LAW IN A FEARFUL SOCIETY: HOW MUCH SECURITY?[1]

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The traditional view of policing and security in an open and democratic society can be summarized in sentiments such as these:

> "The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. In some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free."[2]

Those are the words of a cautious, respected jurist, David Doherty of the Ontario Court of Appeal, writing in the case of *Brown v. Durham Regional Police Force*. Although written two years before the 9/11 terrorist attacks, in the context of a police roadblock set up in rural Ontario in order to dissuade converging biker gangs from creating mayhem in a small town, they remain apposite in a world beset by heightened tension. Mr. Justice Doherty goes on to say:

> "In the criminal law context, police and individual interests typically intersect after the alleged commission of a crime. The police power to interfere with individual liberty or security is tied to their ability to link the individual to the event or events under investigation. This societal harm done by the commission of the crime and the suspect's connection to that event provide the justification for state action which interferes with individual freedoms.

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[1] This article was first delivered in a modified form: Stanley A. Cohen, "How Much Security?" (A presentation to the Law in a Fearful Society Symposium, International Centre for Criminal Law Reform and Criminal Justice Policy, 1 October 2004) [unpublished].

[2] (1998), 167 D.L.R. (4th) 672, 131 C.C.C. (3d) 1 at para. 79 (Ont. C.A.), Doherty JA.

> "According to this paradigm, the police conduct is reactive and, in so far as it interferes with individual liberty or security, is circumscribed by the police ability to meet pre-established standards which are said to forge a sufficiently strong connection between the past event and the individual to warrant interference with constitutional rights. For example, the arrest power is typically triggered when the police have reasonable grounds to believe that the person arrested has committed an indictable offence... The individual's constitutional right under s. 9 [of the Charter] yields only when the police can meet that standard. Similarly, the "investigative detention" power recognized in Simpson, supra, is a reactive power dependent upon a reasonable belief that the detained person is implicated in a prior criminal act. The protection against police excess rests not only in the standard itself, but in its retrospective application. It is self-evident that assessments of what has happened and an individual's involvement in those past events are much more likely to be reliable than are assessments of what may happen in the future and the involvement that an individual may have in those events should they occur."[3]

When national security concerns (i.e., the security of the nation state as distinct from the more local, domestic concerns engendered by crime and criminality) are factored in, this equation becomes more complex.

The divide between the investigatory powers of law enforcement and those of national security is not an obvious one.[4] However, while both of these spheres of official activity are carried out under the umbrella of the rule of law principle, they are quite distinct from one another and their needs and requirements differ – in some cases quite substantially. To be sure, there are similarities and, indeed, there exists a distinct area of overlap in which the interests of a police force in certain crimes against the state, or against particular individuals, are identical to the interests of a security intelligence agency. However, while both of these spheres of official activity are carried out under the umbrella of the rule of law, they are quite distinct from one another and their needs and requirements differ substantially.

The 1983 Pitfield Committee described the difference between these two spheres in this manner:

> "[T]he differences are considerable. Law enforcement is essentially reactive. While there is an element of information-gathering and prevention in law enforcement, on the whole it takes place after the commission of a distinct criminal offence. The protection of security relies less on reaction to events; it seeks

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[3] *Ibid.* at paras. 64-65.

[4] The ensuing discussion in this paragraph derives from my article: S. Cohen, "Policing Security: The Divide Between Crime and Terror" (2004) 15 N.J.C.L. 405.

> advance warning of security threats, and is not necessarily concerned with breaches of the law. Considerable publicity accompanies and is an essential part of the enforcement of the law. Security intelligence work requires secrecy. Law enforcement is "result-oriented", emphasizing apprehension and adjudication, and the players in the system – police, prosecutors, defence counsel, and the judiciary – operate with a high degree of autonomy. Security intelligence is, in contrast, "information-oriented". Participants have a much less clearly defined role, and direction and control within a hierarchical structure are vital. Finally, law enforcement is a virtually "closed" system with finite limits – commission, detection, apprehension, adjudication. Security intelligence operations are much more open-ended. The emphasis is on investigation, analysis, and the formulation of intelligence."[5]

Both spheres of official activity have a bearing on how our society achieves an appropriate balance between the competing demands of liberty and security.

The startling appearance of transnational terrorism – the dark side of globalization - at the gates of North America has caused many to call for a reconceptualization of the manner in which we order and balance liberty and security.[6] There is no doubt that in recent years people have been thinking longer and harder about this contentious question. Michael Ignatieff, the transplanted Canadian human rights scholar has agonized about how best to secure liberty while not unduly sacrificing democratic principles. Writing for the New York Times Magazine, he suggests:

> "A democracy can allow its leaders one fatal mistake – and that's what 9/11 looks like to many observers – but Americans will not forgive a second one. A succession of large – scale attacks would pull at the already-fragile tissue of trust that binds us to our leadership and destroy the trust we have in one another. Once the zones of devastation were cordoned off and the bodies buried, we might find ourselves, in short order, living in a national-security state on continuous alert, with sealed borders, constant identity checks and permanent detention camps for dissidents and aliens. Our constitutional rights might disappear from our courts, while torture might reappear in our interrogation cells. The worst of it is that government would not have to impose tyranny on a cowed populace. We would demand it for our own protection. And if the institutions of our democracy were

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[5] Report of the Special Committee of the Senate on the Canadian Security Intelligence Service, *Delicate Balance: A Security Intelligence Service in a Democratic Society* (Ottawa: Committee, 1983) at 5-6 (Chair: P.M. Pitfield).

