

**Lawyered – Episode 77**  
**National Security Law ft. Yavar Hameed**  
**Episode Transcript**

**[00:03] HUSEIN:** This is episode 77 of Lawyered. I'm Husein Panju. And on this week's episode, we are speaking with lawyer and civil liberties advocate Yavar Hameed, about some of the most current issues in National Security Law. First, we'll speak about the judicial inquiry into the federal government's recent use of the Emergencies Act. The Trucker Convoy protests from earlier this year have attracted plenty of controversies. And now the government's actions will be scrutinized to identify its conduct in any of the said protests.

We will also discuss a new bill that would provide for more civilian oversight over RCMP and Canadian Border Service officers, as well as a series of seven hearings regarding the use of facial recognition technology. And finally, in our Ask-Me-Anything segment, we'll chat about a bunch of issues including national security privilege, online extremism, and sizing up Canada's national security framework against its neighbors. All that and a lot more are coming up in just a bit. This is Lawyered.

[Music Break]

**[01:12] HUSEIN:** Hello, listeners, and welcome to another episode of the podcast. We appreciate you tuning in for another episode. I don't have too much to plug, before we get into this interview, I will just say that our last episode, which was episode number 76, was really an interesting one, it was about the area of corporate governance law, which in Canada, like some of the other episodes of this year, I didn't know anything about in advance, but ended up being very interesting to me. And obviously, we spoke about a bunch of things, including shareholder democracy, and some new amendments that are providing more of a voice to shareholders. I also spoke about diversity on corporate boards, and some things that lawyers can do to help just for some parody and some representation, and there are some pretty unconventional, or I would say new things that I had not considered in that respect.

**[02:03]** And I would say one of the most interesting aspects of that episode was the discussion about these recent issues that have been in the news regarding family-run corporations, particularly all the drama going on with Rogers Communication. So, the guest provided a really insightful analysis about what's going on from a legal standpoint and explaining how the issues that are happening there in terms of lack of formality and ambiguity, or things that are not unique to big corporations, can in fact occur in smaller and even midsize companies as well. So, there are a lot of practices that are happening in that discussion overall. So, I'd encourage you to listen to that, whether that's something that you practice, or you're just interested in

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learning more about what is going on in the news in terms of how corporations work at a granular level. So, that's Episode 76, with our guest, Susan Kushneryk.

**[02:57]** Today's episode is one that I've been looking forward to for a while. It involves a friend of mine who I work with on one of the nonprofit boards that I'm part of. And he's also someone who is very well versed in this area of National Security Law. It's not an area of law that I think a lot of us think about in terms of being a conventional area and one that we come across. But as we'll hear, it actually impacts a lot of what we do on a day-to-day basis as Canadians, even if we're not aware of it. So, there's a lot of meat in this episode, I hope you enjoy it. Without further ado, here's our National Security Law episode featuring our guest, Yavar Hameed.

[Music Break]

**[03:35] HUSEIN:** Yavar practices as a lawyer in the area of Administrative Law in general civil litigation in Ontario, with a focus on the defense of human rights against state and corporate action. Since 2001, Yavar has been actively involved in advising clients in the context of unsolicited CSIS interviews, and national security matters. He regularly provides advice to individuals and community-based organizations responding to racial profiling concerns, anti-poverty struggles, police brutality, and suppression of political dissent. And 2009, he successfully repatriated Abousfian Abdulrazik, a Canadian citizen who was arbitrarily detained in Sudan and blocked by Canadian officials from returning to Canada for six years.

**[04:20]** He's also acted as counsel on several complaints before the Security Intelligence Review Committee, also known as SIRC which is the predecessor of NSIRA. And between 2010 and 2016, was part of a legal team that litigated a security certificate matter for Muhammad Mahjoub before the Federal Court and Federal Court of Appeal. He was a lawyer for IRFAN Canada with respect to the revocation of its charitable status and was involved in a challenge to delist IRFAN Canada as a terrorist entity, which was discontinued in view of statutory prohibitions against funding legal counsel. Yavar also acts as counsel for Deepan Budlakoti, who is a man born in Canada whose citizenship was stripped away by the Canadian government.

**[05:04]** And Yavar also teaches a course in Carleton University's Department of Law and Legal Studies, entitled "State, Security and Dissent," which explores the limits imposed upon civil resistance by the states' construction of security in times of peace and war. So, Yavar thanks so much for joining us on the show today.

