

POST 9/11 LEGISLATION AND POLICY IN CANADA – NEO-MCCARTHYISM?¹

By Linda McKay-Panos*

Today we are engaged in a final, all-out battle between communistic atheism and Christianity. The modern champions of communism have selected this as the time. And, ladies and gentlemen, the chips are down, they are truly down...

As one of our outstanding historical figures once said, 'When a great democracy is destroyed, it will not be because of enemies from without but rather because of enemies from within.' The truth of this statement is becoming terrifyingly clear as we see this country each day losing on every front...

In my opinion, the [U.S.] State Department, which is one of the most important government departments, is thoroughly infested with Communists. I have in my hand 57 cases of individuals who would appear to be either card-carrying members or certainly loyal to the Communist Party, but who nevertheless are still helping to shape our foreign policy.²

As we sat glued to our television at the office on September 11, 2001, watching with horror the images of the falling towers over and over again, one of my colleagues commented with deep concern, "This is going to unleash racism in Canada like we've never seen." This has turned out to be a rather prescient comment. In the days and weeks afterward, as we tried to deal with the insecurity caused by the shock of the events, there were, and continue to be, numerous incidents of racism and violence (e.g., Muslim women in Hijab and Sikh men wearing turbans being accosted and

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¹ "Neo-McCarthyism" is not an original term. See e.g. Geov Parrish, "Neo-McCarthyism: When Patriotism becomes a matter of personal safety" online: <<http://www.workingforchange.com/article.cfm?ItemID=12021>>. McCarthyism has been used to refer to red scare politics in the United States, which began before the Second World War and continued into the mid 1960s: M.J. Heale, *McCarthy's Americans: Red Scare Politics in State and Nation 1935-1965* (Athens, Georgia: University of Georgia Press, 1998) at xv.

² (February 9, 1950, Senator Joseph McCarthy's speech to the Republican Women's Club in Wheeling, West Virginia)

assaulted). In addition to these individual incidents, some authorities have instituted police, immigration and airport security procedures that have a significant impact on people of racial and religious minorities in Canada.

Undoubtedly, the Canadian government faced great pressure to reinstate our sense of security. The United States government also demanded that Canada tighten national security. The Canadian government's response was to quickly introduce the *Anti-terrorism Act (ATA)*,³ followed by *The Public Safety Act*,⁴ and to amend related legislation, such as the *Security of Information Act*.⁵ The proposed legislation was criticized, especially by civil libertarians, the Canadian Bar Association, academics and others, for its potential adverse impact on personal autonomy, privacy and other rights. However, many criticisms were downplayed due to the public tension that followed 9/11. Many people seemed willing to forego some civil liberties in order to feel secure.

Arguably, the real danger to our civil liberties is not in the legislation's provisions, but rather in the way the state or others implement the legislation. Who holds the state accountable for its implementation? The new legislation requires some measures of accountability. Review of the anti-terrorism legislation by Parliament began in early 2005, and it is hoped that reviewers will examine its wide-ranging disparate impact. Further, in exchange for enacting two new serious infringements on civil liberties – preventive arrests and investigative hearings – the Federal government is required to report annually on how these two measures have been used. In its annual report for 2002, the government said there was nothing to report. We are still waiting for the report from 2003, because the government states that it is being “fine tuned” and will soon be released. Presumably, this means that there is something to report.

Once anti-terrorism legislation is implemented, the consequences on individual lives can be very serious. The anti-terrorism laws and policies do not affect people equally. People of ethnic and religious minorities suffer the brunt of the consequences of this legislation. The application of preventive arrest, investigative hearings, and other measures encouraged or required by the government, such as establishing a no-fly list of prohibited passengers,⁶ are based on the suspicion that a per-

³ *Anti-Terrorism Act*, S.C. 2001, c. 41.

⁴ *Public Safety Act 2002*, S.C. 2004, c. 15.

⁵ *Security of Information Act*, R.S.C. 1985, c. O-5, 2001, c. 41, s.25.

