' counsel did not initially present all [exculpatory] information to the judges or special advocates.⁶³ Further, while the special advocates have access to the closed information, they do not necessarily get to know the provenance of the information, which the Ministers may or may not have, in addition to the ability to inquire about

⁶² The United States has both a domestic (the Federal Bureau of Investigation (FBI)) and a foreign (the Central Intelligence Agency (CIA)) intelligence agency.

⁶³ Justice Mosely viewed the Ministers' stance that they were not required to present contradictory evidence as "incompatible with the duties of good faith and candour which the Court expects from the Service and the Ministers" (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 501).

provenance (*Mahjoub (Re)*, 2010 FC 787 (*CanLII*), para. 58). The disclosure of exculpatory evidence was a concern in the cases as it was only brought forward once ordered by the Court (See for example *Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 502). The precarious position of the special advocates and their limited powers contributes to the indistinctness of the SCI as it exists as a court proceedings. Even where there is information that is publicly disclosed, the dependability is uncertain.

The Charkaoui II ruling is very explicit in its expression of there being varying qualities of evidence: “There is no question that original notes and recordings are the best evidence” (*Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 SCR 326, 2008 SCC 38 (*CanLII*), para. 49). The emphasis placed on the idea of an ‘original’ is akin to Baudrillard's (1994) simulation in that translations and transpositions deplete the initial iteration of evidence. Some of the SCI cases rely upon the summaries made by intelligence officials that have passed through multiple transpositions. Justice Hansen expressed concerns over Mr. Jaballah’s CSIS interviews being conducted in English despite his limited proficiency (*Jaballah (Re)*, 2016 FC 586). Within Mr. Harkat’s case, some interviews and conversations were translated into English, summarized, and then entered into the CSIS data bank; Federal Court of Appeal judges found that “The three human interventions generated a possibility of errors, inaccuracies or distortions” (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (*CanLII*), para. 123). The dependence on summaries within these cases is a consequence of the use of intelligence for which it is CSIS protocol to destroy any original documentation leaving behind only copies and double copies (Baudrillard, 1994) to stand in.⁶⁴ Many years have passed

⁶⁴ Justice Létourneau notes that CSIS was acting in good faith and following policy when they destroyed the original information, but this was a breach of duty under the section 7 of the Charter and prevented the

between the intelligence iterations leading to CSIS witnesses having minimal recollection of interviews without prompting from the summaries, leaving the reliability of the summaries in question (See *Jaballah (Re)*, 2016 FC 586, para. 55). Errors and discrepancies are not necessarily apparent to special advocates and judges leaving the accuracy entirely unverifiable (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (CanLII), para. 133).

Justice Létourneau determined that disclosure of the non-redacted CSIS summaries to the special advocates was not a remedy for the original material not being available because “The summaries are the remnants of the destroyed originals. They are the problem, not the solution” (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (CanLII), para. 132). The decision was made to exclude the summaries of conversations that Mr. Harkat was not privy to. However, on appeal to the Supreme Court of Canada (SCC) it was decided that even though the destruction of CSIS operational materials was a breach of section 7 of the Charter, the summaries were adequate for Mr. Harkat to know and meet the case against him and did not have prejudicial effect (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), 2014); such decisions provide legitimacy to the stand ins and contribute to the blurriness of the SCI by acknowledging the problem of copies, but not rectifying it. It seems that the Court found Mr. Harkat untrustworthy and “was unprepared to reward Mr. Harkat with a meaningful remedy” (Interview with Craig Forcese, Ottawa, October 2014). Professor Forcese considers this decision as a win for clarifying the system, but an individual loss for Mr. Harkat. In 2016, Mr. Jaballah was granted an abuse of process motion that led to

named person from knowing and meeting the case against him and precluded the function of judicial review (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (CanLII), para. 125).

the exclusion of all summaries for which original material had been destroyed (*Jaballah (Re)*, 2016 FC 586, paras. 7-9). The selectiveness of what ‘counts’ as evidence indicates an end of adherence to stringent evidentiary parameters as laid out in the CEA and the privileging of mimicked (Baudrillard, 1994) evidence.

The contentiousness of summaries speaks to a concern for the lack of reality embedded in them. The SCI process advances in the courts as if following the ‘real’ just processes of the criminal justice system (though not really real justice, but rather Baudrillard's (1994) hyperreal), while the underlying mechanisms indicate the acceptance of truncated information as evidence. Some respondents spoke directly to the authenticity of the cases: one noted the lack of “real” evidence and “real” ability of the lawyers to challenge information, while characterizing the public trials as a façade, a piece of show, and not the “real deal” (Interview with Lawyer, Ottawa, April 2015). A lawyer and outspoken critic of the SCI portrayed the process in a variety of ways suggesting that the public court proceedings are “an insanity circle” and like being “in Alice in Wonderland” (Interview with Rocco Galati, Toronto, June 2015). More subdued characterizations by Mr. Galati indicate that the process is a sham that is all smoke and mirrors (Interview, Toronto, June 2015). Regardless of the words used, such descriptions suggest that the SCI merely provides the pretense of judicial proceedings—simulation and mimicry—rather than one that respondents understand as genuine. The implementation of the Special Advocate Program (SAP) was meant to rectify some of the concerns with one-sided justice, however, as we will see, constraints to these security-cleared lawyers cause added layers to the courtroom process that further simulate justice. The references to the ‘real’

by respondents is suggestive of genuine justice as a spectre haunting the discourse around the SCI out of nostalgia for what has been lost to the hyperreal.

Special Advocates and the Semblance of Legality

In response to the Charkaoui I ruling that the IRPA inadmissibility scheme was unconstitutional, special advocates were introduced and the SCC reasoned the scheme was constitutionally compliant. This was done by ensuring that suspects are “reasonably informed” of the case against them and that there is sufficient disclosure of information to enable the suspect to “give meaningful instructions” to their public counsel (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), para. 56). Under the IRPA scheme, broad judicial discretion and assigning special advocates to cases are imagined as “substantial substitutes” and “alternative means” for the functions normally attributed to ordinary counsel in public legal proceedings (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), summary). Normal rules of disclosure and evidentiary safeguards ensure that defendants and their counsel know the case made against them, can cross-examine information, and are protected by rules against hearsay. IRPA exceptions are analogous to the common-law privilege granted to confidential informants (CI) in criminal cases and commissions of inquiry. This “informer privilege” has long been recognized in common law and serves a dual purpose, namely, to protect “a channel of information and the safety of those supplying it” (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), para. 115). However, the use of informants in SCI cases does involve different rules and restricted knowledge for special advocates whose role it is to bolster the parity of information and ensure justice.

While CSIS informants are not granted the same blanket privilege as CIs, the information they provide is. This information is secured under broad protections that preclude the public disclosure of information injurious to national security interests. As one respondent noted there is no class privilege, rather just national security privilege (Interview with Lawyer, Toronto, April 2015). The de facto extension of the common privilege establishes that even special advocates are granted only a limited ability to interview and cross examine CSIS informants, and only as a last resort. This variation is not representative of the protections and openness of the criminal justice system. One respondent summed up the difference between witnesses in criminal cases and witnesses under the SCI:

in the criminal law context, the police have informants...but if the informant's information is going to be used to affect a person's liberty then the identity of the informant is disclosed and then they go into witness protection... But you would never in a criminal law context have an unidentified, unchallenged informant's information used to affect a person's liberty. But in the intelligence context, a person can be deported, which affects their liberty, perhaps deported to torture, which affects the security of their person, on the basis of unchallenged credentials of an informant. (Interview with Lawyer, Ottawa, February 2015)

Enabling special advocate access to witnesses and examination of the source, it is claimed, would have a profound "chilling effect" on the willingness of sources to come forward and would limit the ability of CSIS to recruit new information sources (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), paras. 89, 138; Interview with Lawyer, Ottawa, February 2015). The high court also ruled that

the disclosure of abridged summaries to the suspect and allowing special advocates access to un-redacted versions in closed session was “sufficient to prevent significant prejudice to [the suspect’s] ability to know and meet the case against him” (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), para. 97). Criminal cases cannot place as much weight in hearsay as is done in SCI cases. Summaries, special advocates, and judicial discretion function as doubles or equivalents of disclosure, but do not offer a rigorous evidentiary standard thus contributing to a simulation of just court proceedings.

Respondents noted that special advocates have two tasks: first they should push as much confidential information into the public realm as possible and then they should use whatever is left to closed hearings to challenge the allegations against the named person. “In an ideal case the special advocate would push all of the classified information out to the public counsel and then retire” (Interview with Lawyer, Ottawa, February 2015). Though special advocates have never been successful in pushing all information into the open, it has been partially accomplished in most cases.⁶⁵ However, as noted above, much of this information is heavily processed (transposed and translated) and merely stands in for the originals (Baudrillard, 1994). The advantage of pushing information into the public realm is highlighted by Green (1997) who suggests that lay knowledge is often neglected. The disclosure of newspaper articles and online sources of questionable quality used within the (public) Security Intelligence Report (SIR) demonstrate the importance of

⁶⁵ In Mr. Harkat’s case additional summarized third party information was disclosed due to the urging of his special advocates (*Harkat (Re)*, 2010 FC 1241 (CanLII), para. 33).

experts and the general public being able to discredit ‘evidence’⁶⁶ in addition to the named person being informed enough to fully respond to allegations. If more people are privy to the detailed allegations duplicates and doubles may be less influential and allow named persons to advocate for themselves.

All respondents noted the limitations placed upon special advocates in comparison with a criminal defence lawyer. In addition to deficiencies in support and communication, there is information about sources that is held back from special advocates “even beyond just the name or the identifying features” (Interview with Lawyer, Ottawa, February 2015). The trouble with this is that in an intelligence context a person can be deported, perhaps to torture, “on the basis of unchallenged credentials of an informant” (Interview with Lawyer, Ottawa, February 2015). This contributes to the zone of indistinction where ‘due process’ is depreciated. While typically the special advocates have the same knowledge of the provenance of intelligence as CSIS, that does not mean that CSIS knows the origin of the information. There is a relative parity of information between the Ministers and the special advocates, but this is not an indication of the ‘vettedness’ of the information. Even for judges who were eventually privy to all information, it was not clear whether information was coming from reports of conversations from an informant or surveillance or from electronic intercepts; the originality is entirely lost. The veracity of the summaries is indeterminate, however Justice Noël indicated that this was deliberate and necessary to protect sources from being identified (*Harkat (Re)*, 2010 FC 1241 (CanLII), para. 108). However, all of this summarizing is problematic as it is possible that

⁶⁶ An immigration lawyer that was present at two CSIS meetings with Mr. Harkat retained his own handwritten notes of the interview “which may contradict part of the summary of the interview of the Intelligence officers” (*Harkat (Re)*, 2010 FC 1241 (CanLII), para. 48).

the copy does not closely reflect the model, or that the summary is further removed into hyperreality (Baudrillard, 1994).

When made privy to information the special advocates, though limited in their powers, have been able to rectify some disparities with the aid of judges. As part of Mr. Harkat's case it came out that a human source was shown to be untruthful in a polygraph test and this was withheld from the Court and special advocates by the Ministers; Justice Noël regarded the withholding of this information as a breach of duty on behalf of the Minister's counsel (*Harkat (Re)*, [2010] 4 FCR 149, 2009 FC 1050 (CanLII)). However, rather than excluding the evidence, the remedy was to set aside human source privilege making the entire human source file available to the special advocates. For Mr. Almrei's case, the special advocates discovered some issues with the human source information with polygraphs not being administered as reported and questionable circumstances surrounding polygraphs. Further, comparisons done between human source reports and other information held by CSIS such as intercept and surveillance reports "identified some serious contradictions," with one source being discredited as a result of reporting conflicting dates and times (*Almrei (Re)*, 2009 FC 1263 (CanLII), para. 163). The admitting of such questionable evidence reinforces zones of indistinction where mimicry overtakes reliability.

Without the work of the special advocates it is likely that these problems with the material would not come to light. In his public decision, Justice Mosely noted that CSIS's inability to provide a satisfactory explanation for the inconsistencies "suggests a serious lack of analytical capacity in managing enormous volume of information collected by the Service" (*Almrei (Re)*, 2009 FC 1263 (CanLII), para. 164). Part of the concern is that the

CSIS witnesses are often ‘representative’ witnesses who have no firsthand knowledge of the case and are unable to speak to details beyond those in the SIR, rather they merely recount copies of the work of others adding another level of duplication to the ‘evidence.’ Overall, the sources used in Mr. Almrei’s case were unreliable as one source that was interviewed in 2001 with information suggesting that Mr. Almrei was untruthful, recounted consistently with Mr. Almrei’s version of events when interviewed again in 2004. However, CSIS used the 2001 account in the SIR updated in 2008 (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 438). Not holding intelligence up to the rigour of evidence or CSIS to the standards of a policing agency are key differences between SCI and criminal justice mechanisms. The SCI as a simulation pushes for a form of justice for which special advocates stand in for ‘real’ defence lawyers without much needed abilities.