**[05:20] YAVAR:** My pleasure, Husein.

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**[05:22] HUSEIN:** We've known each other for several years, we've both been part of the Canada Muslim Lawyers Association and working on numerous advocacy, issues in that respect. So, I know you're very well versed in this specific area, and I'm looking forward to exploring some of these substantive issues with you today. So, as we mentioned, the theme of today's episode is about National Security Law. And there's a number of issues that are very top of mind and some of which is happening the week that we're recording this episode, in mid-October. Now, the beginning of 2022, was characterized by massive protests in downtown Ottawa, regarding pandemic restrictions, and the convoy protesters had blocked neighborhood access with trucks and the constant sounding of the air horns.

**[06:10]** The Federal government ended this protest by invoking the Emergencies Act, which provided for sweeping powers. And this October, in fact, the day after this recording on October the 13<sup>th</sup>, a public inquiry will begin to analyze the government's rationale for using these emergency measures. And this is reviving dialogue about the use of his controversial legislation. So, Yavar we're again in the fall of 2022, this incident is very fresh in the minds of many Canadians, but there are a lot of listeners who are outside of Canada, they may be listening to this years down the road. Can you give us a brief summary of exactly what was going on in Ottawa in early 2022?

**[06:50] YAVAR:** So, just to give your listeners also a sense, I live in Ottawa, so I have a better sense of what was going on in Ottawa. But the events of January and February 2022, were about a national grassroots protest, which was initially understood to be a trucker protest, at least that's how we understood it to be in Ottawa. People came from across the country, and they converged in the nation's capital, around January 28. And for a period of about three weeks, they remained there, honking horns, there were strikes, there were parties, and there was a hot tub that was installed near parliament. And there was a presence that was nonstop 24/7, that the residents of Ottawa found overwhelming. And these protesters and the individuals who came to the city took over the downtown court.

**[07:52] HUSEIN:** What we're going to be talking about is the government's response to this and subsequent inquiry. Because part of what ended this protest was the Trudeau Government excising this Emergencies Act, which is the subject of this new inquiry. So, can you provide us with a sense of what this Act is and how it works?

**[08:11] YAVAR:** So, the Emergencies Act was created in 1988, and is the successor to the War Measures Act. And the War Measures Act has a really troubled history in terms of being

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invoked in the context of the early part of the last century, being implicated with the internment of Japanese Canadians. What the Emergencies Act tried to remediate is that if we're going to have a statute that provides for this overarching power of the government in certain times of emergency, we have to be clear on what an emergency is, what are the conditions precedent for when this power is going to be invoked? And we're really talking about a conjunctive list of things that the Act defines as being a national emergency.

**[09:06]**

So, we're looking at something that seriously endangers the lives and health or safety of Canadians, but that exceeds the provincial authority of the Province to deal with that thing. So, that's sort of what brings the Federal power into relief. It also has to be something that threatens the ability of the government of Canada to govern, so really threatened sovereignty. And the third part of that test is that the underlying issue can't be effectively dealt with by any other law within Canada.

**[09:42] HUSEIN:** So, now that we're clear about what the conditions are for something to become an emergency. What specifically did the government do in 2022 to use these powers?

**[09:51] YAVAR:** So, when you ask the question about like, what ensues from the government's reliance on the Emergencies Act? That very question is a question that's up for debate. And it's one of the questions that's going to be addressed in this judicial inquiry that's going to be unfolding very shortly. Because we know that on February 14, 2022 – Valentine's Day, the emergency measures were put in place. They were proclaimed by the government. But legal scholars are at odds in terms of whether the things that were actually done that is the arrest of individuals who are involved in protests, the seizing of assets, the use of tow trucks, and things like that which were necessary to deal with and respond to the public emergency, whether any of these things were uniquely under the purview of the Emergencies Act.

**[11:11]** And what I mean by that is that all of the arrests that were done were arrested under the Criminal Code of Canada, where pre-existing offenses, where police had the authority to deal with the situation under existing powers, under the Criminal Code. The other thing to note is that by February 14, almost every instance, whether we want to talk about, Windsor, Coots, or Emerson, these situations were either well in hand, or they were already dealt with through Local, Municipal and Provincial use of powers and police within those jurisdictions. So, it raises a large question as to the invocation of the Emergencies Act, certainly, it gives a larger breath of power to the state. But the question is more of a principled one, was it necessary to do so? And did it constitute an abuse of power for the Federal government to do it when it did so?

