

CANADA'S ANTI-TERRORISM ACT: CREATING A PARADIGM OF INSECURITY?

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ABSTRACT

On December 18, 2001, the Canadian government passed the Anti-Terrorism Act, a piece of omni-bus legislation aimed at preventing terrorist attacks. Since then criticisms of the Act have mounted, with many questioning the legitimacy of some of the Act's more controversial provisions in a country which bills itself as a world leader in respect for human rights and individual freedoms. In passing the Anti-Terrorism Act the Canadian government put the very essence of Canadian values at risk. In so far as Canadian security is seen as a holistic and complete set of rules and processes, the Act serves to undermine the safety and security of Canadians more than it protects them.

Keywords: Anti-Terrorism Act; security; terrorism; Canada; legislation; 9/11

Subject Terms: Canada. Anti-Terrorism Act; National Security – Law and Legislation – Canada; Terrorism – Canada – Prevention; Civil Rights - Canada

DEDICATION

To my Stream B partners in crime – my, but we are a ridiculous bunch! Thank you for the times you kept me sane, but more so, for the times you journeyed with me to the depths of insanity, laughing outrageously along the way.

For T, who has been there for me from 200 Elgin to the Shatabdi Express, English Bay to the Great Wall, I offer my thanks, and love. Insha'Allah this is but one of many adventures to come.

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INTRODUCTION

On September 11, 2001, the world watched in horror as the twin towers of the World Trade Centre came tumbling down, destroyed at the hands of terrorists. Looking back at the fateful events of that day it seems difficult to fathom that the smouldering debris that sat where the twin towers once stood would be a harbinger of the erosion of basic civil rights and liberties across the western world. Once touted as a defining feature of the developed, western world, the commitment to the protection and preservation of individual rights and freedoms has overwhelmingly fallen victim to a political climate increasingly characterized by hysteria and rushed judgment.

The attack on the towers, and subsequent pressure from the US government, led the Canadian government to issue a response, simultaneously aimed at both Canadian citizens and potential terrorists. On December 18, 2001, the Canadian government passed the Anti-Terrorism Act (the Act), a piece of omnibus legislation aimed at increasing the government's capacity to protect Canadians and thwart would-be terrorists. A product of its time, the Act substantially increased the power afforded to Canadian law enforcement officers and intelligence agencies, and took its cue from provisions put forth in its American counterpart, the USA Patriot Act. Despite the heightened sensitivity among much of the Canadian population vis-à-vis security concerns in the post 9/11

environment, the Act, and the public policy makers who crafted it, faced harsh criticisms from the moment it was introduced.

Indeed, many Canadians felt that in crafting a response to the events of 9/11 and seeking to establish a security framework that would build confidence in Canada's ability to protect itself, the government went too far. Some felt the Act was little more than an avenue by which the government chose to increase its power relative to Canadian citizens, and to strengthen the hand of its law enforcement and intelligence agencies. In addition to opposition from Canadian citizens the Act faced criticism from the Government's own Privacy Commissioner as well as the Ontario Supreme Court. Despite the fact, successive governments in Canada, led by three different Prime Ministers, have been unwavering in their support for this piece of legislation.

The implementation of, and subsequent support for, the Act has had a resoundingly negative effect on the civil liberties and individual freedoms afforded to Canadian citizens right here at home. This paper will examine the Act, the most controversial of its provisions, the international context in which it was implemented, and review the subsequent attempt by the government to engage members of Canada's ethno-cultural and religious minority groups via the CCRS in order establish the extent to which the Act has created a paradigm of insecurity.

One of the perils on writing on a subject that is by its very nature, a 'current affair' is that it often lacks a body of printed books and materials from which to draw. As such, much of the research conducted has focussed on web based publications, and online sources – as well as government documents that have only been published online. This has meant that in many cases extensive work is required to corroborate online sources making it a painstaking process – but one which allows the material presented to be extremely current, and therefore relevant to today's context.

CANADA'S ANTI-TERRORISM ACT

Democratic states have struggled with the task of effectively protecting national security while simultaneously safeguarding the individual rights and freedoms which are integral to any democratic state. Unfortunately, it is precisely these characteristics which make a society democratic – freedom to travel, ease of communication, access to technology, the right to exercise one's individual rights and freedoms that make it vulnerable to those who would wish to do harm.

National security is an objective easily maintained in an environment where individuals are afforded little, if any, personal freedom. Where the state is free to dictate all aspects of public and private life national security is easily maintained, as there are no limitations to the state's actions. Conversely, democracies must operate within very clearly articulated guidelines set out within a state's constitution. Law makers cannot arbitrarily impinge upon the rights and freedoms of citizens, a fact which makes the protection of a state's national security all the more difficult.

Canada, like many states, has grappled with the notion of national security and the extent to which it may reasonably trump individual rights and freedoms.

Debate has been rife, between law enforcement officials and policy makers alike, over how to balance these two very important aspects of democratic life. Many will recall the controversy that followed the 1970 October crisis and then Prime

Minister Pierre Elliot Trudeau's infamous interview with Tim Rae of the CBC. Asked how far he was willing to go in limiting the civil liberties of Canadians in the face of aggression by the FLQ Trudeau responded, "Just watch me."¹ In response to a series of dramatic events, including the kidnapping of British Trade Commissioner James Cross and then Quebec Minister of Labour Pierre Laporte, Trudeau invoked the War Measures Act which overrode sections two and seven through fifteen of the Canadian Charter of Rights and Freedoms. Working under these conditions, Canadian law enforcement operated free from many of the restrictions placed upon it by the Canadian legal system. Granted much leeway in its operations, the RCMP subsequently faced much criticism with respect to its actions. Amid allegations that the RCMP made use of forged documents, break-and enter missions, and searches without warrants, the government established the Royal Commission of Inquiry Into Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission.)

During its four years, the McDonald Commission reviewed the RCMP's security service, its actions and its failings, concluding that the service "lacked sophistication and analytical ability...[as well as] a precise mandate, effective political control and adequate review of its activities."² Although well intentioned, the government's attempts to safeguard Canada's national security had resulted

1 CBC Digital Archives, "The October Crisis: Civil Liberties Suspended."
http://archives.cbc.ca/war_conflict/civil_unrest/topics/101-610/.

2 Library of Parliament, "The Canadian Security and Intelligence Service."
<http://www.parl.gc.ca/information/library/PRBpubs/8427-e.htm#C.%20The%20McDonald>.

in unreasonable intrusions of privacy and a lack of respect for the most basic civil liberties. In the face of such serious findings, the government responded quickly to the Commission's report, accepting the most stringent recommendations and moved forward with the creation of the Canadian Security Intelligence Service (CSIS).

The basic function of the Service, as laid out in 1984, was to collect and analyze information and intelligence with respect to threats against Canada. The McDonald Commission was careful to point out, however, that "lawful advocacy, protest or dissent is not within the scope of threats to security."³ Since then, although Canada's national security framework has been subject to debate and criticism,⁴ policy makers have been confident they struck a tenable balance between national security and civil liberties. That is, until the events of September 11, 2001, shocked the world.

The Introduction of Bill C-36

Canada's geographic proximity to the US has long left it sensitive to the vagaries of American foreign, security and defence policy. In an environment where even the most subtle shifts in emphasis can result in a swell of economic and political

3 The Library of Parliament, "The Canadian Security Intelligence Service."
"http://www.parl.gc.ca/information/library/PRBpubs/8427-e.htm#C.%20The%20McDonald."

4 Most notable among these criticisms are those that followed the 1985 bombing of Air India flight 182 which originated in Toronto. The individuals believed to be responsible for the terrorist plot were under CSIS surveillance in the months leading up to the attack yet law enforcement and intelligence officials were unable to prevent the disaster.

consequences north of the border it was no surprise that the tragic events of September 11, 2001, had a “profound and unsettling effect”⁵ on national security and policy debate in Canada. The image of planes crashing into the World Trade Centre and of individuals leaping to their death exposed weaknesses in American national security policy, not to mention transportation policy, leaving nationals from both countries feeling as though they, too, were at risk.

In the days, weeks, and months following the attacks, governments around the world moved swiftly to revise existing national security policy amid fears that they, too, were be similarly vulnerable to terrorist attack. Canada, led by then Liberal Prime Minister Jean Chretien, rushed to implement a new, more stringent national security framework, one that would “...protect the safety, security and fundamental rights of Canadians.”⁶ On October 15, 2001, thirty four days after September 11, the Government of Canada introduced Bill C-36 – *An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other acts to enact measures respecting the registration of charities in order to combat terrorism*, otherwise referred to as the Anti-Terrorism Act.

5 Patrick J. Smith, “Anti-Terrorism and Rights in Canada: Policy Discourse on the ‘Delicate Debate,’” *Arab Studies Quarterly* 25, no. 1 (2003): 137-158, <http://www.web.ebsco.com>.