[6] See, Morris Rosenberg, "An Effective Canadian Legal Framework to Meet Emerging Threats to National Security" (Address presented to the International Conference on the New Intelligence Order: Knowledge for Security and International Relations, Canadian Association for Security and Intelligence Studies , September 26, 2002, Ottawa, Ont.) [unpublished]

> unable to protect us from our enemies, we might go even further, taking the law into our own hands. We have a history of lynching in this country [America], and by the time fear and paranoia settled deep in our bones, we might repeat the worst episodes from our past, killing our former neighbors, our onetime friends. That is what defeat in a war on terror looks like. We would survive, but we would no longer recognize ourselves. We would endure, but we would lose our identity as free peoples."[7]

Ignatieff's controversial positions have been characterized by some as a form of muscular liberalism. There is understandable concern that attends choosing "the lesser evil."[8]

Richard Posner, the distinguished American jurist, believes that civil libertarians are mistaken to be as troubled as they have been over the erosion of civil liberties in the wake of 9/11. He sees the law and history as subject to a natural ebb and flow, with civil liberties expanding and contracting in relation to the nature of the threats to its safety that a nation faces. He says:

> "The safer a nation feels the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation's safety, the stronger will be the grounds for seeking to repress that activity, even at some cost to liberty."[9]

In the contest between security and civil liberties, Posner sees a basic error in prioritizing liberty.[10] (I confess to falling into this kind of "error", although I do not regard it as such.) My position is that in considering the coexistence of liberty and security, it is liberty that first commands our attention. Human security may be the precondition to liberty, but it should not be valued above liberty for, when so weighted, it is capable of destroying liberty. A society that exaggerates its security requirements can debase the values it cherishes. Torture and even genocide have been rationalized in the name of security. Free societies accept less security and, conse-

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[7] Michael Ignatieff, "Could We Lose the War on Terror? Lesser Evils", *The New York Times Magazine*, (2 May 2004) 46. This article is a condensed version of Ignatieff's thinking as expounded in the Gifford Lectures and in his book *The Lesser Evil: Political Ethics in an Age of Terror*, (Toronto:Penguin Canada, 2004). Ignatieff contends that in order to combat the world's most serious evils "we may have to traffic in evils: indefinite detention of suspects, coercive interrogations, targeted assassinations, even pre-emptive war."

[8] Indeed, Ignatieff has subsequently qualified some of his more challenging positions. For example, see Doug Saunders, "'Everything I've said and believed since I was 18 is on the line'" *The Globe and Mail* (8 May 8 2004) F3.

[9] Richard Posner, "Security versus civil liberties" *The Atlantic Monthly*, (December 2001), online: The Atlantic Online <http://www.theatlantic.com/issues/2001/12/posner.htm>.

[10] Posner wrote this article a bare two months after 9/11. At that point there was no Iraq invasion and no allegations of torture coming from Abu Ghraib.

quently, endure some pain and suffering, in order to emphasize their humanity and civility. Liberty, as John Rawls has said, is the highest value. It should be restricted only for the sake of liberty. If liberty is to be made less extensive, doing so must strengthen the system of liberty shared by all. A less than equal liberty must be acceptable to those with lesser liberty.[11] As grave as our concerns are respecting public safety and national security, it is the present condition of liberty that is fundamentally disquieting.

Ultimately, virtually all serious commentators find themselves on the same page in the sense that all are deeply concerned about the grave reality that we now must confront and all share a belief that democracy and liberty must be preserved.[12]

The right to human security, unless it equates with "security of the person", is not to be found in our Constitution's text. Nevertheless, it is often numbered among our great rights since security is thought to be the precondition for the enjoyment of all other rights.[13] Order and security under law – that is, the maintenance of national security - are essential to the maintenance of the rule of law. Richard Posner has said of the US, in words that are equally applicable to Canada, that "We are a nation under law, but first we are a nation."

The lessons of our history and the nature of constitutional adjudication itself ensure that rights will expand and contract in relation to changing circumstances. The wisdom of the *Anti-terrorism Act (ATA)* and the solutions that were devised in the wake of 9/11 lies in the fact that they preserved the entitlement of citizens to question this legislation and the actions of state officials in the administration and enforcement of it in court. Critics of this legislation pay too little attention to the fact that Parliament deliberately eschewed any resort to emergency powers or to the override in section 33 of the *Charter*. Even in those trying times, civil liberties and constitutional remedies were consciously maintained.

Policy development regarding the *ATA* had to be accomplished in the face of rising concerns that Canada and western democracies were inadequately prepared to prevent and respond to acts of catastrophic terrorism. The sense of urgency at the time was palpable and the legislative timetable was compressed. (Indeed, Canada's

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[11] These premises derive from John Rawls' classic work, *A Theory of Justice*, (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

[12] See, Thomas F. Powers, "Can we be secure and free?" *The Public Interest* 151 (Spring 2003) Online: The Public Interest <http://www.thepublicinterest.com/archives/2003spring/article1.html>. Powers suggests that "the current contours of the debate, in which defenders of liberty oppose those arguing in the name of security, are fundamentally misleading. As it now stands, the controversy is deeply confused and exaggerates the disagreement between parties of good will on both sides."