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**[12:25]** And the one caveat that I'll add to that is that the one situation that on February 14 was not in hand, was the situation in Ottawa, which was a more complex situation. I have my thoughts on that. But for all of the other situations, I think the record of facts shows that those situations did not require and in fact, the response to those happened before the Emergencies Act was proclaimed.

**[12:54] HUSEIN:** You mentioned that there are some checks and balances built into the legislation that involves this inquiry. Tell us a bit more about what these checks look like. And also, your thoughts on the inquiry generally.

**[13:07] YAVAR:** Right. So, the big check that the Emergencies Act creates is the fact that there is a requirement for the government to cause an inquiry to be held. I believe it's when within 60 days that the process has to commence for the inquiry. Under the Act itself, the Act does not require a judicial inquiry. But in this case, the public inquiry that will take place will be a judicial inquiry, which is a good thing. So, we're stepping up the scrutiny and the ability for this independent inquiry to look at both the causes of the emergency and the transparency and accountability of the government in using the power that it did.

**[14:06]** And so, what we hope we'll find in the context of this inquiry is, first of all, was the federal government justified in terms of invoking the Act? And what were the interests, both large interests, and small interests, that were at stake that gave rise to the need for government action? And I think that the big question in this kind of inquiry is one and proportionality. So, there are large questions to ask in terms of what is the role of the Emergencies Act and what is the discretion of the state whether it made the legal threshold, and met the legal threshold to impose the Emergencies Act as it did on February 14, 2022.

**[15:07]** But the other question at the level of grassroots and more community-based question is, what could have been done differently? What are the things that are available to municipalities? What are available to the province? What levers are available to the police force? And I think that hopefully that the public will become educated about the fact that there are tools that are available without the use of this overarching power.

[Music Break]

**[15:44] HUSEIN:** Amid numerous documented cases of discriminatory conduct and racial profiling, the Federal government has recently initiated several legislative initiatives to address

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CBSA and RCMP oversight. And most recently, the government has reintroduced legislation to the proposed creation of the Public Complaints and Review Commission. Now, while advocacy groups are optimistic about effective and robust civilian oversight, there still remain numerous issues to consider in this legislation. So, Yavar, I understand that this bill is known as Bill C-20. And we're still at the time of this recording, which is in the fall of 2022, I think we're still in fairly early stages in terms of the life cycle of this bill. But tell us a bit more about the purpose of Bill C-20.

**[16:30] YAVAR:** So I think that there are two purposes of this bill. And the thing that it creates or intends to create is the Public Complaints and Review Commission. And as you rightly pointed out, this is a review mechanism for the RCMP, and for the Canada Border Services Agency. And so a couple of things that it does right off the bat, there has never been a review mechanism for the CBSA or the Canada Border Services Agency. So, it expands the purview of review to the agency. The other thing that it does is sort of reboots or revamps the pre-existing Public Complaints Commission that existed in respect of the RCMP. And with respect to the RCMP review mechanism, that mechanism was notoriously known for having tremendous backlogs. There were problems in terms of getting complaints to turn an investigation to a review, to reporting.

**[17:47] HUSEIN:** And I understand that a big theme of this is about accountability and transparency. Tell us a bit more about the specific mechanisms that are in place to help advance these objectives.

**[18:00] YAVAR:** I would say there are two main things as I understand it from the proposal that would be in favor of this commission. It's the codified timeline. So, we're looking at specific time parameters for creating interim reports, reviews, and recommendations. And the problem with the predecessor is that these things would just fall by the wayside, and they just would not come to fruition. So, a timeline is a big part. Annual reporting is a huge one. And I think that's a new feature that did not exist previously. And I would say personally, that's a good feature of this review mechanism. And then the fact that many people have been talking after the notorious and terrible case of Maher Arar, there was a public commission of inquiry that released the Arar report, and in that context, there was a recommendation for having a broader review of national security mechanisms, and there was a call for having a review of the CBSA.

**[19:26]** And so that is a piece that has remained outstanding for a long time. And so I think that there has been a perception that because CBSA is so intrinsically involved in security measures and regulation, it should have some accountability. And so, we're moving from kind of a

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situation where there were only, whatever mechanisms that were there internally for the CBSA to now having this commission that could theoretically offer some reviews some greater transparency for what's happening, and a lot for the public as well to make complaints.

**[20:05] HUSEIN:** You mentioned that one of the concerns was that there was a big backlog. But one metric to address it is having codified timelines. Do you think that these codified timelines will result in more meaningful accountability? I could see people who might suspect, well, if you have codified timelines, maybe it just means that they're doing a quick rush job in order to meet the timelines without doing the meaningful checks and balances that are warranted. But as someone who is more familiar with this space, what do you think?

