

# Failing to Protect Canadian Citizens

## Refusing to seek clemency for Canadian death row inmates overseas

Ronald Smith is a convicted killer who has spent years on death row in Montana State Prison. The Harper government refused to seek clemency for Smith from the U.S. government. It had been Canadian government policy since the abolition of the death penalty in Canada to seek clemency for Canadians sentenced to death in other countries. The logic is straight forward: if Canada does not believe Canadians should face the death penalty here, then they shouldn't face it elsewhere. There were no exceptions.

The Harper government's new policy stated that it would decide to seek clemency on a case-by-case basis, based on the particular circumstances including the nature of the crime and whether the host country is democratic and respects the rule of law. Once again, it seemed that Harper's personal preferences trumped Canadian law and tradition by inserting subjective criteria for deciding a Canadian citizen's fate. He knew he couldn't execute prisoners in Canada so he took the opportunity to ensure that at least some Canadians would face the penalty he preferred. The practice of seeking clemency was not written in formal legislation but until Harper's election, all other prime ministers had recognized the practice. It was not clear under the new rules who would be making such subjective life and death decisions.

The Canadian Bar Association, at its 2007 annual meeting, denounced the new policy: "The case-by-case approach invites arbitrary and discriminatory decisions, implying that the death penalty may be appropriate for some Canadians," stated the

resolution passed unanimously. "It puts the administration of justice into disrepute," association president Guy Joubert said. Not only was the new position a violation of years of practice and not debated in Parliament, it also revealed a government either ignorant of the potential consequences or dismissive of them. The Bar Association pointed out that based on the new policy, Canada would only seek clemency if it determined that the country in question was not democratic or had a flawed justice system – declarations that would hardly encourage that country to co-operate in the request for clemency.

## The Omar Khadr case

One of the best known and notorious cases of Stephen Harper's contempt for the law and the rights of Canadians – key concepts in any democracy – is the case of Omar Khadr. Khadr was just 15 years old when he was arrested in Afghanistan in 2002, at the height of the illegal U.S. invasion of that country. While he clearly fit the UN's accepted definition of a child soldier, he was charged with "murder, conspiracy, and support of terrorism" by the U.S. for allegedly fighting back against U.S. soldiers (he was shot in the back three times). He was sent to the now infamous Guantanamo Bay, Cuba. He has been awaiting trial for almost eight years. He has, for several years, been the only prisoner from a western democracy who has not been repatriated by his government.

Despite international consternation, calls for his repatriation from dozens of sources in Canada – including the Canadian Bar Association, the Canadian Civil Liberties Association and Amnesty International, the Harper government has absolutely refused to budge from its position. Its only explanation is

openly ridiculed by legal experts: that Canada will wait until Khadr goes through the legal process in the U.S. Of course, even the U.S. courts have ruled that the “legal process” followed in Guantanamo is a violation of the most basic principle of habeas corpus.

Canadian courts have been ruling on various aspects of Khadr’s case for almost six years – and every lower court ruling found in favour of Khadr demand that the Canadian government be forced to bring him home to Canada. On April 23, 2009, federal court judge, James O’Reilly, ordered the government to seek Khadr’s return, concluding it failed to ensure his treatment complied with international human rights norms. That decision was upheld by a two-to-one decision by the Federal Court of Appeal on Aug. 14, 2009. Judge O’Reilly found that Canada had been complicit in tortures, which included sleep deprivation and the use of vicious dogs to intimidate him, by virtue of their refusal to take an active role in protecting him from such abuse. This placed on the Canadian government a constitutional “duty to protect” a Canadian citizen imprisoned abroad.

While the Supreme Court of Canada reversed the lower court’s decisions this past January in a unanimous ruling, it had extremely harsh words for the Canadian government and made it clear that the government had to act to end the violation of Khadr’s constitutional rights, or the court would force it to.

The court unanimously upheld Khadr’s claim that his Charter rights had been violated, stating: “Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person, and was alone during the interrogations.

“Interrogation of a youth to elicit statements about the most serious criminal charges – while detained in these conditions and without access to counsel and while knowing the fruits of the interrogations would be shared with the U.S. prosecutors – offends the most basic Canadian standards about the treatment of detained youth suspects.”

Khadr had been interrogated twice in 2003 and 2004 by Canadian officials from CSIS and DFAIT (the foreign affairs department) who knew that he had been softened up in the days before by the extended use of sleep deprivation.

The Supreme Court also pointed out that the breaches of Khadr’s rights were on-going since the information obtained in violation of his rights could still be used against him in the U.S. proceedings so that: “...the effect of the breaches cannot be said to have been spent.”

But the court seemed to be responding to veiled threats from the Harper government’s lawyer in the case who warned the panel of judges not to intervene in – or “micromanage” a foreign policy matter that could create serious difficulties in relations with the U.S.

On February 3, 2010, the PMO stated it would not seek the repatriation of Khadr. If the prime minister does not follow the court’s explicit order or takes perfunctory action that does not substantively remedy the situation, he could create the crisis the court sought to avoid by “...leaving the government a measure of discretion in deciding how best to respond.” The court was clear that if the government does not substantively address the Charter of Rights violation: “...courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution.”