[13] See, Irwin Cotler, "Terrorism, Security and Rights: The Dilemma of Democracies", (2002) 14.1 NJCL 13 at 14-15.

post 9/11 anti-terrorism legislation became law a scant two months after the terror attacks.) As is evident to anyone who has surveyed the *Anti-Terrorism Act* as a whole, this was a major package of legislative initiatives - the *ATA* amended 20 existing statutes and comprised over 180 printed pages of legislative text.

The Act contains extraordinary measures designed to respond effectively to the unprecedented threats posed by global terrorism. However, the Act was not intended to be the single, comprehensive and definitive attempt to protect the national security. Its objective, the Supreme Court has said, is a somewhat more limited one, namely, the prosecution and prevention of terrorism offences:

> "It was suggested in submissions that the purpose of the Act should be regarded broadly as the protection of "national security". However, we believe that this characterization has the potential to go too far and would have implications that far outstrip legislative intent. The discussions surrounding the legislation and the legislative language itself clearly demonstrate that the Act purports to provide means by which terrorism may be prosecuted and prevented. As we cautioned above, courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere, including very recently in Spain, we must not lose sight of the particular aims of the legislation. Notably, the Canadian government opted to enact specific criminal law and procedure legislation and did not make use of exceptional powers, for example under the *Emergencies Act,* R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter.*
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> We conclude that the purpose of the Act is the prosecution and prevention of terrorism offences.[14]"

There are common misconceptions about the process that led to the policy development, drafting and enactment of the *Anti-terrorism Act.* One of these is that the *ATA* was entirely an 11th hour production and that, due to haste, it was misconceived and ill-considered. Another is that this legislation was "in the can" merely awaiting an opportunity to be foisted on an unwitting public. Neither of these views is correct.

There is no denying that this legislation was produced in short order and was the result of the intense labours of many. Equally, the process of consultation that normally attends the legislative process was truncated in this case, as our nation, like many others around the globe, struggled to react swiftly to the events of 9/11. But

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[14] *Application under s. 83.28 of the Criminal Code (Re)* (2004), 240 D.L.R. (4th) 821 2004 SCC 42 at paras.39-40.

several of the key elements of this legislation were well in hand long before 9/11 in the sense that they had been duly considered and vetted in other settings before they were incorporated into Bill C-36. Among these more developed initiatives were: *Official Secrets Act* reform (developed in fits and starts over a period of several years); organized crime legislation (Bill C-24, which provided the template for such new offences as facilitation and participation in terrorist activities); *Canada Evidence Act* reform (underway well before September 11th as part of the on-going efforts to revise the law of evidence); mandatory suspicious transaction reporting/money laundering (enacted in relation to organized crime but which served as the foundation for monitoring terrorist financing initiatives); charities de-registration initiatives (which had been before Parliament in the form of Bill C-16); in addition, Canada had participated in international efforts leading to the signing and implementation of ten conventions pertaining to terrorism and was on the verge of signing and implementing two others (re suppression of terrorist bombing and suppression of terrorist financing).

The threat posed by international terrorism was manifest in the September 11th attacks. Policy makers and parliamentarians also saw in those events a clear need to improve Canadian law. Moreover, it was understood that while every effort would be made to ensure that Canada's laws responded appropriately to the urgent call for action set out in the UN Security Council's Resolution 1373 respecting terrorism[15], the new legislation also would have to respect Canadian constitutional principles, norms and values. The need to address terrorism was clearly a pressing and substantial objective that was extremely relevant to the judicial analysis of the constitutionality of measures that were to be implemented. Nevertheless, although the courts had shown a substantial degree of deference to arguments made on the basis of "national security", the pressing objective of dealing with terrorism, and arguments of "national security", could not be such as simply to render the Constitution irrelevant. At most, the objective and arguments only provided governments with a modicum of room to manoeuvre.

While strong measures had been adopted in other free and democratic countries around the world, the Canadian government asserted that its particular legislative response to this menacing phenomenon was fashioned with the Canadian reality in mind.[16] Stock was taken of the inventory of existing laws and the conclusion

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[15] A direct response to the terrorist attacks in the United States on September 11, 2001, UNSC Res. 1373 (2001) 4385th Mtg. UN Doc. S/RES/1373 (2001) was passed on September 28, 2001. It reaffirmed the UN's unequivocal condemnation of those events and called on members to work together urgently to prevent and suppress future acts of terrorism.

[16] To be sure, many other countries have responded with legislation bearing similar features. See, David Jenkins, "In Support of Canada's Anti-terrorism Legislation: A Comparison of Canadian, British and American Anti-terrorism Law" (2003) 66 Sask. L. Rev. 419.

was reached that they were inadequate to deal with the threat so graphically and horrifically illustrated by the 9/11 attacks. The classic criminal law model seeks to punish after the event and in so doing attempts to deter others of like mind. Those involved with the *ATA* believed that a new approach was required, one geared to preventing terrorist actions. In essence, the objective was, to the extent possible, to devise and enact empowering legislation that would place enforcement agencies in a position to apprehend suspected terrorists or disrupt and frustrate their designs before they are able to act. As international terrorism increasingly emerged from the shadows with bolder and ever more outrageous attacks, Canada has worked with its allies and the larger international community in the development of international agreements and conventions. Contemporaneously, it has been engaged in developing its own domestic anti-terrorism legislation.