**[20:36] YAVAR:** I think that the timelines are very important to any process. You don't want to have any kind of... whether it's a judicial process, a tribunal process, or commission, you want to be able to tell your client at the onset that in 12 months or 6 months, you're going to have a process and you're going to move forward. So, in so many administrative processes, a lot of my practice deals with Administrative Law and various commissions such as the Canada Human Rights Commission. I will often advise my clients today when we're dealing with discrimination complaints before the Canada Human Rights Commission, I'll say, don't even bother, because the delays are just... there's no accounting whatsoever.

**[21:21]** So, I think that the codified timelines issue is a huge one, to have accountability in terms of a service standard. A couple of points that I would add to that is that, because this is a proposed Commission, we don't know whether it will be able to keep up with that track record, particularly given now the purview is being expanded to a national agency, which is the CBSA apart from the RCMP. So, we already have the track record of a prior review system that wasn't able to keep up with demand. Now we're expanding it and granted, there are over six years, there's a government pledge to put \$112 million into this Commission. But a huge question, is, is that going to be enough? Is that going to be enough to keep up with the level of complaints and that's an unknown?

**[22:17]** The other thing that I would add, and for me, this is probably one of the most important features, are you have a complaint mechanism that even if you do have codified timelines, you have the ability to either get to a review, get to a hearing, have a report produced, the logical question will be what is the remedy that comes out at the end of it? And the remedial power, at least as it's established in the proposed legislation, is a fact that we did provide recommendations to the institutions, to the RCMP, and to the CBSA and have those institutions

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report back in a parliamentary review process to explain whether or not they have complied with those recommendations.

**[23:27]** And for me, this is my personal view, that if you're going to have a commission, that has investigatory powers, and could have adjudicated powers to determine the fact with respect to wrongdoings or issues in respect of how these agencies are functioning. In my view, you should vest that commission with the power to make orders against those bodies.

**[23:48] HUSEIN:** Yeah, I can see how these recommendations might be cold comfort to a complainant who goes through this whole process, and then there's misconduct found, and then you get a recommendation at the end rather than some meaningful recourse that impacts you personally.

**[24:03] YAVAR:** Precisely. And this is a big concern and a complaint that I had dealing with the predecessor to NSIRA – the National Security Intelligence Review Agency, which is then the predecessor for that was called the Security Intelligence Review Committee, and that Committee had that recommendation type of power, and it was very limited in what it could do, by way of orders against CSIS. And the concern there is that you go through a hard-fought battle in which, you know, in many ways when you get to the hearing process, you're looking at an adversarial process, like you would find in another administrative tribunal context, but at the end of it, you don't have the power vested in that Commission to give that remedy to your client.

And so, at the end of some complaints that last years, up to five years before SIRC, I would really caution my clients to go before SIRC. And that's a similar caution that I would give to lawyers and potential complainants going to the PCRC is that, let's be cautiously optimistic about it. It's a new mechanism. But let's wait and see how their track record is going to hold out.

[Music Break]

**[25:30] HUSEIN:** In the spring of 2022, the Federal government held a series of parliamentary hearings about the police's use of facial recognition. And previously, several privacy commissioners had found that the RCMP had violated privacy laws by using a specific facial recognition technique. And this is prompting a broader conversation about the use and misuse of this tool. So, Yavar, can you explain to those who are unfamiliar with what is visual recognition technology?



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**[26:00] YAVAR:** Facial recognition technology involves the capture of the facial appearance of an individual, either in real-time or after the fact. It's a form of capture or monitoring of individuals so that often with policing surveillance techniques, you can trace the location of individuals, you can track them down, and can monitor their activities. So, it really becomes a tool of surveillance and policing. And there are concerns with that as you might imagine, in terms of the way that that that can be used, particularly because once you captured someone's facial features, that information resides in the database of the law enforcement or police and can be used by them for whatever purposes in the future, not related specifically to an investigation.

**[27:08] HUSEIN:** Okay. And so, when we're talking about the collection of this information. Are we talking about the government itself, using this facial recognition technology? Or are we talking about a private company using this technology and the government getting hold of this? Or is it both?