### **Security certificates – Violating the Charter of Rights**

It is difficult to know exactly why Harper is so ferocious in his determination not to bend to the law, broad legal opinion, or opposition arguments when it comes to matters connected with Islamic terrorism. Some have suggested that it is his way of demonstrating to the U.S. the Canadian government’s dedication to the “war on terror.” This phrase has been banished from the Obama White House but Harper still uses the term and seems to still be proving his loyalty to George W. Bush. Others have speculated (citing as well, Harper’s carte blanche support of virtually any Israeli action in the Palestinian territories or Lebanon) that his Christian fundamentalism makes him hostile to Islam and not just terrorists.

Whatever the explanation, there is no area more subject to Harper’s studied disdain for democracy, human rights and civil liberties than the area of Canadian national security. Harper has demonstrated that he will fight every case, no matter its particulars, to the last possible battle – often in the Supreme Court of Canada. This was true with the Khadr case and also with the issues surrounding so-called security certificates.

Security certificates are a legal mechanism by which the Government of Canada can detain and deport foreign nationals or any non-citizen living in Canada for various reasons, including being a perceived threat to national security. The certificates have been around in one form or another for over 20 years but used primarily since the 9/11 attacks. Those held under these certificates are denied the same legal and constitutional rights enjoyed by Canadian citizens and one of the most egregious aspects of the certificates was that neither the defendant nor his lawyer were allowed to see the evidence justifying their detention. They were faced, effectively, with indefinite detention, fighting in the courts for their rights, or the alternative: being deported to their home countries many

of which were known to use torture. The effect of the certificates was that individuals could be deported based on secret intelligence presented to a federal court judge at closed-door hearings.

The certificates were challenged on constitutional grounds by three of the alleged Al Qaeda-linked detainees – Algerian-born Mohamed Harkat, Moroccan-born Adil Charkaoui and Syrian native Hassan Almrei. The Harper government had refused to engage the men or their legal counsel, rejecting claims of rights violations, and the men were forced to take the case to the Supreme Court of Canada, alleging that the certificates violated various sections of the Charter of Rights and Freedoms.

The court found in favour of the men, striking down the security certificate system but giving the government a year to change it so that it was in compliance with the Charter. The court recognized the need for national security and the principle of the certificates, but found in a unanimous 9-0 decision that this could be accomplished with greater attention to the rights of the detainees. On Feb. 22, 2008, just one day before the court's deadline for changes, the Harper government complied with the order by signing into law amendments to the security certificate process that introduced a "special advocate": lawyers who could view the evidence against the accused. It was, however, the absolute minimum required to comply with the Supreme Court's decision; the lawyers would be chosen by the justice minister (the same one who defended the certificates), and the lawyer would see only a summary of the evidence. He or she could reveal nothing about this evidence to their client – even to seek clarifications or corrections.

### **The Abousfian Abdelrazik scandal**

The case of Canadian citizen Abousfian Abdelrazik demonstrates dramatically just how perverse the Harper government can be when it comes to its determination to be tough on terrorism. Most Canadians are aware of the case and the multiple, bizarre twists and turns it took before this man – never charged with anything – was finally repatriated to Canada after spending six years marooned in Khartoum, Sudan. The Harper government looked not only callous in its treatment of Abdelrazik, it looked inept, giving one reason for keeping him in the Sudan one day and when that rationale fell apart, providing a totally different rationale, and then, yet another. It was as if they could not even be bothered to spend a little time getting their lies and deception in order.

For over a year Abdelrazik had been living in the lobby of the Canadian embassy, a form of recognition that he was a Canadian citizen. He had been released, for a second time, by the Sudanese government because they had no evidence that

he had committed any crime. The government even offered to provide a plane to fly him home if the Canadian government would contribute to expenses. It refused. The Sudanese government – hardly a paragon of democracy – was more embarrassed by the situation than Abdelrazik's own government.

When the government claimed that Abdelrazik could not return because he was on a United Nations (UN) no-fly list, the UN quickly pointed out that this was not a barrier to his return. Richard Barrett, co-coordinator of the UN's Al-Qaeda and Taliban Monitoring team told *The Globe and Mail*: "Whether it is Abdelrazik or anybody else, it is up to the state in question whether they want to allow the person to come back or not." The monitoring team oversees United Nations resolutions establishing the blacklist on which Abdelrazik was placed in 2006 (at the request of the U.S.). Barrett said the travel ban exemption allowing for the return of a citizen is so clear that governments need not even apply for permits. When that reasoning was dispensed with, the government stated it would still not provide a travel document because all the countries that a flight would pass over would also have to agree to an exemption from the no-fly list. This, too, was declared untrue by the UN Barrett stated: "The overflight states don't come into it and they haven't ever come into it."

Earlier in the saga, Foreign Minister Lawrence Cannon had made a promise in writing that Canada would provide a travel document if an airline could be found that would fly him to Canada. But when an airline was found, Cannon casually reversed his position with no explanation. Even when more than 200 Canadians raised money for a ticket for Abdelrazik, the government initially refused to budge – even though it now had no rational whatever to fall back on. They were simply refusing because they could.

In this particular case, the only motive of the Harper government seemed to be to kowtow to the U.S. and its tendency to put tens of thousands of people on terrorist watch lists. Abdelrazik, 47, was cleared by both CSIS and the RCMP, presumably the security organizations that a Canadian government would listen to. But the Bush administration, giving no explanation, had him placed on the UN Security Council terrorist blacklist, and refused to take him off. Harper ignored Canadian security services in favour of those of the U.S. On June 4, an Ottawa judge ordered the federal government to issue travel documents and ensure Abdelrazik was able to return home within 30 days. The government did not appeal and Abdelrazik finally returned to Canada on June 27, 2009.