6 Department of Justice, “Parliamentary Review of the Anti-Terrorism Act.” <http://www.justice.gc.ca/eng/antiter/>.

With this new Act, the Canadian government hoped to send a strong message to potential terrorists and the international community alike - it was standing firmly behind the US in this time of need, and it would not allow the same tragic end to befall its citizens. The new Anti-Terrorism Act handed out a unprecedented increase in powers to both law enforcement and intelligence officers in a bid to bolster their capacity to gather information about terrorist activity within Canada to prevent the execution of terrorist acts and to increase their capacity to successfully prosecute individuals responsible for such acts. Although the Act introduced a myriad of new or revised powers, its main objective was to take aim at terrorist organizations and to strengthen the government's capacity for the investigation, prosecution and prevention of terrorist acts both at home and abroad.⁷

At the time the Act was introduced, the government assured citizens that this new legislation came equipped with rigorous checks and balances in order to uphold the rights and freedoms of Canadians,⁸ that the provisions were aimed squarely at terrorists, not law abiding Canadians, and that the measures introduced struck "the right balance between civil liberties and national security."⁹

7 Department of Justice, "Frequently Asked Questions," <http://canada.justice.gc.ca/eng/antiter/faq/index.html>

8 Department of Justice, "Royal Assent of Bill C-36 The Anti-Terrorism Act," http://canada.justice.gc.ca/eng/news-nouv/nr-cp/2001/doc_28217.html.

9 Department of Justice, "Government of Canada Introduces Anti-Terrorism Act," http://www.doj.ca/eng/news-nouv/nr-cp/2001/doc_27785.html.

Despite these assurances, however, it was not long after the introduction of the Act that controversy over its provisions began to emerge.

The Definition of Terror

Of primary concern was the government's definition of 'terrorist activity.'

Couched in vague terms, section 83.01 of the Criminal Code was amended to define a terrorist act as:

An act or omission in or outside Canada that is committed in whole or in part for a political, religious or ideological purpose, objective or cause and in whole or in part with the intention of intimidating the public or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government, or a domestic or an international organization to do or refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada [and]...causes serious interference with or serious disruption of an essential service, facility or system whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in ... harm.¹⁰

Although it makes provisions for those individuals engaged in lawful protest, the sweeping definition allows for broad interpretation of the term. Under this definition, those individuals involved in an illegal strike such as nurses or police officers could find themselves branded as terrorists and subject to the harsh penalties associated with that distinction. In addition, Amnesty International expressed concerns that Canada might use this new legislation to lash out against protestors who stray beyond the bounds of legal action. Although such

¹⁰ Parliament of Canada, "Bill C-36," http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=37&Ses=1&Mode=1&Pub=Bill&Doc=C-36_4&File=6.

acts certainly merit consequences, Amnesty International was particularly concerned that by “asserting that acts of political protest can be considered ‘terrorist’ acts...Bill C-36 [not only has] the potential to stigmatize legitimate human rights defenders in other countries, [but also to] create a chill on Canadian organizations trying to assist these defenders when they most need help.”¹¹ For many critics of the Act the provision amending the definition of a terrorist act is by far the most troubling. With such a broad definition and no established marker against which to judge an action as terrorist or not, there is a great deal of concern that this provision has opened the flood gates for the use of anti-terrorism powers against citizens who do not warrant them.

Pre-empting Action By Precluding Freedom: Canada’s Preventive Arrest Provision

Second only to the definition of terror in terms of contentiousness, the introduction of the power of preventive arrest has received the most attention from civil rights groups. Members of civil liberties groups and legal experts alike have questioned the legitimacy of those provisions that appear to be in direct contradiction with several articles of the Canadian Charter of Rights and Freedoms (Charter). Articles 9 and 10 of the Charter hold that “everyone has the right not to be arbitrarily detained or imprisoned”¹² and that upon arrest or

11 Patrick J. Smith, “Anti-Terrorism and Rights in Canada: Policy Discourse on the ‘Delicate Debate,’” *Arab Studies Quarterly* 25, no. 1 (2003): 137-158, <http://www.web.ebsco.com>.

12 Department of Justice, “Canadian Charter of Rights and Freedoms,” <http://laws.justice.gc.ca/en/charter/>.

detention everyone has the right to “be informed promptly of the reasons...to retain and instruct counsel without delay, and to be informed of that right and to have the validity of the detention determined by way of habeas corpus¹³ and to be released if that detention is now lawful.” Additionally Article 11 states that anyone charged with an offence has the right to be informed of the specific offence, to be tried within a reasonable amount of time and to have a public hearing.

Much of Canadian civil society has spoken out against the Anti-Terrorism Act as a result of the powers of arrest and detention it provides for, which are in contravention of the Charter. Specifically, section 83.3 of the Criminal Code was amended to read that where a peace officer suspects that the detention of an individual is necessary to prevent a terrorist activity, the officer may “arrest the person without warrant and cause the person to be detained in custody.”¹⁴

Once an individual has been taken into custody he or she is to be brought before a provincial court judge within 24 hours for a review of the detention. However, if a provincial court judge is not available within 24 hours, the individual will be held until one becomes available. Civil rights groups have expressed outrage over the fact that a Canadian citizen may be held without charge for days before

13 The Merriam-Webster Dictionary defines “habeas corpus” as any of several common-law writs issued to bring a party before a court or judge; the right of a citizen to obtain a writ of habeas corpus as a protection against illegal imprisonment.

14 Department of Justice, “Criminal Code,” http://laws.justice.gc.ca/en/showdoc/cs/C-46/boga:l_II_1-gb:s_83_01/en#anchorbo-ga:l_II_1-gb:s_83_01.

learning the reason for his or her arrest or before gaining access to counsel.

Further, at the time of review, if the judge determines the officer has reasonable grounds for suspicion, he may order the individual enter into recognizance.

Should the individual refuse, he or she can be held in custody, without charge, for up to 12 months.

Permanent residents and foreign nationals are also subject to increased detention powers under the Act. Where any officer feels that an individual poses a danger to the public he may, without warrant, arrest and detain him. This individual may be held indefinitely, and the only requirement of the government is that it undertake a review of the reasons for detention after 48 hours, 7 days, and every 30 days thereafter. This provision of the Act creates an environment in which Canadian citizens and permanent residents alike can be arbitrarily detained for long periods of time, or in some cases, indefinitely. Criticisms from civil society groups have argued that such power is unconstitutional, and that there can be no form of security measures or oversight mechanisms sufficient to safeguard the use of preventive arrests that could justify their implementation.¹⁵

¹⁵ It is widely, and incorrectly, thought that the ATA introduced the security certificate process – a legal mechanism which allows a judge to rule that a permanent resident or foreign national is inadmissible on the grounds of security. In fact, security certificates have been in use as far back as the 1970s, although they have garnered much public attention since 2001. There are currently six individuals being held on security certificates in Canada.

Increased Surveillance, Decreased Privacy

A third section of the Act which has caused great concern among civil liberties groups are the provisions which influence the country's privacy rights. In the war on terror law enforcement's capacity to access information is paramount. So, in an attempt to ensure effective and successful prosecution of terrorist offences, the Act provided new investigative tools to law enforcement and intelligence agencies in a bid to facilitate the collection of evidence and intelligence.

Whereas previous legislation required these agencies to demonstrate to a judge that surveillance of a suspect was a necessary tool, and that other investigative methods had proved incapable of providing the desired effect, the new surveillance provisions no longer require them to consider alternative investigation tactics – they can go straight to surveillance (electronic or otherwise.)

Additionally, the standard requirement for such surveillance has been reduced from 'reasonable grounds to believe' to 'reasonable grounds to suspect.' Where law enforcement officers are able to establish these grounds they may be granted authorization to undertake surveillance for up to one year, whereas previous to the Act the maximum length was 60 days. The extension of surveillance power extends well beyond Canada's borders, expanding the scope of the Act to reach the international level. Under the Act the Minister of National Defence now has the power to authorize electronic surveillance of international communications without seeking judicial authorization.

Critics of the Act have noted that as a result of amendments to the government's regulation of surveillance the consequences for individual privacy may prove devastating. Those most critical of the provisions have likened the post 9/11 environment to an Orwellian state, where individuals are constantly reminded of the omniscient, omnipresent Big Brother. Other criticisms come from those individuals who are concerned that the state will use these increased surveillance powers to undertake a systematic program of racial or religious profiling.

Concerns regarding the sweeping nature of the new surveillance procedures are not unique to civil liberties groups. Canada's Privacy Commissioner, Jennifer Stoddart, expressed her concern regarding Canadians' right to privacy in her address to the Senate Special Committee on the Anti-Terrorism Act in May 2005. Central to the role of the Commissioner's Office is the consideration of proportionality when reviewing legislation; regrettably, she noted, "there appears to exist no empirical evidence to suggest that the measures provided for by the Act are necessary."¹⁶ The Commissioner went on to note the inherent risks of a rising debate on national security that is not countered by public considerations of accountability and transparency.

16 Office of the Privacy Commissioner of Canada, "Anti-Terrorism Act," http://www.privcom.gc.ca/speech/2005/sp-d_050509_e.asp.