The Necessity of [Over-]Judicializing Intelligence

Of significance is that these cases are based largely on intelligence reports of questionable quality. One hurdle is that actionable information loses its value when exclusive knowledge becomes common knowledge (de Lint, O’Connor, and Cotter, 2007). With access to intelligence being ‘leveled’ and there being multiple informal points of control, de Lint et al. (2007: 51) note that there are “intelligence interruptions” as well as “asymmetrical flow problems.” This is reflected in some certificates being based on information gained through torture; if the intelligence has passed through too many, and possibly non-trusted, or illegitimate nodes, it loses its validity. The existence of a single database contributed to by multiple agencies allows for the dissemination of accountability for actions carried out based on the information available (Diab, 2008). However, supplicates, doubles, and copies are problematic corollaries. Use of intelligence

raises concerns with regards to the method through which it is gathered, with both torture and leveraging potentially compromising the credibility. Secret knowledge can be both a commodity and create power relationships, especially under situations of pre-emption (Bigo 2002). Cooperation with foreign agencies is the central concern with CSIS information being tainted by torture.

In addition to other materials, SIRs are used by CSIS to support the certificate cases. Redacted SIRs are made publicly available for each SCI case. They are essentially a narrative report of assertions deduced from a variety of sources, both open and closed. Despite the use of open source information, such as online sources and newspaper articles, the material may still be redacted due to CSIS not wanting the public to know how the information is being interpreted and analysed; “The Service doesn’t differentiate between open and closed sources and seek to corroborate the facts” (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 190). The corroboration of facts is difficult when working with summaries; one respondent noted that two or three different parties may bring forward the same information, however it may be stemming from the same (potentially unreliable) source transmitting the information to third parties⁶⁷ (Interview with Judge, Ottawa, December 2014; See also *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (*CanLII*), para. 137; *Mahjoub (Re)*, 2013 FC 1092 (*CanLII*), para. 643). Here the copying, duplicating, and doubling of information (Baudrillard, 1994) suggests the validity of information, when the case is the very opposite. Within Mr. Mahjoub’s case, it was a concern that information came from an unreliable source that was being ‘recycled’

⁶⁷ For Justice Létourneau “Corroboration of an erroneous, deficient, misleading or inadequate summary merely compounds the prejudice resulting from the destruction of the original” (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (*CanLII*), para. 142).

through one that was reliable (*Mahjoub (Re)*, 2013 FC 1092 (CanLII), para. 115).⁶⁸ The struggle with sourcing information from the international intelligence community reflects the contradictions of what qualifies as evidence in both content and process.

CSIS intelligence coming to be used as evidence is referred to as the “judicialization” of intelligence (Mactavish, 2013). This is one way of portraying the SCI process as a zone of indistinction; a form of information not meant to be in the courts is introduced and made to ‘pass’ as evidence. Retired CSIS director Jim Judd publicly criticized intelligence being brought into the courtroom (Freeze and Wingrove, 2009; Roach, 2011). The introduction of their material into court has been upsetting for CSIS who, according to respondents, “never expected to end up in court” (Interview with Yavar Hameed, Ottawa, June 2015) and does not “particularly enjoy finding itself in court” (Interview with Lawyer, Toronto, January 2015); “For CSIS I think it was probably a fairly traumatic transition to a new era” (Interview with Judge, Ottawa, December 2014). One respondent characterized the disclosure required by CSIS as a teething process

for the Service to accept that—not accept, but be schooled that this is an adversarial system. But I think that has matured now, to a degree, and I think we’ve lost our baby teeth and the grown-up teeth are coming in. (Interview with Lawyer, Toronto, April 2015)

“Simply put, CSIS is not a policing agency and their information gathering practices are never meant to stand up to courtroom scrutiny” (email correspondence with CSIS representative, August 2015). It has only been over time that the process of using

⁶⁸ This paraphrase comes from a reason for decision that is heavily redacted, including sections of the paragraph being referenced.

intelligence in Court has been worked out, in some measure, under the SCI.⁶⁹ However, this innovation is leading to the indistinguishability of the copy from the original (Baudrillard, 1994) and goes simply beyond pretending to have what one does not. Instead, intelligence is being reproduced and coming to stand in for evidence with troublesome consequences for justice as secrecy is being normalized in the courts.

Using the Charkaoui II ruling, Roach (2009: 18) indicates that “the Court noted that security certificates made use of intelligence as evidence and that such evidential uses of intelligence would require CSIS to adjust their retention policies to observe evidentiary standards.” Stemming from the Charkaoui II ruling and Reasons for Decision is an explicit explanation of evidence and its significance (*Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 SCR 326, 2008 SCC 38 (*CanLII*)). Noting the Canadian Security and Intelligence Act, it is emphasized that intelligence cannot be understood as simply summaries of raw datum that has been destroyed. Original operational notes should be retained because they are a better source of information and evidence when used to support a certificate. Additionally, original notes are needed to refresh the memories of agents who may be testifying to the content of a summary. Further, not having original notes compromises the ability of the judge and ministers to adequately perform their roles in the process. The continual struggle between intelligence and evidence suggests that there are endeavours to ensure that the SCI references the characteristics of the criminal justice system. Making use of original documentation, though an improvement on summaries, maintains a level of exceptionality in using secret information in courts while at the same time normalizing the process.

⁶⁹ The ‘working out’ of the SCI has been to the detriment of the lives of multiple (mainly Muslim) men who found themselves in a consistent state of uncertainty.

Concluding that CSIS investigations are central to the decisions to issue certificates and removal orders, it was decided that there is a duty for CSIS to retain operational notes and to not destroy them following the creation of a summary.^{70 71} Unfortunately, there was little remedy available in cases where the original data had already been destroyed; judges were reluctant to quash certificates on this basis. The Charkaoui II decision notes that “As things stand, the destruction by CSIS of their operational notes compromises the very function of judicial review” (*Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 SCR 326, 2008 SCC 38 (*CanLII*), para. 62).⁷² Overall, the Courts assert that it is troubling to assume that information can stand in the place of evidence once it has been processed and/or transposed so extensively bringing attention to the problem of simulation (Baudrillard, 1994), but the Courts have been reluctant to remedy this by quashing certificates.

At the basis of Mr. Mahjoub’s reasonableness determinations was the connection of information with Cruel, Inhuman or Degrading Treatment (CIDT) and/or torture. The public Reasons for Decision were not ‘rewritten’ as with some other cases, but published in redacted form, making some parts difficult to read and understand⁷³ (*Mahjoub (Re)*, 2010 FC 787 (*CanLII*) and *Mahjoub (Re)*, 2013 FC 1092 (*CanLII*)). The association of this case with CIDT and torture generated interesting and crucial questions about the onus

⁷⁰ The destruction of operating notes was for the purpose of preserving civil liberties; CSIS is now being asked to keep records for the same reason (See Roach, 2011). The judgement concluded that operational notes should be kept for ‘targeted’ investigations, but not for ‘general’ investigations.

⁷¹ As noted in Mr. Harkat’s case, the use of intelligence resulted in named persons being given the opportunity to respond to “a summary of the summaries” (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (*CanLII*), para. 122).

⁷² Destruction of electronic intercepts and original interview notes occurred within the Almrei case, but was “not an issue of major concern in this case” as it did not affect the outcome (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 491-492).

⁷³ Though difficult to read, these Reasons for Decision provide remarkable insight into national security secrecy.

of connecting information with CIDT and torture: Is the onus on the Ministers to demonstrate that it is not connected? Or on the special advocates to establish that it is connected? And what is the standard of proof? Additionally, there was the necessity of establishing why it is important to not introduce information that comes from CIDT and torture into the courtroom. The Reasons for Decision assert that the onus was on the Ministers to demonstrate that information was not connected to CIDT or torture as they were in a better position to establish the provenance of the information. The standard of proof established was that of “reasonable grounds to believe” (*Mahjoub (Re)*, 2010 FC 787 (*CanLII*), para. 21). Justice Blanchard reasoned that information connected to CIDT and torture should not be allowed in the courts because it is unreliable, should be discouraged, and contradicts the integrity of judicial proceedings (*Mahjoub (Re)*, 2010 FC 787 (*CanLII*), para. 66). Here information of specific provenance is not a proper referent for evidence and it seems there are limits to the zone of indistinction reflected in the extent to which intelligence can stand in for evidence.

The introduction of the SAP contributed to the equity of the SCI process, but disclosure restrictions cause a derogation from the traditional adversarial process (See also *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (*CanLII*), para. 57). Multiple respondents noted that the introduction of the special advocates was an improvement, but did not ‘fix’ the constitutionality of the system in their minds. The introduction of security-cleared lawyers does not fully rectify the mimicry of evidence occurring in the courtrooms due to transposition, translating, and extensive copying—special advocates are unable to rectify the destruction of originals (Baudrillard, 1994). Pre-SAP, judges are characterized as a ‘fig leaf’ covering up a problematic process

(Hugessen, 2002), it seems the special advocates have taken on that role. There are two perspectives with regards to asserting political agency in an imperfect system: one respondent suggested that “it may be better to participate in the [constitutionally unfixable] system than to walk away” (Interview with Lawyer, Ottawa, April 2015), while another decided not to be a “cog in the wheel” validating a flawed system (Interview with Lawyer, Ontario, March 2015).⁷⁴ The zone of indistinction created by innovation of the legal system is divisive as exceptionality plays out to the detriment of a non-citizen subjects.

One respondent notes how decades ago the practice in cases such as these was for the Court to not inquire too deeply into the reasons for a national security claim on behalf of the Ministers; this was known as “Crown Privilege” (Interview with Judge, Ottawa, December 2014). But this began to change around the time of the MacDonald Commission⁷⁵ and the creation of CSIS. Respondents noted that such deference to CSIS or co-opting was taking place not just decades ago, but in the more recent SCI cases (Interview with Activist, Ottawa, May 2015; See also Macfarlane, 2012; Rankin, 1986). The sentiment is that the Courts became more confident and security proceedings became more open and this is why judges have been more stringent about what ‘counts’ as evidence. The slow relaxation of security measures may also have to do with the passage of time as some respondents note that following 9/11 there was a “climate of concern”: “There was a real sense at that time that a similar attack could occur anywhere in the Western World, including Canada” (Interview with Judge, Ottawa, December 2014). One

⁷⁴ Mr. Galati walked out of court instead of having his robes used “to pervert the course of justice” in an early SCI proceeding (Interview, Toronto, June 2015).

⁷⁵ A Royal Commission of Inquiry into some of the activities of the RCMP initiated in 1982 that resulted in the creation of CSIS in 1984.

respondent felt that the special advocates have pushed the judiciary to be less afraid of the Service's claims of national (in)security:

So for years and years and years, before special advocates were involved it was just the Service [(CSIS)] and the judge, and it was a hot-house, just them. And the judges became, I think, somewhat co-opted; they were essentially the judicial authorization branch of the Service. And they just accepted what the Service had to say. And when we started as special advocates the attitude of the judges then compared to now was quite different. Now they're not so willing to just accept what the Service has to say because there have been some spectacular instances where the Service's information has been established to be wrong. (Interview with Lawyer, Toronto, April 2015)

Another respondent was troubled by some of the judges having a pre- special advocate stance that the Court could effectively take a quasi-inquisitorial role and serve as the truth-seeker on behalf of the named person. However, the introduction of the SAP was likely something that the judges appreciated: "I think that that return to that [adversarial] system also gave them a great deal more comfort and confidence than the process of trying to figure this out all on [their] own" (Interview with Lawyer, Toronto, January 2015).

Despite respondents suggesting that judges tend to defer to CSIS, in a judgement it is explicitly stated that

Although their expertise is taken into consideration in this delicate mandate, the judge owes no deference to the assertions made by CSIS or the Ministers in this regard; nor does it owe any deference to the special advocates. The decision is the

designated judge's alone. This is what Parliament decreed. (*Charkaoui (Re)*, 2009 FC 1030 (*CanLII*), para. 76).