Historically, Canada has been reasonably secure from terrorist incidents within its borders but, as the activities of the FLQ in 1970 demonstrate, we have not been immune. No one disputes the need for effective tools to keep Canada, to the extent possible, free of terrorists and for cooperative mechanisms to exist to enable Canada to work in concert with its allies in the international community to counter the scourge of international terrorism. Consequently, at the international level Canada has pursued and supported initiatives aimed at reducing the threat posed by international terrorism. Canada has now signed all 12 UN counterterrorist agreements that one finds listed in the *Anti-terrorism Act*.[17]

The *ATA* has been accused by critics of having been "*Charter*-proofed" - as if having serious legislation comport with *Charter* values and standards were somehow a vice, rather than a virtue. Concerns with regard to fundamental rights and liberties often arise in the context of national security investigations and national security legislation typically possesses significant features that are potentially rights invasive. The *Anti-terrorism Act* is not an exception to this general rule. This enactment, in the name of combating terrorism, reforms several pieces of legislation and formally creates "new" entities (such as the Communications Security Establishment) or enhances the mandates of extant agencies (such as the Financial Transactions Reports Analysis Centre of Canada) and creates new offences and powers of inves-

[17] Before September 11, ten of these had already been ratified, including those targeting unlawful acts committed on aircraft, unlawful acts of violence at airports serving civil aviation, actions threatening civil aviation and the unlawful seizure of aircraft. The 9/11 attacks occurred as Canada was completing the ratification process for two remaining agreements - The *Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of Financing of Terrorism.* The events of 9/11 spurred Canada to move forward to the ratification of these two remaining anti-terrorism conventions. The process that secured the implementation of these two conventions was the introduction and enactment of Bill C-36, the *Anti-terrorism Act.* 1st Sess., 37th Parl., 2001.

tigation.[18] It is undeniably a substantial investigative and prosecutorial tool. However, it was a legislative exercise that was undertaken in good faith in an endeavour to create a balanced and proportionate response to what was regarded as an unprecedented challenge involving the security of the nation.

"Proportionality", as the term is used in *Charter* parlance, was attempted in several ways in the *Anti-terrorism Act*. This included, inter alia, strictly defined limits on new powers, special authorization and designation requirements that incorporate direct political accountability, extensive provisions for judicial supervision, ministerial and a full parliamentary review, as well as other substantial accountability mechanisms.

This article cannot encompass all of the controversial features of this legislation, nor can it comprehensively detail all of the many safeguards that have been built into it. Rather, an attempt will be made to describe three of the most contentious legislative provisions – compelled questioning, preventive arrest, and the definition of "terrorist activity".

Critics of the legislation regarded the arrest and questioning proposals as substantial, if not radical, departures from traditional Anglo-Canadian legal traditions. Whether they truly represent as great a break with the past as has been asserted is a matter of legitimate debate.

The procedural provisions confer power while at the same time constraining resort to it. The definitional issue concerns the need to adequately capture criminal misconduct while not overreaching at the same time. These measures exemplify the attempt, in this exercise, to balance freedom and security. Of course, the existence of protective qualities in the legislation, such as those that I will describe, may serve to buttress and support it in the event that a constitutional challenge is launched. In the case of the investigative hearing or compelled questioning, this has already transpired.

Investigative hearings [Compelled questioning - s.83.28]

The investigative hearing power contemplates a judicial order being made compelling witnesses to testify, subject to self-crimination and other protections, under oath at the early (pre-charge) stages of an investigation. Individuals named in an order under s. 83.28(5) may, for the purposes of the hearing, also be required to pro-

[18] For a description of the most significant measures see Canada, Department of Justice, "Highlights of the Anti-terrorism Act" (October 15, 2001) online: Department of Justice Canada <http://canada.justice.gc.ca/en/news/nr/2001/doc_27787.html>.

duce any thing in their possession. The judicial investigative hearing provisions clearly engage s. 7 liberty interests.[19]

The criticism of this particular procedure has been harsh. Some commentators have likened such proceedings to those of the Star Chamber.[20] However, a number of substantial safeguards are applicable to these proceedings, including extensive self-incrimination and derivative use immunity protections and the right to counsel. Such due process/fundamental justice protections were unknown and virtually inconceivable at the time of the Star Chamber. The Courts of the Star Chamber and High Commission used torture as an interrogation device and also had their inquisitors act as the ultimate judges of guilt or innocence.

To be sure, the compelled testimony procedure is at variance with ordinary Canadian investigatory practices. Nevertheless, despite assertions by some to the contrary, this procedure is not unprecedented. Compelled questioning exists in securities law; in public inquiries; it exists with regard to Fire Marshall and Coroner's inquests; in inquiries under the *Income Tax Act*; and it has been used extensively since 1988 in relation to the *Mutual Legal Assistance in Criminal Matters Act* (which means that other jurisdictions can come into Canada and compel people who are in Canada to answer questions pursuant to that Act).[21]

The compelled questioning procedure was also strongly criticized for its insinuation of judges into the investigatory phase of a law enforcement investigation. Judicial neutrality and, hence, judicial independence, this argument goes, are threat-

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[19] *Supra* note 15.