In considering the feedback received regarding the Act's privacy and surveillance provisions it is important to note that not all commentary has been negative. Arthur Cockfield, Assistant Professor of Law at Queen's University, notes that although there are some opportunities for abuse of state power, a review of state practices suggests that "state agents are not generally subjecting Canadians to overly intrusive surveillance practices."¹⁷ Moreover, although there are certain weaknesses within the structural framework put forward by the Act, these can be adequately addressed through the implementation of appropriate "public accountability mechanisms, such as an independent oversight committee to monitor potential abuses."¹⁸

17 Arthur J. Cockfield. "The State of Privacy Laws and Privacy-Encroaching Technologies after September 11: A Two-Year Report Card on the Canadian Government." *University of Ottawa Law & Technology Journal*, 325, no. 1 (2004 – 2005) 325.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=733863.

18 Arthur J. Cockfield. "The State of Privacy Laws and Privacy-Encroaching Technologies after September 11: A Two-Year Report Card on the Canadian Government." *University of Ottawa Law & Technology Journal*, 325, no. 1 (2004 – 2005) 325.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=733863.

AN INTERNATIONAL PERSPECTIVE

The provisions set forth by the Anti-Terrorism Act are too numerous and complex to be fully listed here. Rather, the above should be considered a glimpse into the shift in Canadian public policy that followed the events of 9/11, and the subsequent public response. While each amendment or new piece of legislation introduced by the Act is governed by its individual structure and specificity, the over arching challenge posed by the Act is of finding a balance between national security and civil liberties/individual rights and freedoms. As debate surrounding this omni-bus legislation continues it will be important for citizens and policy makers alike to remember that the fundamental purpose of national security legislation is to protect democracy. Where security requires the abrogation of democratic rights it is perhaps prudent to reconsider the trajectory of the country's public policy. Does it point in the direction of a successful, flourishing society that embraces not only economic and technological progress, but the advancement of civil rights and freedoms, or to an environment in which secrecy, suspicion and fear mongering dictate the ambitions of the state?

In the period leading up to the events of 9/11, much of the western world thought itself immune to the threat of terrorism. Despite the horrific bombing of Air India 182, bombings by the IRA in the UK, and a variety of other aircraft hijackings, numerous politicians and ordinary citizens alike largely thought themselves

insulated from terrorism on their home soil. To western leaders, terrorist acts occurred in places like the West Bank, or the Gaza Strip; the closest it came to 'home' were the bombings of American Embassies in far off lands. Many felt that there was no real threat on western soil. Tragically, as the twin towers crumbled on September 11th, so too did this illusion of invincibility. Americans, along with the rest of the western world, quickly realized that the reach of terrorism could extend into their very own lives.

On the afternoon of September 11, 2001, as the fires raged where the twin towers once stood, and rescue workers continued to pull bodies from the rubble, President Bush addressed the American people. Sitting in the Oval Office, behind his imposing desk with the American flag over his right shoulder, Bush reaffirmed the American commitment to freedom and justice, and urged American "friends and allies to join with all those who want peace and security in the world, and [to] stand together to win the war against terrorism."¹⁹ This address marked the beginning of a new chapter in American policy, both at home and abroad. President Bush quickly turned to American allies and called on them to mirror the American response, setting in motion a profoundly influential shift in rights and freedoms, the consequences of which would be felt globally.

19 The White House. "Statement by the President in His Address to the Nation." <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

In the weeks and months following the terrorist attacks governments around the world reaffirmed their commitment to safeguarding the safety and security of their citizens. Many of them moved swiftly to introduce legislation which, they claimed, would bolster their capacity to fight terrorism at home. The U.S. was the first to pass such legislation, the USA Patriot Act (Patriot Act), and was quickly followed by some of its closest allies, the U.K., Canada and Australia. Given their shared history and traditions, there was little surprise when these legislative steps were taken in the same direction. But it is evident that the extent to which these laws resemble each other is not simply a coincidence of history. The influence of the American administration can be clearly traced through each of these countries' anti-terrorism laws. Although the specific details of each country's laws vary, one would be remiss if they did not address what appears to be an overarching confluence among these pieces of legislation. In order to gain an adequate understanding of Canada's ATA, its strengths and weaknesses, it is therefore prudent to investigate the similar experiences in American, British and Australian legislation.

The USA Patriot Act

Enacted on October 26, 2001, a mere six weeks after the shocking events of September 11th and its introduction on September 14, 2001, the USA Patriot Act (Patriot Act)²⁰ has become one of the most controversial pieces of legislation in

²⁰ The formal name of the act is: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

American history. American legislators wasted little time bolstering the country's capacity to combat terrorism. The Act came into force with strong language condemning the use of terrorism as a means of coercion and clearly identified three stated objectives: (1) to revise counterproductive legal restraints that impair law enforcement's capacity to process critical terrorism related intelligence, (2) update Federal law, and (3) alter criminal law relating to terrorist offences.²¹ Proponents of the Act claim that it exists to facilitate communication and cooperation between national security and intelligence agencies. As a result of their two very separate agendas, these two agencies were not often used to working together, leading to what some have referred to as a "law enforcement and intelligence gap."²² The Act seeks to close that gap through the amendment of five major pieces of legislation: the Foreign Intelligence Surveillance Act of 1978 (FISA), the Electronic Communications Privacy Act of 1986 (ECPA), the Money Laundering Control Act of 1986, the Bank Secrecy Act, and the Immigration and Nationality Act.

Some of the most controversial parts of the Act are those which expand law enforcement's ability to conduct surveillance and collect information. Section 206, for example, amends FISA to allow 'roaming' (or roving) wiretaps. Previous legislation required a separate court order be obtained for each communication

21 Jon Moran. "State Power in the War on Terror: A Comparative Analysis of the UK and USA." *Crime, Law & Social Change*, 44 no. 4-5, (2005): 335-359. www.springerlink.metapress.com

22 The White House, "The Patriot Act Closes Dangerous Law Enforcement and Intelligence Gaps." <http://www.whitehouse.gov/infocus/patriotact/>.

carrier that was to be tapped. If police wanted to listen in on an individual's home and work phone, they would be required to obtain two separate orders. Section 206 introduced a significant shift in surveillance and how it takes place. Rather than focusing on the form of communication to be intercepted, the individual in question becomes the focus of the surveillance effort.

Similarly, if law enforcement officers can convince a judge that an individual may be using the internet to plan or help in the planning of a terrorist act they can be granted the right to monitor the individual's online activities. In this respect it is noteworthy that the person whose online actions are being tracked need not be a central figure to the focus of the investigation. Additionally, law enforcement and intelligence officers are not required to advise the individual that he or she was ever being observed, even after the surveillance has ended. Sections 507 and 508 give law enforcement officers additional access to an individual's private matters, allowing them to pull educational.

Anti-Terror Legislation in the UK

The U.K. context is one worthy of note, as at the time of the September 11th attacks, it already had pre-existing anti-terrorism legislation resulting from a long history of challenges in its domain. The conflict in Northern Ireland led Parliament to institute "provisions and punishment of certain offences, the preservation of peace, and the maintenance of order."²³ The Terrorism Act 2000

23 Office of Public Sector Information, "Terrorism Act 2000," http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1#Legislation-Preamble.

provided useful tools in the fight against terrorism, namely the expansion of the definition of terrorism and increased powers of arrest and detention set out in s.44 and s.45 which allow police to stop and search any individual or vehicle within a specified area.²⁴ Since this act was passed prior to the events of 9/11 it garnered significantly less attention than American or Canadian anti-terror legislation. While the British public remained largely unaware of the full extent of the powers afforded within this legislation, law enforcement agents worked quickly to apply their new powers. From 2001 to 2003 there was no part of London which had not been zoned for s.44 and s. 45 searches,²⁵ effectively allowing police to stop, search, and potentially detain, any individual within the city limits.

In the post 9/11 environment, however, Parliament decided it was necessary to implement additional legislation in order to effectively protect U.K. citizens. The legislative expansion first took place in December of 2001 with the passing of the Anti-Terrorism Crime and Security Act, again in 2005 with the Prevention of Terrorism Act, and, for a third time in 2006 with the Terrorism Act. Each of these pieces of legislation was clearly aimed at providing the state with an increasingly broad set of powers with which to combat terrorism, and was followed by controversy. Perhaps the most highly publicized amendment was contained in

24 Law enforcement in London has taken full advantage of this law. Between 2001 and 2003 the entire city of London was zoned for these searches, and the majority of all search and seizures at Heathrow Airport fall under this category.

25 Jon Moran. "State Power in the War on Terror: A Comparative Analysis of the UK and USA." *Crime, Law & Social Change*, 44 no. 4-5, (2005): 335-359. www.springerlink.metapress.com

the Terrorism Act, allowing the police to hold individuals suspected of a terrorist offence under pre-charge detention for up to 90 days. Despite claims from the government that this power would facilitate the protection of law abiding citizens, many Britons felt that this provision was nothing more than an “example of the state accruing power to itself without specifying how it would actually facilitate an increase in terrorism convictions.”²⁶ Public opposition to this section of the Terrorism Act was so great that the 90 day limit was ultimately rejected – replaced, instead, by a 28 day allowable pre-charge detention. In addition to increases in preventative arrest, the British government has significantly increased its capacity to collect information on individuals with suspected involvement in terrorist activities. The Anti-Terrorism Crime and Security Act has afforded the state the power to collect DNA from individuals arrested on suspicion of terrorist offences, regardless of whether or not they are ultimately charged with an offence.