Here, discomfort with the SCI process is an indication of it not being genuine to the principles of a 'real' judicial system as understood by legal actors. The judge's authority should be assumed, rather than have to be stated, suggesting that the legitimacy of these hybrid legal proceedings is in question and up for debate (Trubek and Trubek, 2005)

“Inequality of Arms” and Zones of Indistinction

Multiple respondents spoke about the equality of arms, referring to the importance in the adversarial process that the two sides be armed up equally in order to have a fair fight (Interview with Lawyer, Ottawa, May 2015; Interview with Lawyer, Toronto, January 2015; Interview with Lawyer, Ottawa, February 2015). It is this dynamic of inequity that degrades due process and reflects a zone of indistinction where potentialities are abound. One respondent noted how the additional disclosure received in the second iteration of certificates was distressing to the open counsel because they realized what additional motions and strategies *could* have been used had they been in possession of that information earlier (Interview with Lawyer, Toronto, January 2015). However, the way in which previously closed information became public is important; during Mr. Charkaoui's case confidential information held by CSIS was leaked to two journalists and the information was confirmed by an additional government source according to the published news article and testimony from the journalists (*Charkaoui (Re)*, [2009] 1 FCR 507, 2008 FC 61 (*CanLII*)). While multiple named persons did want all information to become public so that they could fully know and meet the case against them⁷⁶ the way in which

⁷⁶ See Wala (2014)

select top-secret information⁷⁷ against Mr. Charkaoui became public “had a deleterious impact on the entire judicial system and the administration of justice, and may have affected Mr. Charkaoui’s fundamental rights” (*Charkaoui (Re)*, [2009] 1 FCR 507, 2008 FC 61 (*CanLII*), p. 2). This instance demonstrates the importance of context in how secret information becomes available, which impacts how it is used. Discrepancies in what is known by whom creates a space of inequity where the boundary between actuality and potentiality is unclear.

Ministers’ counsel is able to communicate about decisions across cases as they are all part of the same team. However, opportunities to strategize were inequitable as open counsel received only redacted decisions and special advocates had to apply to get the decisions of other cases and were unable to discuss them with named persons or open counsel. While two special advocates allowed for some discussion of ideas, Ministers’ counsel was made up of larger teams who knew the details of the case(s). For the Secretary General of Amnesty International Canada, what is especially important about maintaining a high standard of openness is that it “gives us the best guarantee that evidence is being probed and tested and examined” (Interview with Alex Neve, Ottawa, February 2015). It is only through careful scrutiny that the origins of information will surface; “we know that secrecy always is the torturer’s greatest friend” (Interview with Alex Neve, Ottawa, February 2015). One respondent noted how it is only when both sides are ‘equally armed’ that the truth will come out; for this respondent, the ability to cross-examine witnesses is a defence lawyer’s main tool (Interview with Lawyer, Ottawa, April 2015). Under the SCI, this tool is not always available to the special advocate who is

⁷⁷ The article revealed that Mr. Charkaoui had allegedly discussed hijacking a commercial aircraft with an individual.

doubly crippled by not being able to communicate with others and not always having access to CSIS witnesses and this compromises the possibility of fair proceedings.

Further, respondents noted the inequality of arms that results from the lack of clerical staff for special advocates (Interview with Lawyer, Ottawa, February 2015; Interview with Lawyer, Toronto, April 2015). Though this should be addressed in future cases due to new precedent, one respondent noted how their top-secret cleared junior was not allowed to assist in the case (Interview with Lawyer, Toronto, April 2015). Another respondent commented that “if it weren’t so sad it’d be funny to see this sixty-year-old lawyer standing at a photocopy machine for three days assembling documents” (Interview with Lawyer, Ottawa, February 2015). A main concern with the lack of support staff is that it could lead to shortcuts, in addition to the issue of it being a poor use of financial resources (Interview with Lawyer, Ottawa, February 2015). The use of special advocates is an effort towards equitable justice proceedings, but there are still significant criticisms, and limitations that debase the SCI and make the proceeding indistinct with regards to fairness. The communication ban that previously existed between special advocates and the named person led to the tactic of special advocates obtaining an exhaustive biography prior to viewing the confidential information. As one respondent notes, this “requires a great deal of trust on the part of somebody who has come from a country where you don’t trust people, even though you’re told that they are meant to be representing your interest”⁷⁸ (Interview with Lawyer, Ottawa, February 2015). Special advocates, though not acting for the Ministers, are trained and paid by the government; the relationship between

⁷⁸ It is for this reason that named persons lying and withholding information within their immigration status proceedings was not always held against them; it is quite common and Justice Mosely suggest that the Service may have given this type of untruthfulness too much weight (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 201; See also Razack, 1998).

named persons and their special advocate is “fraught” at best (Interview with Lawyer, Ottawa, February 2015). The abilities and rapport are not genuine in the sense of counsel privilege in a typical juridical process.

Though the inequality of arms issue seems a very practical one that can be simply addressed through better resource allocation, the ramification is that establishing facts within these cases is unnecessarily challenging. The political structure of homo sacer is evident where different rules apply within the SCI cases—aside from the SCI process only applying to non-citizens. The zone of indistinction between actuality and potentiality is reinforced by unworkable circumstances where advocates are disadvantaged by knowledge and resource discrepancies. Compounded by the indistinguishability of copies from the original (Baudrillard, 1994) within the information that is made available to the special advocates, the SCI is no longer representative of a justice system as it has been severely transformed and distorted. Such perversion is carried out in the name of national security and the protection of Canada, but what is being lost in the process of securing needs accounting for.

Conclusion: What is injurious to national security? And why are such decisions reached through a “Sham” and “Monumental Failure” that consists of “Leaps of the Imagination”?

A significant reason for the intelligence remaining secret in these cases is the potential for impairment of intelligence gathering functions. If sources of intelligence dry up or become unreliable Canadian security will be compromised. Other countries will no longer want to cooperate or share with Canada if the government starts disclosing information that embarrasses states or compromises their ability to gather more

intelligence through divulging ongoing investigations or intelligence gathering techniques and capabilities (Interview with Lawyer, Ottawa, February 2015). There are concerns with the “chilling effect” of not granting class privilege to CSIS human sources, which would result in the inability to recruit new sources (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), para. 89; Interview with Lawyer, Ottawa, February 2015). These concerns are especially significant for Canada as a net importer of intelligence upon which it needs to be able to depend (*Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 (CanLII), para. 108; Lutfy, 2011; Roach, 2009, 2011).

Under IRPA, the designated judge decides what can and cannot be disclosed publicly based on the criteria of its release being injurious to national security or endangering the safety of any person (Valverde, 2015). In the case of Mr. Charkaoui, the presiding judge decided that some of the secret information that the certificate was based on could be released, but rather than disclose this information, the Ministers withdrew the certificate allowing Mr. Charkaoui full release with no conditions; “[the government] would rather have him at liberty in Canada than disclose the information that the judge wanted disclosed” (Interview with Lawyer, Ottawa, February 2015). This is a hazard of the Canadian government relying on secret information to restrict an individual’s liberty. The fact that a designated judge believed the information could be publicly disclosed reflects what multiple respondents and authors refer to as ‘overclaiming’ on behalf of the Ministers.^{79 80}

⁷⁹ The Ministers have redacted documents provided to special advocates resulting in the Court ordering the Ministers to gain permission from the foreign agency to disclose the information. The Ministers argued that merely asking permission to share information would compromise the flow of information (*Charkaoui (Re)*, [2010] 3 FCR 102, 2009 FC 476 (CanLII)). The Court found this argument unconvincing.

An ongoing theme within interviews and intelligence literature is the tendency of the Ministers and cooperating government agencies to ‘overclaim’ the necessity of information remaining secret (Interview with Lawyer, Toronto, October 2014; Interview with Lawyer, Toronto, April 2015). In his decision to quash Mr. Almrei’s certificate, Justice Mosely notes that he was satisfied with what was redacted for the most part, but “In some instances...I considered that the redactions had been excessive and tended to unnecessarily obscure portions of the records” (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 33). In this case, the Ministers removed such redactions when ordered to reconsider. In Mr. Harkat’s reasonableness decision the judges came down even harder on the (over)use of secrecy:

The content of the closed hearings overlapped significantly with the open hearing and did not assist [the Supreme Court] in deciding the issues before it. It served only to foster an appearance of opacity of these proceedings, which runs contrary to the fundamental principles of transparency and accountability. (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (*CanLII*), para. 26)

Over time some judges became dissatisfied with the Ministers’ zealotry in relying on secret information. Such extraneous claims to secrecy have hindered and extended the work of public inquiries and trials (Roach, 2011). Specifically, within the SCI, claims of secrecy undermine justice as what is known is limited and copied intelligence that is put forward to pass as evidence is severely lacking in rigour.

⁸⁰ One respondent estimates that of what the Ministers claim is national security they have probably over claimed by half (Interview with Lawyer, Toronto, April 2015).

The hybridity of the SCI (Trubek and Trubek, 2005) contributes to the generation of a zone of indistinction; it combines rights protections and rights violations in a way that makes the named person a supplicant hoping for a just handout. The SCI is polarizing as individuals have strong feelings about it, but are hesitant to speak generally about it; special advocates are a welcome addition to the system, but some believe the entire system should be abolished. Multiple respondents held back on providing an assessment or evaluation of the SCI, while others were very clear in their criticisms. One participant's words fully capture their thoughts on the effectiveness of the SCI:

[The SCI] has to be seen as a monumental failure from all of the departments and at every level because—I'm not talking about win-loss calculus here, they did have losses that any government should accept as the outcome of justice, just like when a crown attorney loses a case, that shouldn't be seen as some failure on his or her part or on the system's part, it's simply the way the process works—so I don't mean failure on that account... But I mean failure in terms of the sheer volume of resources they devoted and the time it took, and the expense, and the cumbersomeness... It just is not an efficient process. Now on the other hand, it is the most thorough process they have for an extremely draconian result.

(Interview with Lawyer, Ottawa, February 2015)

Another respondent noted that the SCI process is not beneficial for the named person or the government: "I don't think that it's [a process] that particularly serves the needs of anyone" (Interview with Lawyer, Toronto, January 2015). Other respondents were more tempered in their opinion suggesting that it is not an ideal system, but 'it is what it is.' These statements point to the SCI not meeting some parameter set out in the minds of

those working within the system and suggest that actual justice is not the outcome. Rather, justice is merely being simulated by the process that involves over processed information and inequitable support between sides. According to Roach (2011: 405), “Security certificates in Canada have failed as antiterrorism policy.” Most often the referent for comparison is the criminal justice system indicating a loss of what is felt to provide ‘real’ justice (Baudrillard, 1994). As noted above, much of the concern with the SCI stems from the ambiguity in evidentiary standards due to the use of intelligence and the way in which the court cases mimic just proceedings, but fail to actualize fair outcomes.

While it is easy to simply write off the SCI as an exceptional, this chapter demonstrates the intricacies and references that reflect homo sacer subjectivity (Agamben, 1998). Under the SCI non-citizens are not entitled to the rights afforded to Canadian citizens and the ‘prosecution’ of simulated terrorism offences is complimented by simulated security effects. The zone of indistinction between actuality and potentiality is exacerbated by the use of unreliable information. Of grave concern with such a debauched simulation of evidence is that ‘real’ offences may be obscured; the controversies over secret evidence needs to be taken seriously because it “can turn terrorist suspects into fairness martyrs” and obscure the reality of the terrorist threat from the public (Roach, 2012: 179). One respondent who was strongly opposed to the SCI stressed that “I don’t take national security issues lightly. I understand that the threat of terrorism is very real” (Interview with Lawyer, Ontario, March 2015). It is necessary that terrorism be secured against, but such rights-compromising simulations of justice require reimagining.

The contents of the public summaries of allegations against non-citizen subjects “isn’t nothing” (Interview with Lawyer, Toronto, January 2015). At face value the

intelligence indicates that the CBSA took the correct steps in apprehending these individuals. If the information could be proven inaccurate it would be easy to drop the certificates (though the ordeal of these non-citizen subjects can never be recompensed). The complication is that the level of simulation goes beyond Baudrillard's (1994) idea of pretending to have what one does not. The Ministers are not fabricating information, rather intelligence goes through so much processing, doubling, and copying that what stands in for evidence under the SCI is indistinguishable from initial iterations. As noted above, practices of informer privilege, transposition, translation, and summarizing obscure what is in the (destroyed) originals. Information has been so transformed that the copies displace the original. And perhaps, most problematically, these practices support a political structure in which non-citizens and citizens have different rights with the looming potential for all to lose such rights should the exception become the norm. Such steadfast longing for the (albeit limited and problematic) protections provided by the criminal justice system point to a reminiscence for signs of reality in the form of the lost referential for rights.