**[27:23] YAVAR:** It's both. And I think that you raised a very good question. Because in 2020, the Office of the Privacy Commissioner did an inquiry into the general use of AI Clearview. It's a private corporation's use of facial recognition. And in the context of that, there were some investigatory questions that were put to the RCMP. And what came up as a result of that initial complaint was that the RCMP was using AI Clearview. And so that led to a further complaint or further investigation, specifically, in respect of the RCMP, where it was found that the use of AI Clearview constitutes a breach of the Personal Information Act, in terms of the capture of that information and the uses that it was put to.

**[28:30]** The general concern of facial recognition technology is the fact that you're capturing biometric information, personal information that the Office of the Privacy Commissioner found, basically is invasive in the sense that it contains your personal information, that's distinct, it's biometric, it belongs to you. And it goes into the systems or some policing or surveillance system. And so once that policing system or the policing service has it, there aren't really mechanisms that can control how it's used subject to review and things you can do after the fact.

**[29:15] HUSEIN:** Right. And I mentioned these protections are there to ensure that this technique is not being used indiscriminately or amongst a broad swath of people. Is that right?

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**[29:27] YAVAR:** Yeah. One of the real problems here is that when you're talking about just at large capturing of information and people's facial feature, there is not necessarily any investigation at stake. Really, the way in which policing services would be gleaning this information is just because you happen to be in a certain space at a certain time. So, there's an invasion or incursion of your personal privacy right, because you've exercised your freedom of movement. That is something you're protected from under Section two of the Charter to have that liberty to move in public spaces. And now being in a public space, you can be subjected to that kind of invasive capture of your information, and then that can be used against you. So, there's potentially a chilling effect in terms of freedom of expression and freedom of movement.

**[30:37] HUSEIN:** Now, I know that there has been a series of hearings in the government, parliamentary hearings about this technology. Can you just give us a sense of what the hearings are about and what's come of them?

**[30:50] YAVAR:** The Standing Committee on Access to Information Privacy and Ethics has been in the process of taking submissions from the public, stakeholders, and affected individuals on facial recognition. Those Committee hearings are ongoing. The purpose of that in large part is informed by the Office of the Privacy Commissioner's findings with respect to the RCMP. The fact that, first of all, when in 2020, into 2021, the Office of the Privacy Commissioner did its investigation. First of all, it was found that the RCMP was using AI Clearview.

**[31:49]** So, this corporate technique of using the facial recognition was being adopted by the RCMP was further determined that the uses of this information were not necessarily passed, RCMP was describing it to be with respect to either finding victims or missing persons, and there was over 80% of the uses that were described, or the frequency with which it was used, was for other reasons. And those other reasons could be various investigations. But as I mentioned before, Husein, these kinds of investigations are not being started according to a judicial warrant. They're just information that the RCMP might decide to act on, based on the information it gleaned.

**[2:34]** Now, an important thing to know is that the RCMP has since indicated that it has ceased using AI Clearview and so it's distanced itself from that technology. But it also has publicly disagreed with the findings of the Office of the Privacy Commissioner. And so you have the RCMP justifying what it used. And also – and I think this is quite significant – the RCMP sort of pointing the finger of blame back on the technology itself, and that aggregator of the

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information, saying this is not us, this is the problem with that tool. And we didn't mean to do this, and this is not really our fault.

**[33:20]** And I think that it raises a lot of both ethical questions and legal questions when we think about how generally speaking, as technology is improving, there are ways in which private actors and databases and tools that we use every day. One of the questions is, how do we recognize these good and positive, and beneficial uses of technology, while putting safeguards around the ways in which policing services and the state more generally might use this? Those are some of the ethical issues that the committee is grappling with.

**[34:07] HUSEIN:** And so, what are the implications for lawyers, whether you're someone employed as a public service or whether you got a client who has alleged that they've been profiled through facial recognition technology? How does the law play out in terms of what the legal limits are even?

**[34:24] YAVAR:** A very good question. I think that what the investigation of the Office of the Privacy Commissioner helps us with is it establishes first, the fact that the procurement of this information through facial recognition technology is personal information within the meaning of the Personal Information Act, such that its capture without one's consent, constitutes a violation of one's individual privacy. Now, what are some of the implications of this? Any kind of captured information and you for those people working in government or in other sectors or having dealings with the government, you'll often see these disclaimers that information is being used in a manner that's consistent with the Privacy Act or the Access to Information Act. And it asks for consent, if you're going to put your own information either into a database or an application form or things like that.