⁶ Shahid Mahmood, “Citizen Intruder: Since When Do Canadians Need Passports to Travel in Our Own Country?” online: <http://www.nowtoronto.com/issues/2004-09-02/news_story6.php>; The Air Transportation Association of Canada has been contacted by Transport Canada officials to set up a no-fly list (compiled by CSIS) to keep terrorists and security threats off airline flights: The Current “No Fly – Personal Story” *CBC Radio One* (7 December 2004); Jane Taber “Ottawa compiles ‘no-fly’ list

son has been involved or will be involved in “terrorist activities”. The result of acting on this hunch through racial profiling is very detrimental to individuals, yet often suspicions seem to be based on racist assumptions. The consequences of being labeled as a “terrorist” today resemble those that followed receiving a label of “communist” in the McCarthy era.⁷

In the last 60 years, we have seen the “war on communism”, the “war on drugs”, the “war on crime” and since 9/11, the “war on terrorism”. It seems that even if Americans are not at war with another state, it is politically expedient to use the rhetoric of “war”, presumably for political purposes. British criminologist Stanley Cohen once wrote about an ideological feature of modern society:⁸

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.

The “war on terrorism” has features of a moral panic. Yes, terrorism is a real threat. But, what *face* have we put on terrorism? Its nature has been presented in a stylized and stereotypical fashion. If asked to describe a “terrorist”, because of several influences, including the media,⁹ many average Canadians, would probably describe per-

of banned passengers” *The Globe and Mail* (3 September 2004); There will be no compensation for people who are misidentified as potential risks and who miss their flights: “Canada’s Martin government is compiling ‘no-fly list’”, online: Indymedia Victoria <<http://victoria.indymedia.org/news/2004/09/29939.php>>; United States’ no-fly list includes as many as 100,000 names, including “T. Kennedy”, which has caused Senator Ted Kennedy grief on several occasions: Paul Shukovsky “ACLU: ‘No-Fly List’ discriminates against travelers stopped repeatedly” *Seattle Post-Intelligencer* (5 November 2004).

⁷ For example, a suspected terrorist is subjected to compelled testimony before investigative hearings under Canada’s Criminal Code section 83.28 (*Criminal Code*, R.S.C.1985, c. C-46). During McCarthy’s time, a suspected communist was subjected to compelled testimony before the House of Un-American Activities Committee. People who refused to testify were threatened with imprisonment (source: Ellen Schrecker, “Blacklists and other Economic Sanctions” in Ellen Schrecker, “The Age of McCarthyism: A Brief History with Documents”, online: <<http://www.english.uiuc.edu/maps/mccarthy/schrecker5.htm>>).

⁸ Stanley Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers* 3rd (London: Routledge, 2002) at 1.

⁹ A colleague pointed out that during the CNN coverage of 9/11, on several occasions, the image of the twin towers falling was portrayed on split screen beside the image of a Muslim cleric who was being interviewed.

sonal characteristics rather than behaviours; the description would be based on a person's colour and religion. A terrorist or a potential terrorist would likely be described as a person of colour who is an adherent of the Muslim faith or of another non-Christian religion, such as Sikhism. The enemy thus becomes identifiable and somehow we feel more secure. But, this racist response creates many new victims.

Canadians may wish to believe that we are different from Americans, but we seem to get caught up in these "campaigns" from time to time. Our history indicates that we are not immune to enacting policies and engaging in behaviours that are the result of the "witch hunt" mentality. We need only look at the internment of Japanese Canadians during the Second World War for an example of demonization of a particular group and its negative results for that group.

In 1941, by the eve of the bombing on Pearl Harbor, 23,000 Japanese Canadians lived on the West Coast of British Columbia.¹⁰ Three-quarters of that number were Canadians by birth or had become naturalized citizens.¹¹ Three months after Japan attacked Pearl Harbor, the *War Measures Act* was enacted, requiring the removal of all people of Japanese origin residing within 100 miles of the Pacific Coast.¹² The *War Measures Act* gave the Federal government full authority to do everything deemed necessary "for the security, defence, peace, order and welfare of Canada."¹³ Almost 21,000 Japanese-Canadians (75% of whom were Canadian nationals) were removed from their homes and shipped to road camps, internment camps and prisoner of war (POW) camps, most with only 24 hours notice to vacate their homes.¹⁴ The evacuation began in the summer of 1942 and was not completed until October 31, 1943.¹⁵