Anti-terrorism legislation in the UK has increased not only in size, but also in intensity. The post 9/11 environment, characterized by increased sensitivity to security concerns, has led the British government to institute sweeping changes to the national security framework, with amendments largely mirroring those amendments found in the Patriot Act. In a move inspired equally by American pressure as by a desire to more effectively protect its citizens, the British

26 Jon Moran. “State Power in the War on Terror: A Comparative Analysis of the UK and USA.” *Crime, Law & Social Change*, 44 no. 4-5, (2005): 335-359. www.springerlink.metapress.com

government has set a precedent of putting security before rights, much to the chagrin of the majority of its citizens.

Anti-Terrorism Legislation in Australia

Unlike its British and American and Canadian counterparts, the Australian government took some time following the September 11th attacks before passing anti-terror legislation. Although the shockwaves from 9/11 reached its shores, many felt that Australia was largely isolated from the direct effects of terrorism as a result of its geography.²⁷ That sentiment quickly changed, however, following the Bali nightclub bombing which killed 202 people, 89 of whom were Australian. Following this incident, John Howard's administration acknowledged the need for policies that specifically targeted the scourge of terrorism, and that would simultaneously protect the safety and security of Australian's citizens, its communication, and its infrastructure.

The first round of anti-terrorism legislation was introduced in March 2002, and included 5 bills: Security Legislation Amendment (Terrorism) Act 2002 (SLAT), Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, Border Security Legislation Amendment Bill 2002, and Telecommunications Interception Legislation Amendment Bill 2002. Of these, SLAT was the most controversial, largely as a

27 Christopher Michaelson, "Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?" *Studies in Conflict & Terrorism*, 28, no. 4 (2005): 321-339. <http://ejournals.ebsco.com>.

result of its broad definition of terrorist activity and the power it bestows upon the Attorney General to determine which groups or organizations are considered 'terrorist.' Critics of the legislation expressed concern regarding its capacity to limit an individual's fundamental right to freedom of association and the broad strokes of the government which may incorrectly identify certain groups or organizations as terrorists as a result of religious or cultural misperceptions. Previous legislation included a safeguard against such mis-identification as it required the UN Security Council to identify any and all terrorist groups. This new legislation, combined with the government's broad definition of the term terrorism, have many worried that legitimate acts of protest or even peaceful assembly may find themselves designated as terrorist acts.

The second major piece of anti-terrorism legislation, the Australian Security Intelligence Organization Legislation Amendment Act, passed in June 2003. The Act authorizes ASIO agents to detain individuals for questioning for up to 7 days,²⁸ similar to the preventive arrest provision found in Canada's Anti-Terrorism Act. This legislation has been the subject of much attention as those individuals who are detained for questioning need not be suspected of having committed any offence so long as there are "reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is

28 ASIO agents are required to obtain a warrant in order to detain an individual who can be held up to 48 hours. The warrant can be renewed in order to hold an individual up to 7 days at which point they must be released. Agents are then required to wait at least one hour before detaining the same individual again.

important in relation to a terrorism offence.”²⁹ Critics of this legislation have expressed concern that intelligence officers have been granted powers which were traditionally reserved for law enforcement officers, whose actions are governed by more stringent guidelines.

An International Challenge

The challenges Canada is facing in achieving a balance between national security and civil liberties are by no means unique to this country. Canada, the U.S., the U.K. and Australia have a shared history which has shaped not only their respective governments, but also the social and political norms which dictate what is considered appropriate in these societies. The current shift in paradigm which has characterized the policy debate in each of these countries has come almost entirely as a result of the events of 9/11. Whereas previously issues pertaining to national security and civil liberties were seen as largely independent of one another and the state was responsible for ensuring the safety and security of its citizens, this did not necessarily translate to an infringement on anyone’s rights. In the post 9/11 environment many governments have capitalized on the heightened sense of vulnerability many citizens to implement stringent new security measures which, under a different set of circumstances, would normally never have seen the light of day. This shift in public policy and national priorities has had the end result of creating an environment where it has

29 Christopher Michaelson, “Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?” *Studies in Conflict & Terrorism*, 28, no. 4 (2005): 321-339.
<http://ejournals.ebsco.com>.

become increasingly difficult to determine where civil liberties end and national security begins.

A cursory review of academic journals and newspaper articles illustrates the great debate that has sprung up in response to anti-terrorism legislation, writ large. The challenges each of the above mentioned countries face are not unique to them, rather they are a function of the task that is 'national security.' One can look to the work of the contract theorists and their theories of whether man is most free in the state of nature or whether he requires rules and regulations in order to truly be free, to understand that while perhaps the notion of anti-terrorism legislation and the challenges it poses may be new, the quest to achieve a balance between national security and civil liberties has long been considered by man.

The fundamental challenge facing each country in its struggle with anti-terrorism legislation is not that certain members of society are interested in thwarting the government's capacity to protect its citizens. Rather it is one of identifying the extent to which, if any, national security trumps civil liberties. Anti-terror legislation in all of the forms presented above represents an extension of the reach and power of the state into the lives of citizens. Although the countries in question have different constitutional arrangements, jurisdictions, and legal precedent, the fact that they are each struggling with the same issue speaks to

the importance of viewing such an extension of state power in the overall context in which it operates, how it helps as well as how it hinders.

The challenge in implementing legislation that seeks to thwart something as ambiguous as 'terrorism' is that it is difficult, some would argue impossible, to clearly define it. As such, anti-terrorism legislation is saddled with the unenviable task of preventing an action it can't clearly describe. The first criticism that is common to these laws is that their definition of what constitutes a terrorist act is so broad there is a risk that legitimate protest and expression may be restricted or even punished. The Patriot Act defines domestic terrorism as any activity that:

- (A) involves acts dangerous to human life that are a violation of the criminal laws of the United States or any State.
- (B) appear to be intended –
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by mass destruction, assassination or kidnapping and;
 - (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping and;
- (C) occur primarily within the territorial jurisdiction of the United States.³⁰

Since this definition is so broad there is a very real possibility that legitimate forms of protest may fall under this category, and could, legally, be considered terrorism. As such, individuals who participate in or plan protests or rallies led by groups such as Greenpeace or Operation Rescue could be considered terrorists. They would therefore be subject to the full range of tools which under the Patriot Act are now at the disposal of law enforcement and intelligence agencies. In

³⁰ American Civil Liberties Union, "Text of the USA Patriot Act," <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/terrorism/hr3162.pdf>.

choosing to define terrorism in such broad terms there is a real risk that individuals will no longer be able to exercise their right to free speech or freedom of assembly as guaranteed by the US constitutional amendments, as well as in Articles 19 and 20 of the UNDHR.

Even if the legislation had managed to identify a workable definition that limited its scope to those activities which could truly be considered acts of terrorism, the powers bestowed upon law enforcement and intelligence officers are in contravention of the UNHDR, although this has not been ratified by all nations. One of the most hotly contested aspects of these anti-terrorism laws is that which refers to policies of detention. In Australia the ASIO Legislative Amendment Act of 2003 authorizes ASIO officers to seek a warrant to detain individuals even if he or she is not suspected of having committed any offence. Under this legislation ASIO members can take anyone into custody whether or not there exists a possibility that they will be charged with a crime, either at the time of their detention or any time in the future. The legislation does impose a limit on this detention time of 48 hours for a single warrant, however a new warrant can be obtained in order to continue the individual's detention for up to 7 days without charge. Despite international conventions which expressly limit a state's capacity to arbitrarily detain individuals, the Terrorism Act 2006 builds upon the powers of detention afforded to law enforcement and intelligence officers, and allows them to detain individuals who are suspected of involvement in terrorist acts to be held for up to 28 days without charge.

Similarly, little consideration has been given to Article 12 of the UNDHR which states that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”³¹ While the use of search warrants is nothing new in the field of law enforcement, previous applications of US legislation required that officers advise subjects of such a search. Section 213 of the Patriot Act, often referred to as the ‘sneak and peak’ section, amends the ECPA to allow law enforcement to delay notice of any physical or electronic search if they can demonstrate that such a notice would have an adverse result on their investigation.

These as well as other provisions of the anti-terror legislation in question have caught the attention of civil liberty groups, human rights activists and religious communities around the world. They have denounced these laws as little more than a “trampling [of] human rights in the war on terror,”³² and have often called for the most radical provisions to be repealed. In drawing up these Acts each of the governments in question had to know that this legislation would be controversial; the incorporation of the sunset clause which forces an Act to expire unless additional action is taken by legislators has been seen by many as an

31 United Nations, “Universal Declaration of Human Rights,” <http://www.un.org/Overview/rights.html>.

32 M. Welch. “Trampling Human Rights in the War on Terror: Implications of the Sociology of Denial.” *Critical Criminology*. 12, no. 1 (2004). www.springerlink.com

attempt by governments to afford themselves the opportunity to introduce legislation that might otherwise receive much stronger opposition in an attempt to make it more palatable. If the public is unsatisfied or entirely against the Acts introduced, the government can point to the sunset clause to assuage their concerns, and thus extend the time available to them to either amend, repeal, or reinstate it.