Chapter III: Scaling Unease: Mobilizing national security as a legal chronotope

Introduction

Pre-9/11, certificates were largely outside of public knowledge and not the focus of any popular rights movement. They were predominantly topical in the offices of specialized immigration lawyers fighting them until Mr. Jaballah's second certificate. It was around this time, October 2001, that the news media started regularly covering the cases. Certificates began under the 1976 Immigration Act⁸¹ as a way to deem non-citizen persons inadmissible to Canada on various safety and security grounds (Immigration Act, 1978); as will be discussed, the earlier iteration of the measure dealt efficiently and effectively with espionage concerns, but were complicated by challenges when grounds were rooted in 'political extremism,' and even further obscured by post-9/11 terrorism accusations. It has only been within the past sixteen years that certificates have transformed into the procedure that currently exists in the courts. Currently, certificates are issued by the Government of Canada on advice from Canadian Security Intelligence Service (CSIS) officials, and signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Immigration, Refugees and Citizenship (IRCC).⁸² Enabled under the Immigration and Refugee Protection Act (IRPA) (2001), certificates, now often referred to as "security" certificates, act as *de facto* detention and deportation orders for the person named in them. Since 1978, the process involved in issuing and executing a certificate has undergone broad changes. Now a full government program referred to as the "Security Certificate Initiative" (SCI),⁸³ certificates do not consistently act as expedited deportation orders, but have initiated extensive court proceedings and

⁸¹ S. 39. (1).

⁸² Previously Citizenship and Immigration Canada (CIC).

⁸³ See Public Safety Canada (2010).

legal challenges regarding both Canadian and international law. In practice, certificates represent a story of the failure to efficiently transform a state of insecurity into a state of security through the creation and consolidation of legal networks infrastructure, and security forces. This chapter identifies the SCI as a legal chronotope and works to isolate and clarify some of the important dimensions and objects that contribute to the SCI, as well as examine actors and their roles that unfold under the SCI narrative.

Approaching the SCI as a legalistic mechanism, this chapter conducts what Valverde (2015: 57) refers to as a ‘scalar analysis’ that considers space, time, as well as affect and mood. This form of analysis should not be confused with a theory of security, but rather is a methodological review of how spacetime is an essential component of security and the jurisdictional ‘games’ afoot when confronting the terror threat of ‘non-citizens.’ Following Bakhtin, Valverde's (2015) analysis of ‘chronotopes’ enables a review of the temporal and spatial dimensions of governance projects and how they affect one another.⁸⁴ The chronotope thus adds depth and extension through the consideration of how ends are reached through scalar choices and shows the “social production” of law (Valverde, 2015: 154) by examining governance projects. Supplemental to the examination of narrative accounts (objectives and goals), techniques and strategies, or constitutive subjectivities, chronotopic analysis brings to light the spatial, jurisdictional, and temporal processes of governance projects. As such, it reveals the mobility of governance rather than its fixtures. Insight into the temporal protraction of the SCI cases is gained through an examination of nuances in workspaces in which national security is manifest in the conditions of actors working alone. This analysis is not meant to prove the

⁸⁴ Rather than simply analyzing space and time separately and then adding them together.

existence of the SCI as a ‘chronotope,’ but is a way of examining the more obscured components that expose the gaps of the SCI as a governance process.

Much of the literature available about the SCI stems from the discipline of law, with a portion of sociological literature engaging with important narratives of exceptionalism,⁸⁵ and other socio-legal authors incorporating ideas of the ‘othering’ involved in Canadian immigration policy.⁸⁶ Overall, the literature acknowledges various justice and rights concerns, with Larsen, Harkat, and Harkat (2008) being an especially significant piece that incorporates the voices and asserts the political agency of named person Mohamed Harkat and his spouse Sophie Harkat by extensively quoting their responses to questions about their experience. While some of the literature about the SCI engages with ideas of spacetime and jurisdiction, few do so in a way that unpacks spacetime and jurisdictional formations as the appearance of the SCI as a ‘chronotope of security’ (Valverde, 2015). One direct examination of the issue of temporality is Larsen's (2014) chapter on the ‘permanent temporariness’ of the SCI that considers attempts to distinguish between citizens and non-citizens and to reinforce the normalization of the exception. Larsen (2014: 86) uses the term ‘indefinitely pending’ to indicate the experience “of being permanently caught in a web of transitory processes and conditions that are ostensibly in furtherance of a future state of total expulsion.” The experience of being indefinitely pending is illustrated using the spatial settings of indefinite detention (institutional space) and conditional release (domestic space) (Larsen, 2014). Larsen and Piché (2007, 2009) provide detailed studies of the Kingston Immigration Holding Centre

⁸⁵ See example: Aitken, 2008; Bell, 2006, 2011b; French, 2007; Larsen, 2008; Larsen and Piché, 2007, 2009; Oriola, 2009.

⁸⁶ See for example: Aiken, 2001c, 2001a, 2001b; Bell, 2011a; Larsen, 2008; Pratt, 2005; Whitaker, 2002, 2012.

(KIHC) as a jurisdictional struggle embedded within a carceral space. The aim of this piece is to build upon the analysis of Larsen (2014) and Larsen and Piché (2007, 2009) by considering additional chronotopic SCI mechanisms.

Valverde (2015) suggests that legal discourse shares commonalities with literary genres⁸⁷ such that the multiplicity of perspectives⁸⁸ and the influence of spacetimes are relevant to both. Rather than considering space and time separately or simply adding the analysis of one to the other, Valverde (2015) suggests that it is important to pay attention to their interaction,⁸⁹ and the way spatial and temporal indicators are fused into wholes to form a world within which the narrative develops and in which authors and characters act and react to one another; this is the premise of a chronotope. For example, in the monological encounter of authorial and character positions, authors know more and see more than characters (O'Connor, 2002: 163). They know what is going on in, and are privy to, a world, which operates behind the characters' backs. Such authorial positions occupy privileged positionality in space and time as a result of surplus knowledge, enabling them to anticipate what will happen next and how the story will unfold (Bakhtin, 1981). As in the novel, force relations both form and shape access to spatiotemporal worlds of action and interaction. Following these ideas, this chapter engages with the spacetimes, mood, and jurisdiction of the SCI to illustrate the how the encounter of legal and security forces shapes the SCI world and the relations of its characters and authors.

⁸⁷ Genre is not the equivalent of chronotope; a chronotope may unite or transcend genres or underscore a narrative. Valverde (2015) approaches law as a genre.

⁸⁸ Also referred to as "heteroglossia."

⁸⁹ Here Valverde (2015) views Bakhtin to be more useful than Deleuze. Deleuzian chronotopes are a montage of hierarchical relations, where, for example, images of time are either subordinated to movement through space or extension through various sensory-motor formulae (the movement-image) or exerts its independence as co-possible futures (time-image).

Due to the lengthy existence of certificates, it is important to contextualize this discussion within the socio-political milieu in which the SCI have taken shape. This is not to provide divisive points, but rather map out a genealogy of the SCI as a spatiotemporal governance project. The phases outlined here are not self-contained; social and political factors led to some changes in functioning of the SCI, though they remain overlapped with past practices: “In general, governing capacities and resources can always be flexibly re-assembled or shifted to another scale in such a way as to create assemblages of recycled governing techniques that serve novel purposes” (Valverde, 2015: 52). Various authors and respondents note the transformation⁹⁰ of the threat and the way authors, characters, and the law-security enterprise respond to that threat.

Rather than examining the SCI as a space where law is applied, the idea of the chronotope is used to understand the SCI as constituting a world in which legal and national security force-relations unfold in space and time. This approach does not necessarily provide a historical teleology, but examines how spatiotemporal aspects of governance are assembled. Following O’Connor (2002), the idea of mobility is used to augment understanding of social processes involved in the SCI, where the SCI is a process of moving between one ‘place’ or state of affairs and another, ideally, from a state of suspected insecurity to a state of security (through banishment of the threat). The SCI is a tale of the cobbling together of forces, supports, and legal and security technologies to mitigate perceived threats. Five ‘non-citizen’ suspects are indicative of the threat and a patchwork of immigration, criminal, and civil legislation, in combination with an assembled cast of characters—security designated judges, special advocates, public

⁹⁰ There is an inclination to speak of the ‘evolution’ of the threat, but such connotations of progress or advancement are avoided here.

lawyers, named persons, and sureties—brought together in a series of legal and security force-relations. The scope of the assemblage involves not only the movement of ideas and practices across the boundaries of sites and institutions (Walters, 2017), but also across jurisdictions and governmental scales. Formed through the intersection of law and national security, the characters who serve as special advocates for the terror suspects have full knowledge of the intelligence against named persons, but are, by their own account, ill-equipped underdogs while the cast of security-designated-judges face challenges of their own. Open counsel experience a knowledge deficit due to limited access to the world of security intelligence (playing the role of ‘evidence’), lack equalizing forces of legality, and, consequently, find themselves outside of their everyday ambit and experience as legal practitioners. Contingent detention practices, novel workplaces, and modified courts are the places where law and national security interact in a chronotope where the response to the terror threat of non-citizens fails, though threat is also seen to, or is made to, dissipate over time.

This chapter first offers a consideration of 9/11 spacetimes as a spatial and temporal scale of the SCI and sets up the ideas of jurisdiction and mood to provide a framework for what is addressed in the following sections. Second, a historical context of how the SCI was initially conceptualized and how it has developed through multiple iterations involving temporality and spatialization in conjunction with jurisdictional moves is offered. The chapter then suggests that unease is a pervasive ambience of the SCI and that this impacts its governing approach and effect. Bunkers as spaces in which the SCI is ‘worked out’ are then discussed, and in doing so, the chapter highlights the added challenges involved for actors due to the necessity of managing surplus knowledge;

having information to which not all actors are privy constrains every role. Before concluding, the diminishment of threat and how temporality has lowered the perceived risk, while presence in public spaces has had mixed effects on the threat evaluations, are considered. Thus, the main contribution of this chapter is the provision of a socio-legal analysis of the SCI using a fresh framework, the chronotope (Valverde, 2015), to expose some of its inner workings as a governing mechanisms.

Post-9/11 SCI Space[Times]

This section builds upon Valverde's (2015) approach by considering the spatial and temporal scale of the SCI in its current iteration, as well as the problem of jurisdiction and mood. Spatial scale involves quantitative space in the sense of size or dimensions as found in a map, but also qualitative space that considers social space and how one might account for their experience of displacement (Valverde, 2015: 59). For Deleuze, spacetime chronotopes are often ordered by a hierarchy of relations, where time is subordinated to movement through space. That is, time is expressed as the action of crossing or changing places in space and in going from one point or state of affairs to another. In this way, time is made linear and quantitative as a number that indirectly measures movement (Deleuze, 1989: 36). Quantitative time is a function of normal movement. It appears between movements that go from point to point. In this subordination chronotope, actions are understood as reactions, provoked by a situation whose sensuous qualities are sufficiently given and serve as stimuli to action.

For example, terror threats are now typically given within national security situations. Both sensuous quality and provocateur of action, the affective element of a security threat is a problem with vague potential. Without mechanism or direction, it

requires a body with the necessary qualities to direct and actualize it. Jurisdiction is the mechanism for determining which body has authority to respond to the problem and to determine the course of action, often based on their positionality and access to surplus knowledge.⁹¹ Jurisdiction is a ‘sorting practice,’ determining who governs and consequently how something will be governed. Jurisdiction is connected to spatial changes and is dependent upon mood (Valverde, 2015: 84, 86). Like the threat of espionage and political extremism, the contemporary problem of the potential threat of non-citizen terrorists is seen to fall normally within the SCI and comes under its jurisdiction. The certificate embodies the nature of the threat and initiates a response aimed at the expeditious deportation and banishment of the terror suspect.

This analysis of the SCI covers five recent cases, those of: Messrs. Adil Charkaoui, Hassan Almrei, Mahmoud Jaballah, Mohamed Harkat, and Mohammad Mahjoub. The milieu within which the SCI operates has undergone significant transformations in terms of the security concern, as discussed in the following section. Enacting this concern within the ready-made immigration-security rubric creates a series of challenges where legality and national security encounter one another as a relation of forces and within which are created new legal-security characters and social spaces of detention, inquiry, and interaction (namely, KIHC, security intelligence bunkers, and secret courts), all of which are impacted by the affect of national security and are connected with prolonged work as a result of managing intelligence. As we will see, the context of the more recent SCI cases reflects both subtle and obvious transformations in the spatialization and temporality of the SCI as impacted by governing decision-making with regards to jurisdiction and

⁹¹ Valverde (2015: 165) provides examples of chronotopes of security at the scale of local, family, and body and states that “it is difficult to generalize about the scope of national state jurisdiction.”

political affect. Such transformations impact the actors involved and the power and authority they wield.

SCI Context: “Historical” time and temporality

Three respondents indicated that the Cold War⁹² constituted the milieu in which to understand the initial development of the SCI, when espionage was a pervasive security concern (Interview with Lawyer, Ottawa, February 2015; Interview with Judge, Ottawa, December 2014; Interview with Community Organizer, Ontario, April 2015). The security challenge to be overcome by certificate legislation included Soviet spies, organized crime, and terrorism. During Senate and House of Commons deliberations of the 1976 Immigration Bill (C-24) concerns over potential for abuses, arbitrary power, secrecy, and violation of civil liberties by certificate legislation were voiced (Senate of Canada, 1977). The initial formulation of the bill excluded Federal Court judges from being entrusted with security evidence based on the argument that the Federal Court is to handle law, not facts, because “It is not within its expertise to weigh matters of security”⁹³ (House of Commons, 1987: 8593). Here, law is explicitly disconnected from security and there exists a spatial focus in the legislative assemblies rather than the courts.⁹⁴ Further, this speaks strongly to jurisdiction as who governs is part of the calculus of who is the decision-maker, which also dictates how the issue will be governed (Valverde, 2015). Eventually, the legislation was passed under Sections 39 to 42 of the Immigration Act, (1976) under the heading “Safety and Security of Canada” (Immigration Act, 1978: 1219-1222). In this first iteration, the SCI oversight was established via a Special Advisory

⁹² The Cold War spanned from approximately 1947 to 1990.