[20] See D. Paciocco , "Constitutional Casualties of September 11: Limiting the Legacy of the *Anti-Terrorism Act*", an address delivered at the 2002 Constitutional Cases Conference held in Toronto, Ontario on April 12, 2002 at the Osgoode Hall Law School (downtown facility) and D. Paciocco , "Constitutional Casualties of September 11: Limiting the Legacy of the *Anti-Terrorism Act*" (2002) 16 SCLR (2d) 185; and K. Roach, "Did September 11 Change Everything? Enduring Challenges for Canadian Law, Courts and Democracy" 2002 McGill Law Journal Lectures.

[21] Critics may suggest that these comparisons are inapt. The counter-arguments suggest that: inquiries are not investigations into criminal misconduct; securities legislation, at best, is quasi-criminal or regulatory in nature; the procedures under *Mutual Legal Assistance in Criminal Matters Act,* while used in aid of the criminal process, are not used with regard to Canadian prosecutions and exist primarily as a device to promote international comity. While these are valid rejoinders, their significance is far from conclusive. The procedure envisaged in the *Anti-Terrorism Act* is investigatory and is not designed to determine criminal liability. In *Baron* [1993] 1 SCR 194 the SCC observed that labels regarding whether a statutory scheme is "regulatory" or "criminal" are not determinative in deciding whether an unreasonable search or seizure is authorized. One must look at the total context of the challenged process. The national security context is therefore of obvious import to the determination of whether the procedure contemplated by the *Anti-Terrorism Act* offends constitutional norms and values. As Dickson J. observed in *Hunter v. Southam Inc.* [1984] 2 SCR 145 "where the state's interest is not simply law enforcement, *as, for example where state security is involved* ...the relevant standard might well be a different one"

ened by the participation of judges in a role that they traditionally have not played and for which these actors are ill-suited.

However, the role established in the *ATA* for the judiciary in these proceedings has now been unanimously confirmed by the Supreme Court of Canada in the recent decision in *Application under s. 83.28 of the Criminal Code (Re)*[22], a case involving the controversial resort to the investigative hearing procedure in the course of the Air India prosecution. Judges acting under s. 83.28, the Court found, do not lack institutional independence or impartiality, nor are they co-opted into performing an executive function. Rather, section 83.28 requires the judge to act judicially, in accordance with constitutional norms and the historic role of the judiciary in criminal proceedings. Consistent with this view, the Supreme Court concluded, per majority, that the responsibility of the investigative hearing judge convening the hearing may make and, if necessary, vary the terms of an order to properly provide for possible use and derivative use immunity in future criminal or other similarly rights-sensitive proceedings (such as extradition or deportation proceedings).

With respect to the general issue of compelling people to answer questions at the pre-charge stage of an investigation, the *ATA* measures were not intended to become a template for future investigatory practices across the entire field of law enforcement investigation. The legislation was restricted solely to the area of investigating terrorist activity. It was not intended to be a general aid to law enforcement. Restricting the reach or ambit of the legislation in this manner to matters and concerns affecting the national security constitutes a restraining or minimally-impairing feature of this initiative for purposes of constitutional analysis.

Insofar as the individual's exposure to liability is concerned, numerous safeguards have been provided. The individual is not at personal risk with respect to the answers that he or she may give. Under these new provisions, the affected person must answer questions put, but is extended self-incrimination, subsequent use and derivative use immunity protections. Also, while the individual is compelled to testify, laws relating to the non-disclosure of information or privilege continue to apply. In some respects, these investigative hearing provisions are even more protective than the guarantees that are to be found in the Charter itself.[23]

The right to counsel continues to apply in this setting. Also, the prior consent of the Attorney General is required before an application for compulsory questioning

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[22] 2004 SCC 42. Although both a majority and dissenting opinions were filed in this case the judgment is unanimous on this point. This case together with the companion decision in *Vancouver Sun (Re)* 2004 SCC 43 constitutes the first definitive judicial response to the constitutional adequacy of Canada's *Anti-Terrorism Act*.

[23] See, Application under s. 83.28 of the Criminal Code (Re) 2004 SCC 42, at para. 72.

may be brought. The standard on which an order is obtained is based upon the Charter-consistent "reasonable grounds to believe" standard. With respect to compelled testimony in relation to future events, there must also be reasonable grounds to believe that the persons sought to be compelled have direct and material information that relates to the offence or that reveals the whereabouts of the person who the peace officer suspects may commit that offence. Also, reasonable attempts must have been made to obtain the information from the person. The legislation in s.83.28(5) also provides the judge with the authority to include in the evidence gathering order terms and conditions to protect the interests of the witness or third parties.

While the national security context was of obvious importance to the resolution of the issues raised in this case, it is also clear that the Supreme Court's rulings in the *Section 83.28 Cr. C. Reference* rested primarily on the Court's confidence in the sufficiency of the safeguards that were built into the legislation itself.[24]

Preventive Arrest [Recognizance with Conditions, s.83.3][25]

Detention for investigative purposes is not to be confused with detention for purely preventive purposes. Canadian courts have been hesitant to recognize a general power of detention for investigative purposes. Nevertheless, over the years a judicial recognition of a limited power in officers to detain for investigative purposes has evolved.[26] Investigative detention presupposes that the individual who is to be detained is, on the basis of at least a reasonable suspicion, implicated in the criminal activity under investigation. The investigation triggering the detention of the individual must relate to a recent or on-going criminal offence. Preventive detention does not possess this kind of nexus to prior criminal activity. Rather, it is oriented towards the hindrance or discouragement of future potentially unlawful acts.