Some might question the legitimacy of legislation that has to be paired with a sunset clause in order to be more attractive – indeed the controversial provisions contained in anti-terror legislation would have likely been all the more hair-raising had they not been accompanied by a looming expiry date. Each of the countries in question have, and continue to, struggled with the implementation of this wave of anti-terrorism legislation and the subsequent reconciliation with their commitment to the preservation and protection of civil liberties and human rights.

NATIONAL INSECURITY: CANADA'S ANTI-TERRORISM ACT

Criticism of the Act has come from a wide spectrum of Canadian society.

Despite the differences among these various groups and individuals, the similarities amongst them are striking. In the aftermath of the September 11th attacks the international community acknowledged it needed to do more to guard against terrorism and its devastating consequences. The UN spearheaded this movement with Security Council Resolution 1373 on September 28, 2001. This resolution called on all states to "prevent and suppress the financing of terrorism"³³ and to implement comprehensive legislation with "steps and strategies to combat terrorism."³⁴ In order to ensure timely response, the resolution required states to take action no later than 90 days from that point. The Canadian government interpreted this to mean new legislation must be in place prior to the House of Commons rising in December 2001, and thus worked quickly to pass the ATA.

Primary among the criticisms levelled at the Act was the lack of information available on it, and the speed with which it was rushed through Parliament. Of

33 United Nations, "Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving Internal Cooperation Resolution 1373 (2001) Also Creates Committee to Monitor Implementation," <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

34 *Ibid.*

those who offered criticism, few disagreed with the stated objective of the Act, that is to “protect the safety, security and fundamental rights of Canadians.”³⁵ In fact, many of them acknowledged the need to ensure Canada fulfilled its international obligations³⁶ to protect not only Canadians but the international community from the proliferation of terrorism.³⁷

With this in mind, however, many felt that the introduction of such significant legislation required a healthy debate within both Parliament and civil society in order to meet the requirements of security as well as democracy. In pushing the legislation through so quickly critics felt the government had not adequately protected Canadian democratic values³⁸ and had not afforded the public sufficient time or information to adopt an informed position on the matter. Despite its hasty introduction, members of Canadian civil society worked quickly to familiarize themselves with the provisions of the Act and their subsequent consequences. The controversial nature of the Act caught the attention of a wide variety of individuals and organizations in Canada which spanned the full spectrum of political, ethno-cultural and religious backgrounds. Despite this vast

35 Department of Justice, “*The Anti-Terrorism Act*,” http://www.justice.gc.ca/eng/antiter/sheet-fiche/def_ter/def_ter3.html.

36 B’nai Brith, “A Review of Canada’s Anti-Terrorism Act: Presentation to the House of Commons Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness and to the Senate of Canada Special Committee on the Anti-Terrorism Act,” <http://www.bnaibrith.ca/pdf/AntiTerrorism05.pdf>.

37 Despite its concerns regarding specific provisions of the Act, the Canadian Civil Liberties Association has expressed its support for the Act to the extent that its purpose is to strengthen the government’s ability to fight terrorism.

38 Patrick J. Smith, “Anti-Terrorism and Rights in Canada: Policy Discourse on the ‘Delicate Debate,’” *Arab Studies Quarterly* 25, no. 1 (2003), <http://www.web.ebsco.com>.

array of perspectives, the concerns voiced were remarkably consistent.

Canadians across the board were concerned that the balance between collective security and individual rights had shifted in favour of security and that the very essence of Canadian values, as laid out in the Charter, were at risk of being violated. The fact that so many different groups had expressed concern over the same aspects of the Act begs the question of whether or not the ATA has overstepped the boundaries of legitimate security measures and ushered Canada into a modern day Orwellian security state.

Chief among these concerns has been the government's definition of a terrorist act, and its capacity for broad application. The amorphous nature of terrorism is precisely what makes it so difficult to define. In crafting the language for Resolution 1373 the UN recognized the inherent difficulty of defining an act which has no concrete motivation or execution. Rather than grapple with this difficult task itself, the UN left it up to each individual state to define the term rather than to attach a specific meaning to it in Resolution 1373. The Canadian government, among others, was thus charged with the unenviable task of identifying those actions which are to be considered terrorist in nature, and thus subject to the significant legal ramifications laid out within the Act.

The concerns voiced regarding this definition are, in fact, well placed. The Act's sweeping definition of what constitutes a terrorist act is so broad as to encompass actions which would not otherwise be considered "terrorist" in nature.

The stated intention of a terrorist act, that of “intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or refrain from doing any act...”³⁹ is so broad that even actions protected by the Charter could be considered ‘terrorist.’ Even after subsequent amendments to remove religious motivation⁴⁰ from the definition as well as the incorporation of a sub clause which exempts lawful “advocacy, protest, dissent or stoppage of work”⁴¹ there is great concern that law enforcement agencies can and will limit legitimate forms of protest, political or otherwise.

The Canadian Auto Workers Union, led by national president Buzz Hargrove, issued a statement to the House of Commons Standing Committee on Human Rights regarding Bill C-36 in 2001 expressing dissatisfaction with the Act and its potentially restrictive applications. Acknowledging the right of the government to protect its citizens, the CAW expressed its concern that in this instance the Act “represent[ed] a dangerous infringement on fundamental rights and freedoms.”⁴²

Of particular concern to the CAW, and others, was the definition of a terrorist act and its capacity to limit the work undertaken by unions. Between 1995 and 1998

39 Department of Justice, “Criminal Code (R.S., 1985, c. C-46),” http://laws.justice.gc.ca/en/showdoc/cs/C-46/bo-ga:l_II_1_gb:s_83_01/en#anchorbo-ga:l_II_1-gb:s_83_01.

40 A ruling by Ontario Superior Court Justice Rutherford in *R. v. Khawaja* removed the element of religion from the definition of terrorist activity because it was understood to violate the Charter guaranteed right to freedom of religion.

41 Department of Justice, “The Anti-Terrorism Act,” http://www.justice.gc.ca/eng/antiter/sheet-fiche/def_ter/def_ter3.html.

42 Canadian Auto Workers Union, “Protecting Human Rights and Providing Security in Difficult Times,” <http://www.caw.ca/visual&printlibrary/speeches&briefs/briefs/110901.asp>.

Ontario unions, including the CAW, held 11 'Days of Action.' These were single-day, province wide, strikes aimed at protesting legislation put forth by the Provincial Government, then led by Conservative Mike Harriss. Unions felt this legislation unfairly attacked poor and lower middle class Ontarians and chose to speak out against what they perceived as an injustice, exercising their right to protest. The effects of these strikes were felt across the province, and resulted in shut downs among public and private industries alike. Although these protests were in keeping with individual rights as guaranteed by the Charter, were they to take place today, they could be considered terrorist acts as they effectively shut down the operational capacity of the Province of Ontario. Such an action could certainly be taken to fall under the category of attempting to "intimidate a government to do, or refrain from doing, any act."⁴³

Indeed, the term 'terrorist' as understood within the confines of the ATA can have many applications, pertaining even to those world leaders whom we hold in high regard. Nelson Mandela, for example, is a man who has long been recognized as the most significant black leader in South Africa⁴⁴ and was awarded the Nobel Peace Prize in 1993 for his work in bringing about the end of apartheid and instituting democracy in South Africa. Despite his significant achievements and contributions, under the Act Mandela, the African National Congress, and anyone

43 Department of Justice, "The Anti-Terrorism Act," http://www.justice.gc.ca/eng/antiter/sheet-fiche/def_ter/def_ter3.html.

44 Nobel Prize, "Nelson Mandela, the Nobel Peace Prize 1993," http://nobelprize.org/nobel_prizes/peace/laureates/1993/mandela-bio.html.

who contributed, financially or otherwise, to their efforts, would be considered terrorists. Similarly, Viktor Yushchenko and any supporters of the Orange Revolution in Ukraine would be considered terrorists for their involvement in protests against then President Yanukovich. The so-called Orange Revolution, named after Yushchenko's presidential election campaign materials, was a collection of public protests and sit-ins directed against President Yanukovich after it was widely reported that election results were tampered with in his favour.

Proponents of the definition have argued that it is appropriate specifically because it is so broad as to avoid an overly narrow definition of terrorism which might exclude some terrorist groups. The Ministers of Public Safety and Justice have robustly defended it, and have stated that the definition was chosen to suit the unique nature of terrorism, and that the vague language was designed to "limit the scope of the law rather than expand it."⁴⁵ However, despite these claims, the reality is that the applications afforded by such a broad definition are vast and have the capacity to bring many under the tent of terrorism. Frightening consequences of being considered a terrorist, both legally and socially, aside, this definition has a very real capacity to dissuade Canadians from virtually any form of protest or agitation. Although the Act does allow for lawful advocacy, protest and dissent, what begins as a peaceful protest does not always end as such. In fact, it is not altogether unusual for protestors to stray from the bounds

45 Canadian Human Rights Commission, "Expanding Knowledge," http://www.chrc-ccdp.ca/research_program_recherche/ns_sn/page3-en.asp.

of legal action and become engaged in acts of civil disobedience.⁴⁶ While there is no question that individuals who break the law should face appropriate consequences, to hold a wile protestor on charges of terrorism would be a grievous miscarriage of justice. The Act's overly broad definition of the term 'terrorist act' effectively makes every Canadian vulnerable to the threat of oppression at the hands of the state. Through the amendment of section 83.01 of the Criminal Code the Canadian government has eroded its own capacity to guarantee each citizen the right to full and fair enjoyment of civil liberties.