⁹³ The judicialization of intelligence is an ongoing concern for CSIS (Freeze and Wingrove, 2009)

⁹⁴ For insight into the institutional role of the Supreme Courts see Macfarlane (2013).

Board that reported to the Minister and Solicitor General. The concern with espionage and effectiveness of certificates was validated by their efficient use against foreign spies.

Three suspected Russian spies (two in 1996, one in 2006) were discovered and subject to certificates that resulted in their immediate deportation. These cases confirmed that certificates were effective counter-espionage tools since they quickly ended in deportation. But, one respondent could not understand why these individuals were “treated so nicely” (Interview with Lawyer (b), Toronto, October 2014). Rather than prosecuting spies for espionage, the Canadian Government exercised their jurisdictional authority by simply sending them home. When deployed for this type of case, the SCI worked as expected with suspects or ‘named persons’ consenting to be deported rather than languishing in detention; it was expedient for the government (Interview with Craig Forcese, Ottawa, October 2014; Interview with Judge, December 2014). However, espionage has not been the predominant target of the SCI. Prior to 9/11, the two communities most affected by security measures in Canada were Palestinians and Sri Lankan Tamils (Interview with Lawyer, Ontario, March 2015). Actual certificate issuance reflects a diverse cast of characters and a multiplicity of rationales. Certificates were issued against an Algerian for involvement in an “armed Islamic group,” a Sikh from India for connections to the Air India bombing, a Saudi for involvement in bombing USA barracks in Saudi Arabia before coming to Canada, a Kurd for connections to the Kurdistan Workers’ Party,⁹⁵ three Palestinians (at least one with admitted connections to the Palestine Liberation Organization), and three Iranians.⁹⁶ Most of these individuals

⁹⁵ Suleyman Goven is a Kurdish man who faced accusations from CSIS without the issuance of a certificate. See Leddy (2010) for a detailed narrative of his ordeal.

⁹⁶ This information was compiled from Lamey (2011), websites such as Justice for Mohamed Harkat, Justice for Mahmoud Jaballah, Support Mohammad Mahjoub, and additional news and government websites.

came to Canada as refugee claimants and most were subsequently deported by means of a certificate; the government effectively ‘exports’ threats in these cases by relocating them outside of Canada rather than neutralizing the threat subject.⁹⁷

For the most part, pre-9/11 certificates resulted in expedient deportations. However, some earlier certificates were challenged by dedicated lawyers, including those against Manickavasagam Suresh whose (1993) certificate was annulled in 2007 and not re-issued,⁹⁸ but a deportation order was recently (January 2017) upheld by the Federal Court (Bell, 2017). Also, Issam Al Yamani faced multiple certificates and deportation orders after his 1993 arrest, but has yet to be deported. In earlier years, certificates faced challenges, mostly in the space of lower courts, that were not particularly transformative. Some ‘successful’ certificates resulted in expedited deportation because the suspects were not concerned for their safety upon return.⁹⁹ For those caught spying, “they willingly returned to their country of citizenship or last residence because there is no stake to staying in Canada with regards to their safety” (Interview with Lawyer, Toronto, April 2015). For those accused of terrorism, return to a prior country of residence or citizenship is more likely to result in maltreatment. While deportation to spaces of maltreatment is only a secondary concern when determining the reasonableness of the certificate,¹⁰⁰ it adds additional challenges to the expedient deportation of the accused persons (Interview with Judge, Ottawa, December 2014; Interview with Lawyer, January 2015; Interview

⁹⁷ Lamey (2011: 344-345) provides a chart of “Refugee Claims in Canada by Political Extremists 1985-2005” that is helpful for understanding some certificate rationales, though Lamey (2011) does not appear to distinguish between “terrorist” and “accused terrorist.”

⁹⁸ Mr. Suresh is a Sri Lankan man accused of fundraising for the Tamil Tigers. For a comparative account of his case see Macklin (2002).

⁹⁹ This is not the case for the majority of SCI-based deportations.

¹⁰⁰ The experiences of Canadian citizens Maher Arar, Abdullah Almalki, Ahmed El Maati, and Muayyed Nureddin further highlight concerns over the rendition of terror suspects (Interview with Journalist, Ottawa, January 2015; see also MacCharles, 2017).

with Alex Neve, Ottawa, February 2015; Interview with Lawyer, Ontario, March 2015; Interview with Community Organizer, Ontario, April 2015; Interview with Supporter, Toronto, July 2015; Interview with Activist, Ottawa, July 2015).

A perplexing component of the Cold War narrative is the involvement of named persons in the fight against the Soviet Union. Three respondents noted that Mr. Almrei was involved in battling the Soviets when the ‘West’ supported the war¹⁰¹ (Interview with Lawyer, Ottawa, February 2015; Interview with Judge, Ottawa, December 2014; Interview with Journalist, Ottawa, January 2015), while another noted the “Red-Scare” that took place in Canada when fear of communism and communist supporters was at its height during the USA’s ‘McCarthy era’ (Interview with Community Organizer, Ontario, April 2015). When the Soviet threat disappeared and hostility was directed towards the ‘West,’ individuals who were only part of the first phase of Al Qaeda had ‘Western supported’ acts held against them (Interview with Lawyer, Ottawa, February 2015). One respondent stated that SCI “characters are complicated: ...we’re talking about whether or not a...Chechen fighter is a terrorist or a freedom fighter” (Interview with Journalist, Ottawa, January 2015). Political involvement that was once admirable is transformed into a potential threat, post-9/11. This reflects how temporality affects what is and is not a threat, where the threat originates, and how that threat is managed. One respondent noted that for named persons, it is likely that, after taking part in some (potentially clandestine) acts, they have come to Canada to put their past lives behind them (Interview with Lawyer, Toronto, April 2015). Regardless of past actions, the certificate must establish a current or “present” threat to Canadian security to be reasonable. However, the worst-

¹⁰¹ For a discussion of Cold War politics and Islam see Mamdani (2004).

case-scenario approach sees SCI cases playing-up the “most dire and sinister circumstances” (Interview with Yavar Hameed, Ottawa, June 2015).

The Honourable Anne Mactavish differentiates between the nature of the threat to Canada posed by international terrorist networks and past Cold War concerns of espionage, suggesting that the terrorist acts that took place on 9/11 were a marker of a shift in thinking around security (Mactavish, 2013). Many respondents acknowledged 9/11 as crucial to the transformation of the SCI, having had a significant impact on security responses in general (Interview with Judge, Ottawa, December 2014; Interview with Journalist, Ottawa, January 2015; Interview with Lawyer, Toronto, January 2015; Interview with Lawyer, Ontario, March 2015; Interview with Community Organizer, Ontario, April 2015; Interview with Lawyer, Ottawa, April 2015; Interview with Yavar Hameed, Ottawa, June 2015). However, proportionately, an examination of pre-9/11 certificates does not reveal espionage as a more significant security threat than extremist associations. While 9/11 is widely held to be an influential factor in the use of certificates, some authors suggest that it merely hastened or rationalized already problematic legal practices that are not imperative for keeping Canada secure (See for example Aiken, 2001c; Roach, 2002; Whitaker, 2002). One respondent explicitly stated that they did not view the SCI as a post-9/11 undertaking: “It’s kind of a continuation of Canada’s...sketchy practices when it comes to migration” (Interview with Supporter, Toronto, July 2015). However, another respondent noted: “I didn’t feel these issues were taken up when I first started working on them, which was pre-9/11” (Interview with Lawyer, Ontario, March 2015). The events of 9/11 did not take place on Canadian soil, but significantly impacted the political environment in Canada. As an element of the SCI

chronotope, the ambiance of the situation (pre- or post- 9/11) produces a national-security-scale response by means of an immigration mechanism effective for the expulsion (or perhaps exchange) of espionage threats from Canada rather than their criminal prosecution in Canada. When the primary character of the threat shifts from concerns over espionage and political extremism to heightened post-9/11 concerns over terrorism this political mechanism is repurposed for the new environment. And, as we will see, with these changes, jurisdictional reorganization makes an impactful change to how certificates operate. At the same time, deportation goals are increasingly problematized by rendition contingencies operating beyond the national scale as international regulations are recognized. Rather than temporal progress, there is a decided shift in characteristics of the world within which law and security function. This, in turn, affects the qualities and capacities of the immigration response targeting non-citizen threats.

Mood/Affect: The state of unease

In addition to space, time (scale), and jurisdiction, legal networks have mood or affect as an aesthetic dimension (Valverde, 2015). This dimension influences how governing projects are approached and differentiates by impacting how they are perceived; a mood may be positive or discouraging, though it is often not acknowledged by those governing it does impact measures and responses. Moods may be prominent or unobtrusive depending on the issue at hand (Valverde, 2015), while for Deleuze, situations are events that constitute a challenge and are rife with affect and ambiance (O'Connor, 2002). The feelings of unease stem from both sides of the SCI with different actors having their own reasons and perceptions of unease (Bigo, 2002). In the case of the

SCI, the mood is both glaring and complex in that there are very strong feelings about the need for national security as well as the necessity of acknowledging and honouring rights.

Affect pervades the entirety of the SCI in a way that cannot be parsed into distinct components. As one respondent noted, post-9/11 the climate within government departments was very much one of concern: “There was a real sense at that time that a similar attack could occur anywhere in the Western World, including Canada” (Interview with Judge, Ottawa, December 2014). Respondents noted that post-9/11 there is a (justifiable) hypervigilance to prevent another terrorist event, resulting in a hardline being taken through security legislation¹⁰² (Interview with Lawyer, Ontario, March 2015; Interview with Lawyer, Toronto, January 2015). Post-9/11, just as with the Cold War, there is a pervasive ambiance of insecurity. The threat of another attack incites anxiety and fear and affectively charges ‘surroundings’ or ‘environments.’ To meet or parry these challenges, new responses are formulated because normal responses are habituated derivatives of normalized surroundings (the challenges of everyday life) and are therefore presumed to fail in extraordinary situations. Even standard adversarial practice, which aims to insure an ‘equality of arms’ in legal contests (such as in criminal cases) is problematized as insufficient relative to what is at stake in terms of the threat. As one respondent noted, we are “in a political environment where providing fairness to terrorists does not have a lot of public sympathy” (Interview with Lawyer (a), Toronto, October 2014). Fairness is an affect deeply rooted in the Canadian law and multiculturalism and is embodied in numerous practices of inclusion, but also problematized.¹⁰³ Post-9/11

¹⁰² One respondent noted that it is between 2001 and 2004 that “all of [Canada’s] worst excesses happened” with regards to rights violations as a part of a “crack-down on Islamic extremists” (Interview with Journalist, Ottawa, January 2015).

¹⁰³ See Abu-Laban and Gabriel (2008); Day (2002); Mackey (1999); Thobani (2007).

responses that are directed at Muslims (Buck-Morss, 2003; Razack, 2008) are but one aspect of rights-denying practices directed at non-citizens.¹⁰⁴

In terms of temporalization/spatialization of this security project, two key points are identified, the threat and its placement under the jurisdiction of the SCI, and the ultimate reaction resulting in the deportation/banishment of the terror suspect. However, between suspicion and banishment a world is created where the response to the threat (the endgame of deportation and banishment) is ‘held-up’ or suspended (even indefinitely). This milieu occupies the interval between one state of affairs and another (Deleuze, 1986), but also serves as the medium needed to account for the action of one body on another at a distance (Foucault, 2007b). The interval is where qualities (the mood of the milieu) are actualised as forces in determinate, geographical, historical and social spacetimes (Deleuze, 1986: 141-143) and it is within and through the medium that a series of encounters take place between the forces of law and national security. Rather than a simple and single encounter of forces, force-relations are played out over time, through a series of minor contests and challenges between the independent forces of law and national security, each reacting to the actual and potential actions of the other and situation within an affect of unease.