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[24] Para. 73: "It is clear ...that the procedural protections available to the appellant in relation to the judicial investigative hearing are equal to and, in the case of derivative use immunity, greater than the protections afforded to witnesses compelled to testify in other proceedings, such as criminal trials, preliminary inquiries or commission hearings."

[25] This section of this article modifies and updates my treatment of preventive detention in S. A. Cohen, "Safeguards in and Justifications for Canada's New *Anti-Terrorism Act*" (2002-2003), 14 N.J.C.L. 99.

[26] Not all commentators are sanguine about this development: See, J. Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335. The Supreme Court has adopted, refined and incrementally developed the common law relating to investigative detention in several contexts, including the pre-*Charter* lawfulness of random automobile stops under the Reduced Impaired Driving Everywhere (R.I.D.E.) Program (*Dedman v.The Queen*, [1985] 2 S.C.R. 2); the scope of police power to search incident to lawful arrest (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158); and the scope of police authority to investigate 911 calls (*R. v. Godoy*, [1999] 1 S.C.R. 311). Investigative detention must be based on articulable cause or reasonable grounds to suspect: R. v. Simpson (1993) 12 OR (3d) 182 (Ont. CA). More recently the Supreme Court has discussed the scope of the power to search as an incident of investigative detention: see, *R. v. Mann* 2004 SCC 52.

Preventive detention, due to its potential breadth and its lack of connection to prior ascertainable misconduct, summons up visions of official abuse and arbitrariness. Quite naturally, it is a power that arouses deep suspicion in democratic societies.

The *Anti-terrorism Act* has been pilloried in some quarters for conferring a power of "preventive arrest" but the legislation does not use that Draconian phrase at all. (The heading employed in s.83.3, is Recognizance with Conditions.) The purpose of the provision is not to effect the arrest of a person but to put a suspected person under judicial supervision in an effort to prevent the carrying out of a terrorist activity.

Canada's recognizance/arrest procedure requires the Attorney General's consent and allows for only a short period of detention (up to 3 days) prior to final judicial determination concerning release. Provisions in other comparable jurisdictions arguably are not as restrained or balanced.[27] Additional safeguards include: judicial supervision of this recognizance process;[28] the "reasonable grounds to believe" requirement that terrorist activity will be carried out; the requirement that an arrest without warrant can only be made where it is necessary to prevent the commission of terrorist activity; and the ability by the person to vary a recognizance. Rather than emphasizing arrest, this recognizance with conditions provision has presumptive release as its primary feature. Arrest is reserved for instances when it is necessary to bring the person before the court in order to prevent a criminal act from being committed.

The whole scheme is designed to disrupt nascent suspected terrorist activity by bringing a person before a judge who would then evaluate the situation and decide whether it would be useful via the mechanism of a recognizance to impose conditions on this person. Let us be clear: Peace bonds such as these will not deter suicide bombers. In the context of combating terrorism, they are designed as a technique to aid in the disruption of the preparatory phase of incipient terrorist activity. Also, the provision provides a kind of dissuasive warning to the individual that the authorities are aware of what he or she may be up to.

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[27] See, D. Jenkins, "In Support of Canada's Anti-terrorism Legislation: A Comparison of Canadian, British and American Anti-terrorism Law", (2003) 66 Sask. L. Rev. 419.

[28] The recognizance provision upon which this section of the Act is modeled (s.810 of the *Criminal Code*) has previously withstood a broad constitutional challenge: see, *R. v. Budreo* (2000) 32 CR(5th) 127 (Ont. CA). (It is also similar to recognizance with condition provisions in ss.810.01 (re criminal organization offences), 810.1 (re sexual offence against a child) and 810.2 (re serious personal injury offence) of the *Criminal Code*.) The Ontario Court of Appeal there noted that while some aspects of the provision are coercive, the provision was essentially of a preventive rather than a punitive nature.

There is precedent for a power of this type; it is not something new. The same kind of power is employed in domestic violence and organized crime situations and enables a person to go to a court and ask for the imposition of conditions on another person because a legitimate, reasonable fear exists that the other person may commit an offence.

Some observers have questioned whether the grounds for arresting a person have been set too low and allow for arrests to be made on a low threshold - essentially on a hunch. In reality, under this legislation the police must still base their suspicions on reasonable grounds, not create them out of thin air. Whether the standard employed is reasonable grounds to believe or whether it is reasonable grounds to suspect, there must be an objective basis that can be reviewed. Nevertheless, one may still inquire as to why the operative standard is that of "reasonable grounds to suspect" as opposed to "reasonable grounds to believe".

Undoubtedly provisions such as those conferring the power to make arrests for even limited, proactive purposes do pose a challenge to accepted notions of liberty. We now live in an age where the conventional view of what constitutes freedom in society has been affected by 9/11 and is in flux. Parliament's swift response to the events of September 11th demonstrated its belief in the need for decisive action in response to global terrorism and the fear that it engenders. Courts now have the task of determining whether that response was reasonable and proportionate.