**[35:35]** So, consent, generally speaking, is something that will allow the procurement of personal information, and that's generally speaking, for the reasons that the individual is put on notice of. So, if you're in a situation where, a policing service or the government more generally has procured facial recognition technology without your consent, on the face of it, that information is inadmissible. It has not been procured in a manner that is consistent with the law, it would translate the violation of the Privacy Act would also in my submission, I haven't read on this specifically, but I would venture to say that it would constitute a violation of Section 8 of the Charter.

**[36:27]** And so where that would bring you in the context of a criminal investigation would be the normal procedural rule for inadmissible evidence that's gleaned in the context of an

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investigation would mean that it should be excluded. So, the state is not going to be able to rely on that. And you're going to be able to point to this illicit use of facial recognition technology as a way to defend yourself and throw out the evidence against your client.

[Music Break]

**[37:03] HUSEIN:** And now it's time for the episode installment of our Ask-Me-Anything segment or AMA. As listeners will know one of the bonus awards from members of our patron crowdfunding community is the opportunity to submit questions that they want to hear answered on the show within our guest's area of expertise. We usually do call for the questions about a week or so before each interview. If you want to learn more about how you can become a patron, and submit your own questions to our upcoming guests and get other awards like that, you can check out our crowdfunding website, which is at [www.lawyeredpodcast.com/patreon](http://www.lawyeredpodcast.com/patreon). There's a lot more information there.

**[37:44]** So, yeah, we've got a bunch of questions for this episode, I think for timely and obvious reasons. And the first question that's been submitted is this: Over the last few years, CSIS annual reports have indicated that ideologically motivated extremism has dramatically ramped up. But with a lot of the discourse happening online, how do or can authorities avoid trampling on Canadian privacy rights, while still monitoring online behavior?

**[38:15] YAVAR:** Part of the premise of your listener's question there is about the necessity to monitor online behavior. I would certainly raise a flag of caution, generally speaking, to the fact that online behavior, as a rule, should and must be monitored in all cases. And so there are instances within various platforms where there's hate speech, or there is violence that's directed against a specific group. And in those kinds of instances, a specific investigation or questioning of individuals who espouse targeted violence is certainly within the purview of policing. The concern is that, at what point is simply an expression, for example, the expression of Palestinian human rights, that involves the support of individuals who live within Gaza, and are de facto controlled by the Hamas government? Does that become a glorification of Hamas, or is it seen to be by proxy because an individual is talking about human rights support?

**[39:44] HUSEIN:** There is a scenario though, that there is hate speech or extremism happening online and there are grounds to be monitoring this online behavior. Are there certain protections that should be in place to avoid breaching privacy rights?

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**[40:01] YAVAR:** Within that question, there are several things that arise, there are several questions that we have to know more about. Are we talking about private communications within a private chat group? Or are we talking about forums that are open to the public at large? If it's generally open to the public, I would say that the state normally should not have a place in monitoring public forums, but the level of intrusion is different than if it's an invitation-only forum where either, the RCMP or CSIS or another entity happens to come across information or gets access to that, that's a different situation.

**[40:51]** But when hate speech or violent speech is detected in the context of online expression, I think the follow-up to that, whether it's taken by the RCMP or whether it's done by CSIS, should be exercised in a cautious and proportional way. I've been involved in cases where the RCMP has been interested in speaking to a client of mine because of certain expressions, whether it's on Facebook, or otherwise. And I think that there are ways, delicate ways, there are sensitive ways in which law enforcement can approach an individual and I've been part of some of those processes.

**[41:39]** I tend to be cautious and skeptical about CSIS investigations with respect to expressions where there seemed to be a threat to national security, because in cases that I've been involved with, often, the target of interest is not necessarily about the expression of the individual, but it's about who the person knows. It's about guilt by association and guilt by proxy. And so there has to be a focus upon a specific individual and ideally, that should be done as a precursor to a criminal investigation, if it warrants that. And so I do raise a flag of caution to national security investigations that are trying to police people because of their expression.

**[42:29] HUSEIN:** Okay, the next question that's been submitted: How does Canada's national security law framework compare to that of other Western countries? Can you tell us about what's happening here, and in the US, but maybe less about other countries as well? So, we want to get your vantage point of view on how we stack up with other comparable countries.