Preventive Arrests

Amendments to section 83.3 of the Criminal Code, allowing the use of what the government refers to as 'preventive arrest,' has similarly elicited outrage from individuals and groups across the country. This new provision allows a peace officer to arrest "a person without warrant and cause the person to be detained in custody"⁴⁷ if he or she feels such action is necessary to avert a terrorist act.

According to the Department of Public Safety, this power is an important tool in helping law enforcement battle the threat of terrorism because "prevention is the most effective approach to combat"⁴⁸ it. Recognizing the controversial nature of section 83.3 of the Criminal Code, the government incorporated what it

46 Patrick J. Smith, "Anti-Terrorism and Rights in Canada: Policy Discourse on the 'Delicate Debate,'" *Arab Studies Quarterly* 25, no. 1 (2003), <http://www.web.ebsco.com>.

47 Department of Justice, "Criminal Code (R.S., 1985, c. C-46), "http://laws.justice.gc.ca/en/showdoc/cs/C-46/bo-ga:l_II_1-gb:s_83_18/en#anchorbo-ga:l_II_1-gb:s_83_18.

48 Department of Public Safety, "Annual Report on the Use of Arrests Without Warrant Pursuant to the Anti-Terrorism Act," http://www.publicsafety.gc.ca/abt/dpr/at/aww_03-eng.aspx.

considered to be safeguards against misuse and abuse. Included among these provisions is the requirement for “reasonable belief that a terrorist activity would be carried out”⁴⁹ as well as the onus being placed upon the peace officer to demonstrate why an individual should be kept in custody upon review of detention by a judge within 24 hours of the individual having been detained.

Despite the government’s assertions that these safeguards will protect Canadians from abuse of the considerable powers afforded by this amendment, these so-called protections lack the appropriate rigor to provide any peace of mind. Where the definition of terrorist activity is so broad as to encompass activities which by any other measure would not constitute a terrorist act, and where peace officers are only required to demonstrate appropriate suspicion that a terrorist act is likely to occur, a large section of the Canadian population is vulnerable to the whims of law enforcement officers beyond what is reasonable as laid out in both national and international legislation.

Interestingly, the Canadian government has often pointed to its international responsibility to protect against the threat of terrorism as laid out in UN Resolution 1373 as justification for the swift introduction, debate, and passing of Bill C-36 in the months following 9/11. Reference to this resolution is often made when policy makers are faced with questions regarding the necessity of the Act,

⁴⁹ *Ibid.*

yet little mention is made of the fact that this same piece of legislation fulfils Canada's responsibility vis-à-vis Resolution 1373 is simultaneously in contravention of Articles 9 and 10 of the Universal Declaration of Human Rights⁵⁰ as well as Articles 9 and 10 of the Canadian Charter of Rights and Freedoms.⁵¹

The preventative arrest provision of the Act has, to date, never been used. Indeed, much to the relief of human rights and civil liberties advocates, the provision itself sunset in February of 2007. For many, this signalled the end of a particularly troubling era in the Canadian security regime. However, earlier this year, the government reintroduced legislation to activate a similar provision once again. This bill, S-3, currently in third reading aims to provide the government the ability, yet again, to conduct preventative arrests, in line with the earlier legislation. For many this has been a particularly disconcerting development – with advocates noting that the provision itself has provided little utility to law enforcement officials, but sets a dangerous precedent and sends a troubling signal about the rights and freedoms of people in Canada. Many critics point to the fact that the government had yet to use the power of preventive arrest before

50 Articles 9 & 10 of the UNDHR state that “no one shall be subjected to arbitrary arrest, detention or exile” and “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him,” respectively.

51 Articles 9 & 10 of the Canadian Charter of Rights and Freedoms state that “everyone has the right not to be arbitrarily detained or imprisoned” and that “everyone has the right on arrest or detention to be informed promptly of the reasons therefore, to retain and instruct counsel without delay and to be informed of that right and to have the validity of the detention determined by way of habeas corpus and to be released if that detention is not lawful,” respectively.

the provision sunset as evidence that law enforcement officials do not require this power in order to effectively protect against terrorist acts.⁵²

Big Brother is Watching: The Shift to Surveillance

On February 14, 2005, then Deputy Prime Minister Anne McLellan noted in an address to the Special Senate Committee on the Anti-Terrorism Act that the Act should be seen as an act of prevention, recognizing that “if the terrorists are on the planes, it is too late, and [the government] has failed.”⁵³ Acknowledging the age old adage that an ounce of prevention is worth a pound of cure, the Act significantly decreases restrictions on law enforcement and intelligence agencies vis-à-vis surveillance in a bid to enhance their capacity to interrupt any and all terrorist plots. Specific amendments to the Criminal code aimed at surveillance capabilities include eliminating the need to demonstrate that electronic surveillance is a last resort in the investigation of terrorists, reducing the requirement for surveillance from ‘reasonable grounds to believe’ to ‘reasonable grounds to suspect,’ extending the period of validity of a wiretap authorization from 60 days to up to one year and delaying the requirement to notify a target after surveillance has taken place for up to three years.

52 The Toronto arrest of 17 men in June 2007 is testament to this fact. Law enforcement and intelligence officers were able to foil an alleged plot to attack several high profile Canadian landmarks without making use of the power of preventive arrest.

53 Department of Public Safety, “Review of the Anti-Terrorism Act: Speaking Notes for the Honourable Anne McLellan Before the Special Committee of the Senate,” <http://www.publicsafety.gc.ca/media/sp/2005/sp20050214-en.asp>.

Specifically, the impacts of the Act can be grouped into three broad themes. First, the surveillance powers of security and intelligence and law enforcement agencies have been overly broadened. Under the legislative amendments put forward by the Act law enforcement and intelligence agencies have the power to conduct surveillance with very little, if any, oversight. Where these agencies are free to utilize intrusive means to gather information without the targeted individuals' knowledge significant questions about the government's capacity to protect the privacy of Canadians arise. The test of reasonableness has not been applied in this case and the government has served to curtail the charter rights of Canadians, specifically section 8. Second, constraints on the use of those same surveillance powers have been unduly weakened. By expanding the circumstances under which surveillance can occur, a significant threat exists in terms of the ability of law enforcement and intelligence officials abusing the latitude granted them in order to conduct operations, which leads to the third concern – that government accountability and transparency have been significantly reduced.

Law enforcement and national security agencies are no longer required, in anti-terrorism investigations, to consider other investigative methods prior to applying for judicial authorization for electronic surveillance. What this has meant is that the knee – jerk reaction to seek the fullest powers in the first instance. The principle of incrementalism in seeking powers has been eroded completely in favour of an all or nothing approach in its implementation. Also troubling is the

fact that in the current state the executive branch of government may displace the role of the judiciary in issuing security certificates and authorizing interception of communications. Where the minimum requirement for approval is 'reasonable grounds to suspect' there can be little confidence among Canadians that authorities are using sufficiently stringent guidelines to approve invasive and potentially devastating surveillance techniques. The consequence of a diminished measure of requirement is that recourse mechanisms for those under scrutiny are greatly limited.

In an environment where a number of the legislative amendments enacted under the *Anti-terrorism Act* have had the effect of weakening independent oversight of the surveillance activities of law enforcement and security and intelligence organizations the fundamental question, then, is: whither the charter? To date, the attitude of the department of justice on this matter continues to be one which seeks to change only when challenged in the courts – which can often be a lengthy and expensive process. Although there may be recognition that many surveillance provisions would not meet the Charter test, the principle of application until objection has led to the government fundamentally altering how and when it conducts surveillance, knowing well that many of these actions are seen as fundamentally unconstitutional.

THE CROSS-CULTURAL ROUNDTABLE ON SECURITY

After the ATA was passed the media focused its attention on the most controversial provisions, the definition of terrorism, preventive arrests, and increased surveillance powers. While this focus served to inform the public about the true nature of the Act and the powers it introduced, little attention was paid to its far-reaching influence. The Act was the result of a knee-jerk reaction on the part of the Canadian government to pressure from the United States to shore up its end of the world's longest unprotected border. As Americans readied themselves for the war on terror and George W. Bush set his sights on those countries which constituted the 'Axis of Evil,' the Canadian government sought to reaffirm its position as an American ally. As a result of this hurried approach, public policy makers were left scrambling to understand exactly what kind of implications would result from the passing of the ATA.