The definition of "terrorism"/ "terrorist activity"

Another provision that has come in for considerable scrutiny has been the definition of "terrorist activity" that appears in the Act. This is because this definition serves as the lynchpin for so much of the legislation. It is, for example, central to the listing process and to the various new offences that have been created.

The *Anti-terrorism Act* does not define "terrorism."[29] Consensus on a universally accepted definition of "terrorism" has eluded domestic legislatures and the international community. Canada is no exception. Instead of pursuing this "Holy Grail", Canada has chosen to define what constitutes a "terrorist activity" in the *ATA*, in a complex and exhaustive fashion. A "terrorist activity" is now defined so as to include a number of indictable offences implementing the activities encompassed in a number of U.N. anti-terrorism conventions which are referred to in s.83.01 of the *Criminal Code*. The definition also embraces activities committed for political, religious or ideological purposes that are designed to intentionally intimidate the public

29 In *Suresh v. Canada* [2002] 1 SCR 3, a case concerning deportation to face torture, a unanimous Supreme Court of Canada adverted to the difficulties inherent in attempting to find, or ultimately define, "terrorism".

or compel a government to do or refrain from acting in certain way, and are intended to kill, seriously harm or endanger people, or substantially damage property or disrupt essential services.[30]

This provision has been the subject of considerable criticism and debate. Three criticisms especially have received repeated commentary. These involved contentions concerning unconstitutional vagueness and overbreadth; the potential to stifle legitimate criticism and dissent (free expression); and the contentious formulation in the definition pertaining to religious, political and ideological purpose.

Vagueness and overbreadth

Allegations of vagueness and overbreadth have been directed at certain aspects of the "terrorist activity" definition. However, in light of the Supreme Court of Canada's determination in *Suresh* that the term "terrorism" that is found in s.19 of the *Immigration Act* (and that was applicable to the denial of refugee status upon arrival in Canada and germane to the issue of deportation under s.53(1)(b) of that Act) was not "so unsettled that it could not set the proper boundaries of legal adjudication", the prospect of invalidation of the *ATA* definition for reasons of vagueness or overbreadth seems unlikely. While "terrorism" is not defined in the *Immigration Act*, the Supreme Court in Suresh endorsed a meaning of the term that draws upon the formulation that is found in the *International Convention for the Suppression of the Financing of Terrorism*. The similarities between the definition of terrorism endorsed by the Court and the definition of terrorist activity found in the *Anti-terrorism Act* auger well for the future prospects of the *Anti-terrorism Act*'s definition.

Free expression and democratic protest

One of the main arguments marshaled against the definition in the early stages of the Parliamentary debate involved a contention that the provision had the capacity to capture within its embrace legitimate political activism and dissent, including *inter alia* union activities and student protests. The intention of the drafters was that protest and dissent should be protected forms of democratic activity but questions were raised as to the adequacy of the definition in achieving that result.

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[30] Canada had never before tried to define "terrorism" or similar terms in its legislation prior to this bill. The decision to attempt a definition of terrorist activity was taken, at least in part, because the Supreme Court in *Suresh* had warned that defining terrorist activity would be required if it were thought necessary to criminalize it. Since measures taken in the name of national security conceivably may allow the state to go further than it normally does in the criminal law domain, care was taken to ensure that the law did not overreach. The definition is therefore necessarily complex and runs to almost four pages of legislative text.

As originally put before the House, the definition of "terrorist activity" excluded "lawful advocacy, protest, dissent or stoppage of work" from its scope. Critics questioned whether, because of the use of the word "lawful", activities of this type that included unlawful conduct, such as assault, trespass and minor property damage, might be interpreted as amounting to terrorism. This was never the intent of the drafters of this legislation. Obviously, the fact that an activity is otherwise unlawful does not, by itself, mean that it amounts to terrorism. Ultimately an amendment was accepted removing the word "lawful". This did not have the effect of making protests lawful that are otherwise unlawful due to violations of other criminal laws. It did, however, clarify that this specific exclusion from the scope of the definition of "terrorist activity" applies whether or not the advocacy, protest, dissent or stoppage of work is lawful.

Political, religious or ideological purpose

Section 83.01 (1) (b) in subparagraph (i) (A) speaks in terms of acts or omissions that are committed "in whole or in part for a political, religious or ideological purpose." The words "political, religious, or ideological purpose, objective or cause" refer to the motivations for terrorist activity under the definition and have provoked some discussion and controversy. Various commentators called for the deletion of this phrase on the basis that it unduly focused on religion and might inspire unsavoury profiling practices by authorities entrusted with the enforcement of the Act. Nevertheless, the phrase has been retained in the definition, because Parliamentarians deemed them necessary to appropriately define and limit the scope of the *Anti-terrorism Act*.