**[42:50] YAVAR:** The useful comparators would be what we call the Five Eyes. So, Australia, New Zealand, the UK, the US, and Canada. I think that because of our proximity to the United States, there is a tendency, and has been certainly increasingly since September 2001, September 11, a real attempt to harmonize with US policies and US interests. And there's a certain logic to that, as the United States tries to increase security around its borders, it sort of necessitates stepping up the Canadian process. So, Canada is always in this push-and-pull relationship with the United States. And I think, in some respects, that causes it to be more aggressive, in some of its policies, and we saw that most dramatically with respect to the Anti-Terrorism Act, which was

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created in 2001. And revisited again, in Bill C-59 in 2015, which basically, allowed the perpetuation of those increased national security standards that we saw 15 years previously.

**[44:06]** The UK, in some respects, is more aggressive in some of its national security policies. But I think that what we've seen more specifically in recent years with respect to the Passenger Protect Program and security around travel, has raised some flags and caution in terms of Canada's specific approach. There has been pushback, in respect of Canada's version of what is basically the US No Fly List, in terms of being quite expansive in the naming and flagging of individuals. The other thing that your listeners have to bear in mind is that Canada, in many ways, is seen to be a purveyor of human rights throughout the world. And it's a country with a high living standard, and we respect human rights in everything that we do.

**[45:00]** But from now a security perspective, we are what we call a net importer of security intelligence. And that means that in order to safeguard our relationship with the Five Eyes, and particularly with the United States, "we have to do", we do a lot of things that compromise these would be Canadian values, because we're trying to placate our allies. And so this is what happened in the case of Maher Arar, where Canada was basically trying to deliver on a suspect, who was not involved in any terrorist activity, but ended up being sent to Jordan and Syria, through a process called "extraordinary rendition" that was facilitated by Canada.

**[45:50] HUSEIN:** So, the next question we have is: How do judges reconcile the open court principle with the need for security on national security grounds?

**[46:00] YAVAR:** So, in proceedings that I've been involved with in the Federal Court of Canada, particularly dealing with immigration and national security cases, there are specially designated judges of the federal court, who are equipped to handle confidential national security information. So, the compromise that has been created... and this is not necessarily a new thing is to bifurcate open public hearings, bifurcate, meaning creating two separate or parallel procedures, where you'll deal with or you will adjudicate the normal issues, constitutional issues in open court, and then in another closed setting what they call an ex parte setting, you will have a specially designated judge, and specially appointed lawyers for the individual concerned. These may be referred to as an *amicus curiae* or a Special Advocate representing the interests, so to speak of the accused person or the person whose rights are at stake.

**[47:18] HUSEIN:** So, you mentioned that these matters get bifurcated. So, how does the subject matter differ between one and the other?

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**[47:28] YAVAR:** Under Section 38, of the Canada Evidence Act, the Attorney General of Canada can invoke privilege on the basis of national security. And so national security privilege is a preemptive notice or invitation that the Attorney General can give where there is the potential that the disclosure of certain information will affect its either communication, the interests of Canada, or more broadly, our relationship with allies, there could be other matters, that have been provided to the Canadian government on the basis of reciprocal intelligence guarantees and safeguards.

**[48:19]** And so the Attorney General will invoke this privilege, and automatically, that creates this ex-parte process where the first order of business is to determine the scope of issues that are to fall under this umbrella. The Federal Court will determine what the parameters of that privilege should be, and then it will in the ex-parte forum, determine whether any of that information can be disclosed, can be put back into the public forum, and/or whether only a summary of that information could be made available to the public forum.

**[48:55] HUSEIN:** The last question we have and this question resonates with a lot of what we were talking about throughout this discussion today, especially Bill C-20 materials. So, the question is: What measures are currently in place to ensure that our national security bodies are acting with accountability?

**[49:12] YAVAR:** So, we talked about Bill C-20. And that is an example of a review mechanism. So, we have bodies such as NSIRA, which is the National Security Intelligence Review Agency, which is an after-the-fact review body, and that's primarily the basis that we have of accountability, which is not real-time operational oversight, but it is a mechanism that after the fact driven by complaints, or even in the context of the new public complaints body, they can raise complaints at their own accord, those can be investigated. And there is some kind of reporting of those results. So, our system is primarily one of review, where after the fact, issues are investigated by these bodies.

**[50:21]** There can also be—and this has happened on various occasions, judges of the Federal Court, and this is somewhat exceptional, but it has happened where judges have looked at, for example, applications for judicial warrants by CSIS, and have subsequently found that CSIS was perhaps not providing full information and Federal Court judges can hold a hearing of their own volition and can make the results of that hearing or their order, public. And so that's somewhat exceptional. But I think that we have a problematic system, where, by its very nature, the Attorney General of Canada holds the cards to be able to basically identify what national security is, the parameters of privilege, and then ultimately, it will be a Federal Court

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designated judge, who will make the call as to how much of that information will come into the public realm.