The Act was often touted as one of prevention,⁵⁴ bestowing powers upon Canada's law enforcement and intelligence agencies in a bid to facilitate the collection of information and detention of suspects before an act of terrorism were to occur. However, despite the substantial powers afforded by the Act, the government recognized that it alone was not sufficient to combat terrorism. Unfortunately, as a result of the sweeping powers afforded to Canada's national

⁵⁴ *Ibid.*

security agencies, the controversy surrounding some of the Act's provisions, and the charged atmosphere among many of Canada's ethno-cultural and religious communities, particularly the Arab and Muslim communities post 9/11, many viewed the RCMP, CSIS, and the government with large with suspicion. In fact many individuals felt they were unfairly targeted by these agencies as a direct result of their religious beliefs or cultural customs.⁵⁵

As suspicion and mistrust of the government began to build among these communities, largely as a result of the Act, the government was reminded that legislation does not exist in a vacuum, and that the Act would require the "cooperation and support of all Canadians of all backgrounds and all beliefs."⁵⁶ Recognizing that "there might be a perception in some communities that they are being unfairly targeted by law enforcement,"⁵⁷ the government moved to establish a body responsible for facilitating a dialogue between national security agencies, government departments responsible for their oversight, and members of Canada's diverse multicultural communities.

55 Canadian Islamic Congress, "Let Canada Lead the World Toward Security With Rights, Justice is the Ultimate Guarantor of Security: A Position Paper by the Canadian Islamic Congress Released in Toronto on September 9, 2005," <http://www.canadianislamiccongress.com/docs/position.php>.

56 Parliament of Canada, "Proceedings of the Special Senate Committee on the Anti-Terrorism Act," http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/anti-e/01evb-e.htm?Language=E&Parl=39&Ses=1&comm_id=597.

57 *Ibid.*

On February 8, 2005, the inaugural members of the Cross-Cultural Roundtable on Security (CCRS), a central feature of the government's National Security Policy,⁵⁸ were appointed. Charged with "engag[ing] Canadians and the Government of Canada in an ongoing dialogue on national security in a diverse and pluralistic society,"⁵⁹ members of the CCRS set out to provide insights on how national security measures were impacting Canada's diverse communities, promoting mutual respect and common understanding among these communities and the government, and advising the government on how to improve national security legislation. Members were selected from a pool of individuals nominated by community members and were chosen based on their:

- Awareness of security matters as they relate to the community and relevant community dynamics;
- Knowledge and experience in engaging diverse and pluralistic communities;
- Ability to facilitate the exchange of information with communities;
- Commitment to building community capacity and safer communities.⁶⁰

By choosing members from a broad cross-section of Canadian communities, the government sought to achieve the legitimization of its National Security Policy and the Act, taking a backdoor approach. Members of the CCRS were quickly charged with the task of meeting with representatives from the RCMP, CSIS, and other government departments implicated in national security. The objective of these meetings was to allow government representatives the opportunity to

58 Department of Public Safety, "Securing an Open Society: Canada's National Security Policy," <http://www.publicsafety.gc.ca/pol/ns/secpol04-eng.aspx>

59 Department of Public Safety, "Terms of Reference," <http://www.publicsafety.gc.ca/prg/ns/ccrs/ccrstor-eng.aspx>

60 *Ibid.*

communicate their respective roles, responsibilities and governing principles to the CCRS members who would in turn relay the message to community members at various 'grassroots' meetings in various communities across the country.

The impetus for the creation of the CCRS came from overwhelmingly negative community feedback regarding concerns that the government would use its freshly minted powers, many of which were in direct contravention of the Charter despite claims to the contrary, to focus attention on members of Canadian minority communities. While the ATA clearly outlines a zero-tolerance position against terrorism, the government has been reluctant to establish a similarly absolute policy regarding racial or religious profiling by Canadian law enforcement or intelligence gathering agencies. This reluctance has not gone unnoticed, further necessitating the need for some sort of community outreach initiative, a need which the government felt could be met by the CCRS.

Unfortunately, as is often the case with initiatives conceived by members of the majority isolated by the thick walls of Parliament, the member selection process has failed to capture the myriad complexities and nuances present in each of Canada's minority communities. The end result has been that many CCRS members either lack legitimacy within those same communities which they were

chosen to represent, or are simply not representative of the entirety of the ethnic or religious group they are assumed to speak for.⁶¹

Concerns regarding the effectiveness of the CCRS have emanated from both sides of the debate, with members of the Senate Special Committee on Anti-Terrorism expressing doubt as to the influence of its members as well as the mandate of the CCRS as a whole. Indeed, the very role of the CCRS, that of “advocate for those who may be wrongfully profiled and subject to the anti-terrorism legislation and as disseminators of information from the government to minority communities”⁶² appears to force the CCRS members to work at cross-purposes with themselves. One Senator succinctly echoed a criticism of the CCRS which has been levelled at the group by members of various ethno-cultural and religious communities when he noted that the CCRS “could be seen as a PR group for the department [of Public Security.]”⁶³ In creating an independent body capable of critiquing national security policy and anti-terrorism legislation, the government had hoped to establish a workable example of civil society’s involvement in the national security debate. Through this body it had hoped to facilitate the expression of more positive feedback from various communities to counter the wave of negative responses stemming from the passing of the ATA. This attempt has fallen markedly short of its stated

62 Kent Roach, “National Security, Multiculturalism and Muslim Minorities,” U Toronto, Legal Studies Research Paper No. 938451(October 2006), <http://papers.ssrn.com>.

63 *Ibid*.

objective, however, largely as a result of the expectation that civil society be independent of the government.⁶⁴ So long as the members are required to simultaneously critique government policy and act as a conduit between the government and Canadian communities to deliver government messaging the legitimacy of the CCRS' message will remain suspect. Doubly so because its members serve at the pleasure of the Ministers of Public Safety and Justice, and can therefore be expected to tow the government line.

Scepticism about the CCRS and its capacity to affect meaningful change in the national security debate is visible no more clearly than in the aftermath of a CCRS public meeting held February 10th 2007. Hosted by the CCRS and open to the public, this meeting offered the opportunity to meet and talk with representatives from various government departments and agencies, including senior officials from the RCMP and CSIS. Although the stated objective of public outreach events to "engage Canadians and the Government of Canada in an ongoing dialogue on national security in a diverse and pluralistic society,"⁶⁵ this event, like many others hosted by the CCRS, could be classified as little more than a circus.⁶⁶ Government representatives found themselves listening to a

64 According to Rueschemeyer, the very notion of 'civil society' can be understood to comprise the totality of social institutions and associations that are not strictly production related nor government or familiar in nature. Such a conception would view any organization which is created by the government and serves at its pleasure could neither be considered independent of the government, nor part of civil society.

65 Department of Public Safety, "Terms of Reference," <http://www.publicsafety.gc.ca/prg/ns/ccrs/ccrstor-eng.aspx>

66 Kent Roach, "National Security, Multiculturalism and Muslim Minorities," U Toronto, Legal Studies Research Paper No. 938451(October 2006), <http://papers.ssrn.com>.

wide variety of complaints and conspiracy theories, not the least of which was one community member's belief that "Muslims were not involved [in the 9/11 attacks] and seven of the alleged 19 hijackers are alive and well."⁶⁷ Inflammatory comments like this, and others, only served to fuel the anger and objections voiced by other community participants and left government representatives scrambling to maintain some semblance of order. The event became so raucous that at one point even CCRS member Salma Siddiqui became frustrated, noting that:

[F]or the past 3 years the government has been engaging with goodwill. The government has come out in goodwill to listen. Now the goodwill has to come from those self-proclaimed leaders to come forward with some concrete proposals on how to move forward.⁶⁸

Sadly, this meeting is not the exception to the rule when it comes to characterizations of outreach sessions hosted by the CCRS. Meetings held in Montreal in 2006 unfolded similarly, with one Muslim community member remarking that a Surete du Quebec officer who was present was not a 'real' Muslim because he worked for the government.⁶⁹ Many community members come to these meetings already on the defensive as a result of the perception that the CCRS is not sufficiently independent from the government, thus further deepening the 'us vs. them' divide.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

Since its inception in 2005, the CCRS has been plagued by a number of challenges. The members' close ties with political leaders and their reliance on the Department of Public Safety for administrative support has led many to view it as nothing more than a public relations tool for the government. By appointing 15 Roundtable members who are each representative of a particular ethnic or religious minority group in Canada the government had hoped to respond to criticisms that it is not mindful of the experiences and challenges faced by Canadian minorities by pointing to the CCRS as evidence of its endeavours to bring all Canadians into the debate on national security. For the Ministers of Public Safety and Justice, the CCRS acts as a direct delivery method for any messaging the government wishes to communicate to Canada's ethno-cultural and religious communities. Rather than trying to get Canada's minorities to buy into policies and priorities put forward by white men in blue pinstripe suits in the House of Commons, the government, via the CCRS, has attempted to have those messages delivered directly by those inside the community.

The challenge that this approach faces is that the legitimacy of the CCRS members vis-à-vis their individual communities is questionable, as many see the CCRS as a vehicle through which the government picks only those individuals who are willing to support its political agenda. Indeed, the very purpose that the government seeks these members to fulfil – to become a vehicle by which to hear the various community perspectives – is diluted by the profound loss of

credibility they suffer within their own communities as they become increasingly seen as apologists for government policies.