The references to religious, political or ideological purpose were intended to be words of limitation. They were not designed to stigmatize or single out people on the basis of their religion, their political beliefs or their ideologies; rather, the words, which must be read against the rest of the clause, are linked to an intention to intimidate the public or a segment of the public. Also, they must be read in conjunction with the intended consequences that must be present before exposure to criminal liability can exist (e.g., causing death or serious bodily injury, endangering a life, causing a serious risk to the health or safety of the public, or causing serious interference or disruption of an essential service facility or system). The aspect of a political religious or ideological purpose therefore is a form of specific intent which imposes an extra burden of proof upon the state. By reason of the layering in of an "intention" and purposive element, it actually constitutes a safeguard or a restraining feature. The requirement also serves to differentiate terrorist activity from other forms of potentially less serious (and less severely sanctioned) criminal activity.[31]

[31] In the course of the Parliamentary hearings on Bill C-36 it was ultimately recognized that it was advisable to clarify the definition to provide, with as much certainty as possible, that the enforcement

Review and oversight mechanisms

No legislation can completely ward off over-zealousness in application or abuses such as discriminatory application or lawless behaviour. The development of a proper enforcement culture and the provision of adequate oversight and review mechanisms are therefore extremely important. For reasons such as these, review and oversight are important features of the *Anti-terrorism Act* exercise. Measures have been enacted in an effort to ensure that the powers conferred are applied appropriately. The goal has been to create enforcement powers under the Act that contribute to the safety and security of Canadians, while not undermining fundamental rights.

The review and oversight mechanisms that were part of the *Anti-terrorism Act* when it was introduced – and which continue – included extensive provisions for judicial supervision and ministerial review, and a full review of the Act by Parliament within three years. That review is now upon us. Moreover, existing oversight mechanisms that are already part of the law within Canada, such as civilian oversight of law enforcement, remain applicable. In addition, an annual public report by the Attorney General of Canada, the Solicitor General of Canada, and their counterparts in the provinces concerning the powers of investigative hearings and of recognizance/preventive arrest under the *Anti-terrorism Act* is required. This report provides an annual check on the use of these new provisions and will be of value to the three year Parliamentary review. A substantial amount of information is required and will be amassed in this process. Additional review and monitoring of the powers of investigative hearing and preventive arrest is also provided in the form of a five year sunset clause that is applicable to these provisions.[32]

It is important to note that the House Committee did not accept a sunset clause for the whole of the Act. Such a clause, it was argued, would have negated Canada's ability to fulfill its international obligations to address terrorism. Further, it was seen as incompatible with the Government's view that this is not emergency legislation but rather is a statute that recognizes a perceived need to maintain vigilance against

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provisions in the Act are not to be interpreted or applied in a discriminatory manner or in a manner that would suppress democratic rights. An amendment was therefore accepted stipulating, in this regard, that the definition of terrorist activity does not apply to the expression of political, religious or ideological ideas that are not intended to cause the serious forms of harm set out in the definition.

[32] Parliament can extend this expiry period on resolutions adopted by a majority of each Chamber, but no extension may exceed five years. This sunset provision will give additional impetus for close re-examination of these powers, as Parliament will be required to turn its mind directly to whether these provisions of the Act are still required and still represent appropriate policy choices. The process requiring a resolution adopted by a majority of each Chamber will allow for a full Parliamentary review and debate. And nothing would prevent the matter from being referred to the appropriate Standing Committees of each Chamber in the course of the debate. Indeed, since the expiry date will be well known, nothing would prevent Parliament from initiating a study on the potential need for an extension even prior to the introduction of any resolution.

the continuing and ongoing threat posed by international terrorism, albeit with measures that are balanced, reasonable and subject to significant safeguards that are consonant with constitutional values and international norms.

It is possible to examine each of the major provisions that are found in the *Anti-Terrorism Act* and enumerate the many safeguards employed; safeguards such as those pertaining to the right to counsel, standards of mens rea and fault, and the availability of judicial review as well as other oversight and accountability mechanisms.

There are some who say that our governments have gone too far in displacing the constitutional and legal rights that we cherish. Their fears and warnings should not easily be dismissed for, if we have learned anything from our history, it is that embracing authoritarian measures too ardently can ultimately damage the fabric of the very society we wish to preserve[33].

Historically, the tradition of open political debate and dissent has been regarded as one of the great strengths of Canadian society. The fact that the strong measures taken in the name of national security have attracted searching criticism and, occasionally, even robust denunciation, is not necessarily evidence that the exercise of safeguarding society is failing or bankrupt. Rather than a sign of failure, expressions of concern may be emblematic of democratic vibrancy. Almost certainly, they are an indication of the anxiety that free people experience when liberty hangs seriously in the balance. While liberty and security can co-exist they are not in a state of natural equilibrium.

As is apparent, even constitutionally protected rights and civil liberties may be eroded when free societies come under threat. Such retrenchment is permissible and the process for doing so can even command public respect, provided the justification for infringing upon rights is of sufficient magnitude and the means selected are reasonable, proportionate and minimally impairing. The practice of democracy is more art than science. Obviously, calibrating the appropriate balance between the need to be secure and the requirements of liberty in a free society is a weighty responsibility. Part of the answer to the question of how this delicate balance is to be achieved resides in the practice of democratic vigilance, open political debate and dissent, and an insistence upon mechanisms to ensure true accountability.

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[33] R. Whitaker, "Before September 11 – Some History Lessons", in D. Daubney, W. Deisman, E. Mendes & P. Molinari eds., *Terrorism, Law and Democracy: How is Canada Changing Following September 11* (Toronto, Universitè de Montréal, 2002), 39 at 53.