**[51:27] HUSEIN:** As someone who practices in this area, how do you feel this system is working for Canadians who are often the subject of these national security projects?

**[51:40] YAVAR:** I don't think that the system is working, and I don't think the system is working well. I think that Federal Court-designated judges are doing their job. And these judges are highly qualified and they do their job well. But they are basically being appointed to operate within these restrictive boundaries. And so these national security-oriented procedures become quite esoteric, because it's so hard to get at the full transparency of the underlying facts, and we have to resign our skepticism by saying, okay, these judges and these processes are going to do their job. And so, everything will be well and good. But lo and behold, when we have the Federal Court coming back, and telling us, as they've done on various occasions that CSIS, has not presented them with full and accurate information in order to authorize a judicial warrant.

**[52:49]** It's cold comfort to complainants to know this after the fact. Another thing to flag is that we saw this in the Abdelrazik case, is that public servants, whether it's in global affairs or in CSIS or in other organizations, they understand the importance of human rights, and they understand some of the ways in which individuals need to be protected, how government should be scrutinized, but they are basically, in some ways are limited, very much in what they can say and how they can speak out against even processes that they see as they are unfolding.

**[53:44]** So, one issue that I would raise for your listeners is that, what safeguards are there for whistleblowers within these institutions, to be able to speak out against abuses? Against systemic problems where we find for many years, racialized communities, and Muslim communities have talked about disproportional impacts of CSIS surveillance upon them. You also hear CSIS employees themselves, talking about systemic practices that have been discriminatory against them. I think that there needs to be protections for individuals within these organizations if they want to speak about abuses that are happening.

**[54:27]** Because in so many ways, we are never going to see the light of day of some of these issues, because given the parameters of national security privilege, we're often just left with a summary of the very high-level points of what the issue is and we're not able to get to a transparent and full view of what actually occurred. Leaving aside the very notorious cases like the case of Maher Arar, or the other individuals who have caused the public inquiry takes place. We normally never see the details of what happens in any national security investigation.



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**[55:10] HUSEIN:** Yavar, I want to thank you, again for taking the time to chat with us about these really important issues. And as you mentioned, a lot of these topics are very top of mind and happening as we speak, and I think that our discussion really brought to light some of the issues that are happening behind the curve in terms of how these bodies are working, and how they're held accountable. And we're very grateful that we have people like you who are doing the hard work to hold these systems accountable, as well. So, I want to thank you so much for your time for being on the show and looking forward to staying in touch in the future as well.

**[55:40] YAVAR:** Thanks so much, Husein.

[Music Break]

**[55:48] HUSEIN:** And that's going to be it for this episode of Lawyered. Thanks for listening. In today's episode, our guest was Yavar Hameed, and you can learn more about his law firm which is called Hameed Law, at the firm's website which is [hameedlaw.ca](http://hameedlaw.ca). And for more about today's show and all the links to the cases and bills that we spoke about in this episode, you can find those on our website, which is [www.lawyeredpodcast.com](http://www.lawyeredpodcast.com). In our next episode, we'll be speaking with Sakina Babwani, about the area of Class Actions Law. Sakina is one of the lawyers that is part of Bennett Jones practice, which is especially respected in this area.

**[56:24]** And we'll be speaking about a bunch of issues including a recent case involving the liability of gun manufacturers, a fallout of the Danforth shooting. We will be speaking about a calculation of damages in the context of data breaches, and also some new case law regarding certification. And if you want to help to improve the show and get some neat and affordable rewards. Like the opportunity to submit questions for our show and listen to some of our bonus episodes. We really appreciate it if you check out the Patron page of our crowdfunding campaign. You can find out more about how to do that on our crowdfunding website, which is [www.lawyeredpodcast.com/patreon](http://www.lawyeredpodcast.com/patreon). I'm going to give a shout-out to some of our existing patrons including Muhammad Moledina, Mohan Pandit, Munawer Chattoo, and Peter Chiykowski. Thanks so much for supporting this show. We really appreciate it! Our sound editing work is managed by Solomon Krause-Imlach, theme music by Ben Swirsky, and the website is maintained by Steve Demelo. Finally, please be advised that while the show is aimed to be helpful and informative that it is not legal advice. However, if you do want some legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we'll see you in two weeks. Until then, keep it legal!