Secondly, the CCRS has been criticized for its lame-duck mandate, and has been judged by some to have little influence on actual policy decisions.⁷⁰ The Terms of Reference of the CCRS state that the Ministers of Public Safety and Justice are to meet with the CCRS at least once per year, and that senior government officials will attend meetings of the CCRS as appropriate.

Ostensibly, these meetings would provide both CCRS members and government officials the opportunity to discuss issues of national security that are of concern to various communities, if not all Canadians, in order to allow members the opportunity to seek clarification from government officials, which they could in turn communicate to their wider communities. However, since no member of the CCRS is screened for a security clearance of secret or higher these meetings cover only that information which is already present in the public domain. As such, government officials can only offer superficial commentary, much of which is likely to mirror any comments released to the media on the same subjects. Although members of the CCRS are afforded a relatively significant amount of pomp and circumstance as a result of their positions, being taken on tours of airport security clearance facilities and holding meetings with high ranking government officials, they are incapable of really digging into the heart of national

70 Kent Roach, "National Security, Multiculturalism and Muslim Minorities," U Toronto, Legal Studies Research Paper No. 938451(October 2006), <http://papers.ssrn.com>.

security matters, and thus, can offer little insight to their individual communities nor to Canadians as a whole as to the inner mechanisms of Canada's National Security Policy, the Act, or government security machinations writ large. This lack of depth is evidenced by the dearth of policy recommendations put forth publicly by the CCRS in the 3 years of its existence.

In fact, there has not been much information regarding any of the activities of the CCRS put forward publicly. According to the Department of Public Safety's website, since its inception in February 2005, the CCRS has held 9 meetings with government officials and a total of 6 community outreach events. For each of the meetings with government officials the website lists a brief bullet summary providing information on the overarching theme of the meeting, attendees, issues of discussion and an overview of outcomes, none of them counting more than 250 words in total.⁷¹ Similarly, information provided regarding community outreach events is scant, with only two of the six listed events accompanied by a full-page report.

Insofar as the CCRS exists to foster a dialogue between members of the public and government officials, it can only be deemed to have fallen well short of the mark of success. There is very little, if any, information available to the public regarding the actions and undertakings of the CCRS members and therefore

⁷¹ Department of Public Safety, "Meetings of the Roundtable," <http://www.publicsafety.gc.ca/prg/ns/ccrs/meetings-eng.aspx>.

very little occasion for members to highlight their work and thus refute claims that they serve as little more than a rubber stamp of community approval for government policies. Even the most ardent supporters of the CCRS would be hard pressed to defend the utility of this body in the face of the criticisms levelled above as there is exists virtually no evidence, at least that which is available to the public, that would contradict them. If the government were truly committed to pursuing a policy of community outreach, one of bridging the gap between national security policy makers and those individuals it affects, it would be wise to empower those tasked with outreach appropriately so they are able to participate in a meaningful dialogue, rather than simply acting as a community based 'rubber stamp' for government policies.

CONCLUSION

Anti-terrorism legislation in Canada has proven to be more of a threat to the safety and security of Canadians than terrorism itself. By rushing to pass hastily crafted legislation during the aftermath of September 11th, the Canadian government proved that it was more concerned with taking cues from the Americans than with protecting its own citizens. Although the Act introduced a wide variety of provisions which would influence virtually every aspect of life within Canada, there were three which caused particular concern as they would significantly erode the human rights and civil liberties of Canadians. It is noteworthy that this opposition has cut a wide swath across Canadian civil society, emanating from not only those individuals of Arab or Muslim descent who find themselves the focus of government attention in the post 9/11 environment, but from a wide variety of groups, including, but not limited to, Jewish, Muslim and Christian religious associations, ethno-cultural groups, professional associations and unions as well as political activists. The introduction of provisions that allow for an overly broad interpretation of the term terrorism, preventive arrest and detention and substantially increased powers of surveillance have led all sectors of Canada's civil society to stand together and publicly decry this ill-conceived legislation.

Unfortunately Canada is not the only country facing the challenge of overly restrictive, backwards looking legislation. The US, UK and Australian governments have all enacted eerily similar laws, lending credence to claims that this policy shift has more to do with placating the American administration than it does with responding to the 'pervasive' threat of terrorism. Despite opposition from the public, academia and a handful of policy makers, the Canadian government has held strong on the Act, insisting it is necessary to safeguard the security of Canadians. These claims, however, ring hollow when one recognizes that those provisions which the government maintains are integral to protecting Canadians against terrorism are the very things responsible for the erosion of human rights and civil liberties in Canada. The sweeping definition of terrorism found in the revised Criminal Code is so broad that virtually any form of public protest could be considered a terrorist act, and the preventive arrest and detention provision is in direct contravention of both national and international charters which protect against the threat of arbitrary arrest and detention. The government's own Privacy Commissioner has come out against the Act, noting that the extent to which it allows the government to pry into the lives of Canadians is unreasonable. Individually, each of these provisions, in addition to others contained within the Act, are cause for concern. What is most frightening, however, is that in order to be subjected to any of these sweeping powers one need not be found guilty of having committed any offence. In passing the Act the government greatly lowered the requisite threshold necessary to allow law enforcement officials to make use of these powers which are so powerful that a

Canadian citizen could be detained for up to one year without ever having been charged or convicted of any crime. So long as a law enforcement officer has sufficient 'reason to suspect,' a notable difference from the previous 'reason to believe,' that an individual may be involved in planning or executing a terrorist act as defined by the Criminal Code, he or she has the power to detain Canadian citizens without charge for up to one year, and landed immigrants or foreign nationals indefinitely.

It was no surprise, then, that when the Anti-Terrorism Act was passed in 2001 it was soon followed by a storm of controversy. The government of the day was forced to take action and attempted to assuage the fears of Canadians who feared these awesome powers would be used arbitrarily by law enforcement officers who were subject to little oversight. In response to these fears the government established the Cross-Cultural Roundtable on Security in an attempt to secure the support for their agenda from Canadians of all ethno-cultural and religious backgrounds. While the mandated role of the CCRS may have been well crafted, the reality of this body's work is that the access to government officials and classified documents it was afforded has been so limited as to render its capacity to create meaningful dialogue inconsequential. What was created to serve as a viable conduit between policy makers and the public has turned out to be little more than a dog and pony show pushing the government's agenda.

The issue of national security is no less significant today than it was when planes crashed into the twin towers. In fact, if there has been any shift in the debate of this matter it has been an increase in size, scope and prominence both at the national and international level. 7 years after the introduction of the Anti-Terrorism Act Canadians are bearing witness to what has been billed as the first 'real' test of the legislation, as Momin Khawaja, the first person charged under the Act, goes to trial in Ottawa. With each passing day the media provides sound bites of the evidence against him and political pundits are offering their insights as to how the trial will unfold and its subsequent impact on the Canadian security stage. Although this trial will no doubt continue to capture the attention of Canadians for many months to come, it is important to recognize that the Act has already been tested, and has failed, spectacularly. This paper has drawn together a critical assessment of some of the most controversial provisions of the Act, their implications for civil liberties and the government's attempts to cover its missteps via the CCRS. In so doing it has highlighted the egregious damages inflicted upon not only human and civil rights, but also upon Canada's reputation as an international beacon of hope to those individuals suffering at the hands of a foreign government, hoping for a better life. In considering the arguments put forth in this paper it is important to note that its purpose is not simply to criticize the actions of the Canadian government in the name of national security. Rather, to question the validity and necessity of many of the measures which have been set in motion through the Anti-Terrorism Act and which fly in the face of the

fundamental notion of Canadian values as set out in the Charter of Rights and Freedoms.

While there is no doubt that the events of 9/11 were tragic and provided governments ample evidence of lapses in their security policy that warranted attention, the response from the Canadian government has been disproportionate. The pendulum of national security has swung so far in the opposite direction that the most serious threat to the safety and security of Canadians comes from the Canadian government. Prior to 9/11 the term national security was understood to imply protection from external threats as well as the protection of the right of all Canadians to enjoy freedom of speech, religion and association, among others. It is precisely this notion of national security which has drawn so many immigrants to Canada, each of them searching for the opportunity to live free from oppression of any form. For these individuals, and indeed for all Canadians, the Anti-Terrorism Act has rocked the very foundations of this country and the principles upon which it was built. Since the Act was passed the government has been working overtime promoting a security based agenda, focusing on increasing its capacity to combat the scourge of terrorism. In the same breath, it has systematically eroded the most basic and fundamental rights of Canadians. Benjamin Franklin once said that those who would sacrifice liberty for security deserve neither, and those words are no more appropriate than right now. Rather than implement a holistic security policy, one focused on the protection of tangible items such as people or buildings, but also of those

intangibles that have made Canada the world's best example of a pluralist society, namely those liberties guaranteed by the Charter of Rights and Freedoms, the government has pursued a policy that has left Canadians vulnerable to the whims of the state right here at home. Until the Anti-Terrorism Act is repealed Canada should no longer be considered the "true north, strong and free."

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