In the suspense of the SCI proceeding, the independent forces of law and security are compelled to interact with, respond to, or resolve the state of unease. While the government is concerned with challenging the state of unease as a national security problem by deporting/banning terrorist threats, named persons and their advocates are concerned with moderating the state of unease, to prevent deportation as well as other

¹⁰⁴ See Anderson (2013); Bell (2011a); Benhabib (2004); Mountz (2010); Pratt (2005); Rygiel (2010); Stasiulis and Bakan (2005).

indirect outcomes. Authorized to defend Canada's security challenge, government proponents (Ministers' counsel) characterize the threat as one posed by hardened characters who need only the opportunity to unleash mayhem on Canadian soil.¹⁰⁵ As counterpoint, friends, families, and legal advocates who rally around named persons, register distress about the ambiguous state and status of named persons, and their detention conditions and deportation outcomes (Interview with Community Organizer, Ontario, April 2015; Interview with Activist, May 2015; Interview with Activist, July 2015; Interview with Supporter, Toronto, July 2015; See also Wala, 2014). For deportation opponents, the state of unease goes beyond the direct effects to concerns over the normalization of unjust practices targeting vulnerable groups such as Muslim non-citizens.

The unease owed to the current state of affairs is significant and few are optimistic about the possibility of a single blow capable of bringing about its transformation with regards to rights honouring. While some activists are hopeful for change, there is a general sense that each separate SCI case will have to be fought independently and on its own merits within an environment that is perceived to be one-sided:

The fact that a case worked or that the special advocate has success shouldn't tell you about whether it is a good system or not...It doesn't mean that the process is fair, it just means that they got this one right... You can't judge a system by whether it worked in any particular case. (Interview with Lawyer, Ottawa, April 2015)

¹⁰⁵ Canada's National Terrorism Threat Levels shows that a terrorist act is always possible (Government of Canada, 2016).

Noting recent Supreme Court of Canada (SCC) rulings that deem the SCI legislation constitutional, there is a feeling of resignation that the system is as fair as it can be: “once you’ve decided that the government can rely upon national security privileged [secret] information, then you have to have this kind of regime” (Interview with Lawyer, Toronto, April 2015). With regards to the government side of the courtroom, Justice Hugessen (2002: 385) notes:

I have every confidence that the Department of Justice is doing the best it can. I am just not always satisfied that the best it can is always going to be the best. I do not know if there is any solution to this.

There is ongoing concern that the process is not rigorous enough to assuage the state of unease and support trustworthy relations with foreign intelligence agencies.

Though open counsel act as important supports for named persons, their power is restricted by limited access to the secret information and such monological encounters leave them unable to fully engage in their adversarial powers in the face of court challenges. When they were able to cross-examine the information, they were “met by comments by the judge, ‘I hear you. If that was all there was, I’d be with you’” (Interview with Lawyer, Ottawa, May 2015). In such situations, the judges have an authorial role and know more than the other characters. In these cases, open counsel play instrumental roles but are inadequately armed vis-à-vis their ministerial counterparts who possess surplus knowledge. Consequently, open counsels rely on the forces of special advocates as a third party to diffuse the dyadic relation and push information into the ‘public’ (non-secreted) domain, thus rectifying the dissymmetry of information (O’Connor, 2002: 164). Many of the court challenges centre around the forces of special advocates and their ability to see

or know fully the state of affairs that has implicated the suspects as national security threats. It is within the space of ‘bunkers’ that special advocates and judges wield their (sometimes limited) tools in an attempt to ameliorate unease. Within these spaces, procedural parameters drive the temporality of the work of special advocates and judges.

The Bunkers: Authorial power and its limitations

Spaces where classified information is reviewed by both judges and special advocates working within the SCI are referred to as ‘Bunkers,’ as is the secure courtroom space. The bunkers are characterized by an affect of discomfort and disorientation as a result of being atypical workspaces and contribute to the protracted temporality of the cases. In past iterations of the SCI, judges and Ministers’ counsel were the only actors authorized to view secret information; a ruling from Canada’s highest court led to the introduction of a new actor to support the named person. The Special Advocate Program (SAP) was established by the Department of Justice in 2008 following a 2007 ruling (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC9). The SAP overcame the constitutionality challenge brought to and upheld by the SCC by introducing a new role under the SCI. Prior to the creation of the SAP, judges held *ex parte* hearings (with one of the parties in the dispute absent).¹⁰⁶ Justice Hugessen (2002: 384) notes that the security designated judges “hate” being in such a position where the “security blanket, which is the adversary system,” is absent. Here, judges are constrained by the SCI legislation, reflecting separation of government and earlier wariness of judicial involvement in security. While the judges have the jurisdiction and authority to admit

¹⁰⁶ Section 86 IRPA proceedings take place in a similar fashion to those of the SCI having the same consequences, but the appointment of a special advocate is discretionary rather than a right. An increasing or ongoing use of these proceedings is noted by advocates (Interview with Lawyer, Ontario, March, 2015; Interview with Craig Forcese, Ottawa, October 2014; Interview with Yavar Hameed, Ottawa, June 2015).

‘evidence,’ they struggled to make such decisions owing to monological encounters and the limited ability to openly challenge that which is allowed to pass as evidence. In the face of such challenges, judges are divided, acting both privately (secretly) and publicly, resulting in disorganized or fractured judgements where the ‘public side’ is redacted or decisions are written in two separate iterations¹⁰⁷: “It’s enormously time-consuming and requires attention to detail. We spend long hours in what we call the ‘bunker’...” (Interview with Judge, Ottawa, December 2014). Under SCI jurisdiction, security designated judges are constrained by legislation and relegated to arduous duties in inhospitable spaces of security. Review of sensitive information takes place in the bunker, that is, “in a sealed windowless courtroom deep in the bowels of a building in Ottawa where the air is terrible, [and] the only thing that is good is the coffee” (Hugessen, 2002: 384).¹⁰⁸ The mood within the bunkers is one of discontent.

Prior to the SAP, only the judges and Ministers’ counsel had surplus knowledge via access to secret information. The introduction of special advocates added a semblance of the equality of arms to the SCI process. As one respondent noted, the “return to [the adversarial] system gave [judges] a great deal more comfort and confidence” (Interview with Lawyer, Toronto, January 2015). The Special Advocate roster is a modified redeployment of the mechanisms used for closed hearings in criminal cases and by CSIS’s oversight body. One respondent found the creation of a roster of ‘security-cleared’ lawyers for other types of cases to be a convenient, though inadvertent, outcome of the SAP (Interview with Lawyer (a), Toronto, October 2014). Others saw the introduction of

¹⁰⁷ Vismann (2008) provides an insightful discussion on the history of files and the significance of their erasure and revision.

¹⁰⁸ The registry where court documents are filed and records of the courts are held has a separate section for designated proceedings (Interview with Judge, Ottawa, December 2014).

the *amicus curiae* (lit. friends of the court) as an important innovation for security intelligence cases in criminal courts (Interview with Lawyer, Ottawa, February 2015). Conversely, the ready availability of such security-cleared lawyers can result in a ‘net-widening’ of security processes enabling the government to over-claim security privilege rather than publically disclosing information to the accused and their (open) counsel; here, secrecy reinforces the state of unease. Expanding the use of secret courts runs counter to the fairness concerns of named persons and their ability to see, know, and meet the forces and charges against them. It is evident that the introduction of the SAP not only influences governing under the SCI, but has wider ramifications for the use of intelligence in courtrooms in general.

The working conditions of the bunkers also add challenges for special advocates who are taken out of their usual working environment. As one respondent noted, their usual support team is absent; in addition to a lack of clerical assistance for typing, photocopying, and binding, “you’re learning how to use [computer software] without the assistance of people who could show you how to use the software because anything that comes up on the screen is going to be classified information” (Interview with Lawyer, Ottawa, February 2015; supported by Interview with Lawyer, Toronto, April 2015).

Working in the bunker also challenges the normal ambit of legal routines and practices:

You’re in a secure space, which is difficult to work in because you don’t have your telephone, you don’t have email...you can leave the room, obviously. You are working with secure information. You can’t take it home. So, each day you have to close up all of your files and have them put away in a safe and each morning everything is brought out again to you and you set up your desk again, open all of

your binders again, start your computer up. So, each day you have to sort of get back up to speed in terms of organizing your materials so that you can work with them. (Interview with Lawyer, Ottawa, February 2015)

Spatial constraints influence the temporality of the special advocates' work: "It's a laborious, time-consuming process, and the risk of that is that the special advocate will take short cuts to deal with the fact that there isn't the ability to process all of the detailed information" (Interview with Lawyer, Ottawa, February 2015). Another special advocate commented on the "tons and tons and tons" of information that they have to go through in the solitude of the bunker (Interview with Lawyer (b), Toronto, October 2014) and that it takes an extensive amount of time to respond to the challenges of the Ministers' case. One respondent noted that: "Because the issues were so complex...to have one lawyer operating solo and dealing with the evidence, and not even able to talk to anybody about it, was seen as unreasonable" (Interview with Lawyer (a), Toronto, October 2014; Supported by Interview with Lawyer, Toronto, January 2015). As a result, two special advocates were assigned to each case. They would "try a little bit to divide up the work, although we really both had to go through all of the material so we were familiar with it" (Interview with Lawyer (b), Toronto, October 2014). Introducing this new role marginally alleviated the issue of surplus knowledge, but did not rectify the equality of arms concerns as advocates remained heavily outnumbered both during preparation and in the courtroom.

One respondent described the lack of parity in the open courtroom, suggesting that it is similar to what takes place in the closed courtroom: "this whole team, every morning, six, eight lawyers, people carrying briefcases, junior lawyers, senior lawyers, employees of the Ministries come in, and you've got the lone special advocate just sitting there with

his or her computer, monitoring the proceedings” (Interview with Lawyer, Ottawa, February, 2015). The SAP provided special advocates with surplus knowledge over open counsel, but they had less capacity to act on it—including open communication with the named person. One respondent noted, “one of the limitations of the special advocate’s role is there’s no express acknowledgement in the Act of an ability to call evidence” (Interview with Lawyer, Ottawa, February 2015). While special advocates do a “very detail-oriented examination of thousands and thousands of documents,” they do not have the power to present their own evidence (Interview with Lawyer, Ottawa, February 2015). They can only attempt to parry the actions and ‘evidence’ brought by the Ministers’ counsel. The space of the closed courtroom was meant to expand the capabilities of lawyers to act on behalf of named persons; however, it is apparent that those in the role of special advocate are constrained in their tools and abilities to ‘lawyer.’ Both spatial and temporal configurations under the SCI reinforce limits rather than expanding the authorial power of the special advocates.

SCI cases were also challenging for Ministers’ counsel:

They have very busy workloads and limited ability to devote time and resources to these files... They resented having to do overtime... They resented having to work weekends when other colleagues of theirs in the Department of Justice had easy nine-to-five jobs. The role of being government counsel on these security certificate cases was much harder work than many other Department of Justice roles and I don’t think they got any more money for it. So, you could sense the resentment ... (Interview with Lawyer, Ottawa, February 2015)

The time it takes for the SCI cases to make their way through the courts is widely held as an inefficient process that affects all counsel in addition to the prolonged precarity of named persons and their families. For example, in the Mahjoub case:

The certificate was issued in February 2008, disclosure occurred throughout 2008 and yet it is just now headed to the Federal Court of Appeal¹⁰⁹ and we are what? Seven years later. And the man—from the Government’s point of view, a person who shouldn’t be in Canada—is still here. From his point of view, he has had seven years of hell and you might say seven years of additional hell because he went through the initial process of the certificate issued in around ’99-2000, and then had it restarted in 2008. (Interview with Lawyer, Ottawa, February 2015)

The temporal extension of SCI cases has been criticized openly by judges in their Reasons for Decision. One respondent noted having to deal with information from multiple government departments leading to much repetition: “It’s not unusual to see the same information repeated over, and over, and over again in multiple documents” (Interview with Judge, Ottawa, December 2014). The judge is, nevertheless, expected to be well-versed on the case making it necessary for them to go through all information presented. One judge explicitly acknowledged the extent of the process in their decision: “It was impossible for the Court to proceed more expeditiously... These have been lengthy proceedings” (*Harkat (Re)*, 2010 FC 1241 (CanLII), para. 38). In the same case, another was critical of the confidential submissions: “...it is my view that it was unnecessary to conduct a portion of the appeal hearing behind closed doors” (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII), para. 23). The spatial

¹⁰⁹ The Federal Court of Appeal rejected the challenges on July 19, 2017 (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 (CanLII)).

considerations that result from managing surplus knowledge impact the temporal aspect of the process, sometimes needlessly. Frustratingly, what was initially devised as an ‘expedited’ deportation order has transformed into a lengthy process that benefits none of the actors involved.

As one respondent noted, open counsel struggled with time despite having no role managing surplus knowledge; making living conditions tolerable for named persons made it “challenging at times to feel sort of divided between what were, really, bail review writ very, very large and the trial itself” (Interview with Lawyer, Toronto, January 2015). One respondent noted that the cases being publicly aided has impacted the lengthiness of these cases with some public counsel taking the approach of “spot the issue, argue the issue, regardless of its merit, regardless of whether or not the cost in terms of time and effort is worth the ultimate benefit” (Interview with Lawyer, Toronto, April 2015). However, the lawyers arguing points are savvy to the transformative nature of the SCI and realize that they have a pivotal role to play in ensuring the best possible precedent for persons named in any future certificates; though perhaps not operating in ‘real time,’ the importance and ramification of these seemingly minor battles are not self-evident to all actors (Walters, 2017). Though open counsel are unable to aid robustly in the reasonability determinations when limited information is made public, they have an important role in protecting the rights of named persons. There are many factors contributing to the protraction of these cases, but the management of surplus knowledge is pivotal; regardless of the reasons, the private/public temporal extension of this governing process has personal ramifications for named persons.

Motions to improve the living conditions were left to open counsel, while special advocates focused on the ultimate reasonability determinations by working to push information out to open counsel. As noted above, open counsel are constrained by dissymmetry of information, rather than the physical space they are working in. They spend a great deal of time on moot challenges that resulted from limited knowledge of the full case against their client(s): “As public counsel, it’s extremely frustrating...that would be a polite way to describe it” (Interview with Lawyer, Ottawa, April 2015). Without the support of special advocates and surplus knowledge, public counsel was nearly powerless to successfully challenge certificates. They were, however, active and overall effective in challenging detainment, conditions of detention, and conditions of release. Though this took time away from preparations for the reasonableness hearings, it was “necessary to focus on the day-to-day stuff ...[and we]... spent days and days and days in court dealing with [it]” (Interview with Lawyer, Toronto, January 2015). These small, lower court, challenges tested the government’s level-of-threat arguments and culminated in precedent for reasonableness challenges before the SCC. Though limited in what could be included, crucial information and decisions were dealt with in public courtroom spaces.

The lengthy cobbling together of forces is done at the expense of named persons’ liberties, especially with the second iteration of certificates after the introduction of special advocates. A new system cost these individuals significant time with regards to how long court cases “should” take and significantly impacted the course of their lives; named persons are at different stages with regards to marriage and children and some have missed out on opportunities as a result of their detention and precarious situation (Interview with Lawyer, Ottawa, February 2015; Interview with Activist, Ottawa, May

2015; See also Wala, 2014). Noting that the process will never again take this long, respondents had varying perspectives on whether another certificate would ever be issued. One held that because changes to disclosure procedures were being proposed to the SCI under Bill C-51 (assented June 18, 2015) (Anti-Terrorism Act, 2015), the government must see the SCI as a viable option (Interview with Lawyer, Ottawa, February 2015). Another respondent noted that if managed properly SCI proceedings could run smoothly: “I don’t imagine, if properly organized, that these cases should take more than, at the trial level, start to finish a year to eighteen months” (Interview with Lawyer, Toronto, April 2015). While another stated: “I don’t think security certificates are going to be used that much more” (Interview with Lawyer (a), Toronto, October 2014). But as another noted “everyone has more clarity about how these things are meant to unfold now” as opposed to the ad hoc-ness of the initial procedures (Interview with Lawyer, Toronto, January 2015). The many small challenges have made the process more efficient for the future, but have resulted in significant and crucial portions of lives being lost to detention and surveillance.

The bunker is a spacetime for the ongoing management of secret information that avoids public accessibility; here, information is kept from open counsel who act as a proxy for the conventions of law. When working in the bunker, where there is access to surplus knowledge, special advocates act as a mediator between the transparency of law and the secrecy of security, but their normal powers of cross-examination are severely limited. As a reaction to minor contestations over the equality of arms, the SAP extends the gap between the norm and exception by addressing the equality of arms, but limiting authorial powers. The extraordinary work and extra time required to manage surplus

knowledge also hinders the right to a fair and speedy trial. It is clear that the bunkers and public courtroom are spaces in which a governing process is at work, but must note that the challenge of ameliorating insecurity is made more difficult by spatial, temporal, and jurisdictional constraints placed on actors who are limited in their powers and authority while working in a state of unease.

The Diminishing Threat

Deportation and banishment are the ultimate endgame of the SCI as a security project whereas the goal of the legal challenge is to represent an equality of arms contest in a public space. The security strategy is a problem of spacetimes given that the banned named person would, ideally, fall expediently under the jurisdiction of another state.¹¹⁰ The intention of banning individuals from Canadian soil as a measure of security was questioned by one respondent as a strategy of merely “exporting the problem” (Interview with Lawyer, Toronto, January 2015).¹¹¹ Banishment also encompasses a risk that suspects are “irretrievably lost from surveillance, and might be a greater threat than they would be living in Brampton [and] raising a family” (Interview with Lawyer, Ottawa, February 2015). The benefits of pre-deportation detention as an intelligence-gathering instrument were also noted (Interview with Lawyer (a), Ottawa, October 2014; See also De Genova, 2007). However, because the threat is perceived to decrease over time, as one respondent noted, “how do you deport someone that’s no longer a risk?” (Interview with Activist, Ottawa, May 2015).

¹¹⁰ For a discussion of the ban-opticon see (Bigo, 2006).

¹¹¹ The power of the SCI as a legislative mandate from Parliament is evident in the end goal of deportation being a question of government policy that obliges the CBSA to carry out their mandate. One respondent noted that CBSA officers view themselves as merely following orders regardless of their own personal views on the SCI (Interview with Activist, Ottawa, May 2015).

While deportation fails as a mechanism for security, extending the spacetime of the legal-security contest through SCI proceedings may serve as a functional equivalent of securitization by diminishing the threat. It is evident from judicial decisions that judges saw time as mitigating the threat posed by named persons. For most, the passage of time decreased the terrorist threat: “It is unlikely that after such a prolonged period of detention that he could re-enter the life that he had and reactivate his contacts...” (*Almrei (Re)*, 2009 FC 1263 (*CanLII*), para. 507). Importantly, Justice Mosley acknowledges that his 2009 decision to quash the certificate against Mr. Almrei was not a criticism of the 2001 decision to uphold the certificate, which he reasons was appropriate at the time (*Almrei (Re)*, 2009 FC 1263 (*CanLII*)). A similar statement is made about Mr. Harkat without the outcome of a quashed certificate: “I find that although the danger associated to Mr. Harkat has diminished over time, he still poses a danger to Canada, but at a lesser level” (*Harkat (Re)*, 2010 FC 1241 (*CanLII*), para. 13). Two respondents made similar observations with regards to the publicity of the cases (wrought through the forces of legality) that highlight the jurisdiction each judge has over the case before them. One respondent stated that according to a judge, Mr. Harkat’s high profile made him less of a threat; however, they were concerned that he was being made an example of because his case was so public as a result of the powerful political campaigning on his behalf (Interview with Activist, Ottawa, May 2015). Time and notoriety being held against named persons was also evident in Mr. Mahjoub’s case: according to one respondent, CSIS’s “weird” theory is that named persons are

still seen to be threats to security, not because they’re dangerous, but [because] other people will get inspired if they become free. So, it’s a really perverse kind

of argument. Like some of the most scrutinized individuals in...Canadian national security history... are going to inspire a lot of extremist activity.

(Interview with Yavar Hameed, Ottawa, June 2015)

The notoriety gained over the course of fifteen years is highlighted as a concern by CSIS within their submissions to the court. Significantly, Mr. Charkaoui was scrutinized years after his certificate had been quashed when students from an institution he instructs at were connected with extremist activity (Interview with Activist, Ottawa, May 2015; See also Perreux and LeBlanc, 2015). It seems that even when cleared, the SCI remains a dark cloud over named persons. The extent to which elements of cases moved into public space is seen to offer both advantage and disadvantage, as did the course of time during which their ordeals occur(red).

Mr. Harkat's SCI case reached culmination in a SCC ruling with the relation of legal and national security forces reaching a stalemate. The SCC ruled the certificate reasonable and sanctioned Mr. Harkat's removal to Algeria (or another country that will accept him), however the government has yet to assert its final move of deporting against a pre-removal risk assessment (PRRA).¹¹² ¹¹³ With the secret evidence set aside, Mr. Harkat's immigration counsel now fights his removal, while Mr. Mahjoub has recently (July 2017) had his challenges rejected by the Federal Court of Appeal (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 (*CanLII*); Perkel, 2017) and continues to live in limbo under release conditions with the possibility of the SCC hearing

¹¹² The PRRA provides an overview of any safety concerns associated with deporting an individual, though there is no absolute legal ruling preventing Canada from deporting to torture.

¹¹³ A country may provide a 'reasonable assurance' they will not torture or act unreasonably towards a returned individual, however one respondent noted that those "reasonable assurances are probably not worth the paper they're printed on" (Interview with Lawyer (a), Ottawa, October 2014).

his case or of deportation. Messrs. Charkaoui, Almrei,¹¹⁴ and Jaballah, however, have successfully challenged their certificates and the national security threats they pose have been neutralized according to the courts. For these cases the correct mix of forces have resulted in a transformation of the threat situation. The SCI as a legal chronotope has had diverse outcomes for each case as they have developed under varying actors working under fluctuating governing mechanisms and spacetime formations.

Conclusion

This chapter shows how the SCI enacted a milieu in which a fluid and uncertain assemblage of legal and national security forces engaged in a series of challenges aimed ultimately at neutralizing threats. Interviews and court documents reveal that the assembled SCI characters lack sufficient or effective force to ‘win’ the confrontation—even if in possession of surplus knowledge—and end up simply trying ‘make do’ and ‘make the best of it’ in a protracted struggle of legal and security strategies. It still is unclear whether Messrs. Harkat, Suresh, and Al Yamani will face deportation to potential ill-treatment.¹¹⁵ Additionally, Mr. Mahjoub has still not had a reasonableness determination from the highest court and may have his certificate dropped or may face deportation. The chronotope aids in an understanding of how, when, and by whom national security threats are managed. A consideration of spacetimes exposes nuances that prompt that larger and less obscured practices of national security; a lack of clerical assistance contributes to prolonged liminality under the guise of insecurity. The above discussion provides just one approach to looking at the SCI; adjustment of the chronotopic

¹¹⁴ Mr. Almrei is facing criminal allegations with regards to providing false documents—an allegation in his Certificate—following his SCI ordeal (Freeze, 2014).

¹¹⁵ Though “Canadian law and international norms reject deportation to torture,” the SCC has not ruled absolutely against it (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1 (*CanLII*)).

lens may render insight into various other pieces such as the racialized components of national security management, or further perspective on the moments of resistance within national security governance.

The failure of the securitization to resolve in normal fashion (per the SCI initiative), the difference between suspicion (based on security intelligence), and deportation and banishment opens a spacetime of contestation. Rather than a full-on confrontation, the contest is differentiated in a series of minor challenges involving differences between disclosure and secrecy, evidence and intelligence, and detention and punishment, that is, between the forces of law and the forces of security. This relation of independent forces results in the formation of new security-legality assemblages that emerge from the legalization of security and the securitization of law. The failure of law to resolve in normal fashion (through disclosure, cross examination, equality of arms, habeas corpus) results in bunkers, secret courts, and nested detention facilities, combined with securitized agents of legality (special advocates and securitized judges) to form this assemblage.

Ultimately, the transformation from insecurity to security has been achieved through the multiple small challenges and changes to the SCI. Use of the chronotope, as the appearance of spatial-temporal formations, shows the threat situation as gradually altered through use of an assemblage of criminal, civil, and immigration law with a novel cast of characters working under innovative spacetimes. Special judges and various counsellors continue to struggle with a situation that oscillates between the (legal) norm and the (national security) exception. The centre of gravity around which the conflict turns is the complicated presence/absence of secret intelligence information, and the aim, on

one hand, to protect the secret and its sources, and, on the other, make the secret known by pushing it into the public domain where it can be challenged (through the legal conventions of disclosure and cross-examination). While the future of the SCI as a way to govern problems is uncertain, the merging of secret (security) information and special procedures and agents within legal proceedings has allowed us to illustrate how the security-legality assemblage functions to legalize security and securitize law.

Conclusion

The dimensions of detention, legal wrangling, and spacetimes operationalized under the Security Certificate Initiative (SCI) illustrate the SCI as a failing operation (Higgins, 2004). Though successful in espionage cases, the deployment of the SCI for managing terror threats reveals the extensive revisions (Walters, 2017) necessary to operationalize governmental threat management objectives, namely, the expedient deportation of named persons. Ultimately, the SCI achieves some level of threat mitigation through a complex assemblage of agents and technologies borrowed from other registers; however, the objective of the ban is thwarted by recently introduced elements. Indeterminate detention in institutions followed by (equally indeterminate) conditional release via community surveillance and sureties in the context of extensive legal-security proceedings establishes a temporal framework for threat mitigation, rather than immediate deportation. The use of unconventional technologies, such as familial sureties and community release and the use of intelligence in the courts prove problematic as ways to defuse threats to national security. Using intelligence as evidence and proof of these threats complicates the actions and capacities of characters involved in the SCI proceedings. Further, consideration of the SCI as a chronotope helps to bring to the fore the cobbling together of forces under SCI in an effort to achieve the desired state of security.

The main concern with the SCI as a governing mechanism is the use of intelligence to pursue national security threats. Intelligence in release decisions results in problematic notions of risk that proliferate the unchecked power of petty sovereigns couching ad hoc decision-making within actuarial notions of courtroom justice. The

breakdown of rule of law is reflected in the amalgamation of select criminal, administrative, and civil processes. Though simulation problematizes the idea of justice as ‘really real’ or ‘genuine’ even within the criminal justice system, the added referents involved in substituting intelligence for evidence reflects a process that is nearly unrecognizable from its (albeit copied) original. Such practices bolster the potential for *homo sacer* existence among all (non-) political subjects as citizens and non-citizens alike are governed in an environment of heightened fear, and (especially racialized) othering. Further, the normalization of specialized workspaces and extended timelines for managing secret information drives the legitimacy of using (otherwise non-vetted) intelligence to pursue national security threats. Comparisons to the criminal justice system are useful for reflecting upon what is becoming customary as a form of ‘national security justice,’ however, deprecation of rights generates a longing for the protections of the criminal justice system while overlooking the unjust practices contained therein. The scrutiny and consequent transformation of the SCI has resulted in its apparent abandonment as a viable assemblage for governing national security concerns.

The Bigger Picture

The in-depth consideration of certificates provided by this dissertation is valuable because it reflects practices that are becoming regularized within citizenship governance in Canada under the guise of ‘regular’ (or ‘normal’) immigration proceedings. Since the development of the full “Initiative” under the Department of Justice, a new certificate has not been issued. However, ‘normal’ rather than ‘exceptional’ channels are increasingly being used for national security inadmissibility based deportations. While careful consideration of the five cases highlighted within this dissertation exposed significant

limitations with the SCI, many court challenges have rectified some of the transparency issues and transformed the SCI into a more robust system with some checks and balances. Importantly, the earlier limitations of the SCI suggest that a system without an advocate privy to all information against an individual is not suitable when the outcome is deportation—and especially when the deportation may be to maltreatment. Under the SCI, a small number of individuals now have (limited) lines of defense against secret information through the Special Advocate Program while many more individuals are facing the same knowledge deficit and outcome without any protections.

Removals without adequate legal counsel occur daily amounting to hundreds of individuals being deported on information not disclosed to them or scrutinized at a meaningful level. Essentially, the same process as the SCI is taking place under Section 86 of the Immigration and Refugee Protection Act without the (imperfect) scrupulousness offered by the SCI, creating a multi-tiered system (Rygiel, 2012) that does not treat all cases equally. As noted, the function of special advocates has expanded into criminal cases for which it was not developed, however their use in normal immigration cases are discretionary rather than obligatory. While the SCI has spurred a popular movement in opposition to ‘secret trials’ and indeterminate detention, Section 86 proceedings are taking place expeditiously, in a greater number, and are largely unnoticed by the general population. Just as little was known about the SCI in public space pre-9/11, Section 86 proceedings are ongoing with little scrutiny and no transparent court proceedings, indicating that “Critique is without end” (Pavlich, 2001a: 153).¹¹⁶ In effect, the Canadian

¹¹⁶ My assumption is that those being affected by Section 86 proceedings have not been in Canada long enough to garner connections and support for their deportation to be challenged in the political realm and are at the whim of government decisions even when represented by skilled immigration counsel.

Government is complicit in carrying out a process that has otherwise been determined unconstitutional by the Courts through the Charkaoui II ruling.

One respondent noted that the robust communication between the special advocate and named person that was established in the Harkat decision (*Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 SCR 33, 2014 SCC 37 (CanLII)), despite coming about late in the day, has made the Special Advocate Program and the SCI quite good:

I think what you're seeing is a diversion of cases away from the security certificate context and...into the regular immigration proceedings, which are before an immigration adjudicator and where they can use more short-hand tactics to remove persons without triggering this whole complicated special advocate apparatus...

And so I'm really not comfortable with the idea that they're using these regular immigration proceedings to have their way with an immigration adjudicator. It's not a transparent, robust system. (Interview with Craig Forcese, Ottawa, October 2014).

With the diversion of cases there is a loss of the special advocate as an actor. However ill-equipped, special advocates have had successes and provide a layer of protection. Their absence opens up a space for abuse of process and grave rights violations. The Section 86 cases are not automatically put in front of a judge, but are often decided by adjudicators who are appointed senior immigration officials. Limited publicity and transparency precludes Section 86 proceedings from being 'taken up' as a public concern.

Significantly, the SCI gained momentum as a popular issue and two additional concerned respondents noted that similar cases are being carried out under Section 86 with much less fanfare. Open counsel Yavar Hameed stated:

I think it's really unfortunate that we have security certificates and I think that it's fascinating the way that the law works, but it's weird that there is so much attention...politically and academically and socially on the certificate when it makes up such a small proportion of the way that danger and threat are dealt with on a daily basis within our immigration system. (Ottawa, June 2015)

Moving security deportation measures to the peripheries is the most efficient and convenient way for the government to deport on grounds of security inadmissibility. Pre-9/11, the certificates were obscure and relatively unknown to the general public (perhaps they still are) but as the more recent five named persons and their cases gained support and publicity, methods have moved away from certificates towards more 'fringe' proceedings that lack even the reduced protections of the SCI. This makes deportation on the grounds of security more expedient in terms of time while isolating the process in a space that avoids public scrutiny. Another respondent stated that:

All of the concerns that we have about the security certificate procedure are exactly the same for the Section 86 cases. And the one concern I have about the security certificate advocacy at the grassroots level is that there hasn't been enough attention to the link between these two things.... Because even if the government never introduces another security certificate, it's doing all of this same stuff through Section 86. (Interview with Lawyer, Ontario, March 2015)

By investigating the SCI, around which there is now rich involvement and knowledge, this dissertation offers insight into governing through secrecy more generally and thus provides a solid framework for the examination of the more widely used Section 86 procedures. Governing through secrecy is concerning as it prevents individuals from

speaking to their own ‘case’ in an informed manner. The potential for individuals to be deported to maltreatment is a contravention of their rights; if such a decision is made, it should be done with full transparency for concerned parties and their legal counsel. It seems that inadmissibility technologies have come full circle from attempts to keep security and intelligence out of the courts, to the SCI having a full panoply of security issues before Federal Court judges, and back to Section 86 cases occurring before an adjudicator (as the SCI was initially devised).

Keeping in mind that “genealogy is always partial”, this dissertation denaturalizes practices of governance (Walters, 2017: 798) that use secrecy to violate rights and allows us to rethink any governing assemblage that makes use of such mechanisms with mixed outcomes. In doing so, shifts in ways of thinking about and acting on non-citizen threats and how the ban is carried out become unmistakable. Arguably, SCI proceedings have become too arduous, or perhaps too rigorous, for the government to continue using them. However, this dissertation analyzes and illuminates the issues and concerns supporting this particular governing assemblage, how and what technologies have been operationalized, and the iteration and reiteration of the national security/legality problematic; moves to exceptionalize security measures are not new, and the (il)legality has not been resolved by the creation of tools such as special advocates and bunkers. The publicity of the SCI and its rendition in public and closed courtrooms provides insight into the innuendo of cases that are not normal immigration decisions but establish immigration and security inadmissibility precedents. It is arguable that there is a long way to go to protect the rights of named persons under the SCI, but even more concerning are the proceedings that neglect even those limited protections. However, the extent to which the

SCI and Section 86 proceedings contribute to the non-event is unknown (Massumi, 2009), that is, the lack of a coordinated mass-casualty terrorist attack on Canadian soil.¹¹⁷ The balance of security and rights protections is not easily determinable.

With the understanding that the use of intelligence in national security cases is what spurs the negation of any sense of justice under the SCI and Section 86 proceedings, the creation of an international body for managing both intelligence and national security concerns/cases could be remedial. As noted, intelligence is problematic because of its unknown provenance and the need to protect sources, both individual CIs and states. By globally centralizing and standardizing practices of gathering, vetting, retaining, and sharing, intelligence could achieve a level of legitimacy currently attributed to evidence. This is not to suggest that criminal standards of evidence are beyond criticism, however, they operate at a higher level of scrutiny and acceptability among citizenry. A single organization, rather than agreements or pacts among already agencies,¹¹⁸ could undermine current problematic practices and offer greater transparency to information available. In coordination with centralized intelligence handling, a judicial body that is independent from, but privy to the intelligence practices could offer a venue for processing cases dependent upon secret information. By separating (inter)national security concerns from domestic courtrooms, the already existent leaching of law into security and security into law could be discontinued.

Securitized Legality and Legalized Security

This dissertation provides an analysis of a double movement towards securitizing legality and legalizing security. There were early concerns with rights and justice during

¹¹⁷ This is not to diminish occurrences such as the Quebec City mosque shooting of January 29, 2017 (see Belanger, 2017), or the shootings at École Polytechnique (in 1989) or Dawson College (in 2006).

¹¹⁸ Such as the 'Five Eyes.'

its initial formulation (Senate of Canada, 1977), and continued attempts to keep the SCI out of the courts a decade later (House of Commons, 1987). The recent culmination of these cases saw the clear judicialization of intelligence as an issue for CSIS as judges weigh in on issues of security. The creep of security into the courts enables security measures to be legalized (once ruled unconstitutional (illegal), the SCI has been revised to fall within the parameters of legality, though some respondents are skeptical of the ruling). Separation of the three branches of government is a longstanding doctrine in Canadian law, but branches may enhance each other's power in addition to checking it (Lagassé, 2012). In effect, the legislative, administrative, and judicial branches have each legitimized varying components of the SCI allowing for the convergence of security and legality. The movements of security into law and law into security is facilitated by the assembling and reassembling of governing mechanisms that combine criminal and administrative elements and make use of legal hybridity (Trubek and Trubek, 2005). These movements reinforce the suspended state of banishment from political life (Bigo, 2006).

The hybridity of the SCI is evident in the legal maneuvering of judges and lawyers, as explained in the Reasons for Decisions, and written about elsewhere (Forcese, 2008; Forcese and Waldman, 2008; Hudson, 2010; Roach, 2009). However, this dissertation offered an analysis outside of the “jurisprudential view” and “the box of legal logic” (Calavita, 2010: 4) by examining the ramifications of SCI for law and society. It provides important insight into the gap between “law-on-the-books” and “law-in-action” (Calavita, 2010) by elucidating the structural problems of the SCI in practice. The work

required to both challenge and uphold the SCI reflects the limits of the SCI and forms the basis of its reimagining.

The SCI, as a legal assemblage, provides a compelling case for examining the interplay of forces governing the ever-transforming relation of immigration and security. Due to its changing nature, this analysis approached the SCI “as a dynamic and experimental assemblage of elements” (Walters, 2017: 794) and extended the analytic scope beyond space and time to also consider the jurisdictional elements of intelligence in the courts. The reassembling is viewed as adaptations to the multifaceted nature of national security governance as complexities arise, while the division of the SCI into carceral and judicial spaces reflects occurrences of nodal governance, which facilitates the concentration of power rather than its dispersion (Burris et al., 2005). Maintaining the administrative structure of the SCI ensures that discretion is not afforded to normal (non-national security designated) judges, juries, meaningful defense counsel, or the accused, as expected in the criminal justice system; protecting intelligence ensures that there is a knowledge deficit. Rather than abolish the system, as advocates have called for, the SCI has undergone endless changes to maintain its existence. Its persistence is founded in its constant transformation (Walters, 2017) and resistance to normalized channels of justice.

The management of national security suspects in Canada uncovers an active relationship between the norm and the exception and exposes state power with limited restrictions. Rather than describing and labelling the SCI as a state of exception, beyond the law, this examination of the struggle to normalize undefined detention and unchecked deportation exposes the inner workings and mechanisms of a normalized state of exception within the law. It also shows how exceptional governing structures form from a

patchwork of discrete decision-making authorities (petty sovereigns in Butler's (2004) articulation) and technologies borrowed from other governance registers, rather than from the prowess of systematic, effectual, and singular sovereign power. The SCI remains on the margins of what is otherwise accepted under Canadian law; this dissertation addressed the limits of detention, evidence, and spatial-temporal practices. The unending force to keep the SCI normalized pushes the limits of the state of exception as it maintains the potential for *homo sacer* existence (Agamben, 1998, 1999, 2005). There is a need to reconsider the implications for justice when people are deported and banned, or rather, maintained in a state of deportability from Canadian soil without being privy to the knowledge upon which the ban is based.

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