Unlike in the United States, where families were generally kept together, Canada initially sent its male evacuees to road camps in the B.C. interior, to sugar

¹⁰ The section on Japanese Canadian Internment is based on research performed by ACLRC to create a teaching resource called "Beyond Blame: Reacting to the Terrorist Attack" adapted with permission for Canadian classroom use by ACLRC, 2001 (Original copyright 2001, Educational Development Centre, The Justice Project, Vietnam Veterans of America Foundation).

¹¹ Linda Di Biase, "Japanese Canadian Internment: Information at the University of Washington Libraries and Beyond" online: <<http://www.lib.washington.edu/subject/Canada/internment/intro.html>>.

¹² Jennifer Baker, "Diversity Watch – Japanese" online: <<http://www.diversitywatch.ryerson.ca/backgrounds/japanese.htm>>

¹³ The Law Connections, "The War Measures Act" online: http://www.educ.sfu.ca/cels/past_art28.html; WMA 1998 "Canada's Concentration Camps – The War Measures Act" online: http://www.educ.sfu.ca/cels/past_art28.html

¹⁴ *Ibid.*, note 12.

¹⁵ *Ibid.*, note 12.

beet projects on the prairies, or to internment in the POW camp in Ontario. Women, children and elders were moved to six inland B.C. towns created or revived to house the relocated people.¹⁶ These were desolate and abandoned ghost towns and farms made into small cities in the interior of British Columbia. There were ten internment camps, three road camps, two POW camps and five self-supporting camps in total.

Many historians believe internment camps came about because of racist attitudes Canadians held towards Japanese Canadians.¹⁷ Over 1,100 internees paid for their relocation and leasing of farms in “self-supporting” camps that provided a less restrictive, less punitive environment. These Japanese Canadians were still considered “enemy aliens” by the government. About 945 men worked on road construction camps. Those 699 men who complained of the separation from families as well as other “dissident men” who violated curfew hours were sent to the POW camps in Ontario. They were forced to wear shirts with round, red targets on their backs.¹⁸

There were other significant consequences for interned Japanese Canadians. The Canadian government confiscated and sold the property, businesses, cars and boats of Japanese Canadians before they were forced into labour camps. Without their property, assets, or jobs, they were then charged inequitably for their internment. Harold Hirose, a veteran of the Second World War, had five acres of Surrey farmland confiscated and sold for \$36. He received a cheque for \$15, which included charges for the administrative costs of the transaction. He subsequently made several appeals to the government to recover the land but these failed.¹⁹ Proceeds from the sale of goods and property were used to pay for living expenses of the interned.²⁰

Many scholars have argued that the internment affected the self-image and ethnic identity of Japanese people in Canada, particularly the Nisei (second-generation Japanese Canadians). Because of their experiences during the war, many Nisei came to feel ashamed of being of Japanese origin and they tried to hide their ethnicity, or to remove themselves from things that made them or made the people around them recognize that fact.²¹

¹⁶ *Ibid.*, note 11.

¹⁷ “Japanese Internment Camps” online: <<http://www.yesnet.yk.ca/schools/projects/canadianhistory/camps/internment1.html>>

¹⁸ Masumi Hayashi, “Canadian Concentration Camps” online: <http://www.csuohio.edu/art_photos/canada/canada.html>

¹⁹ *Ibid.*, note 18

²⁰ Canadian Race Relations Foundation, “Racism to Redress: Japanese Canadian Experience” online: <http://www.crr.ca/EN/MediaCentre/FactSheets/eMedCen_FacShtFromRacismToRedress.htm>.

²¹ Masako Iino, “Research Proposal Abstract ‘LARA’ and Japanese Canadians (and Japanese Americans)” online: <http://www.janm.org/inrp/english/sc_iino.htm>.

Throughout the Second World War, not one Japanese Canadian was charged or convicted of espionage.²² The Canadian government officially acknowledged that the Japanese internment was unjust and made reparations several decades later.²³

Some may argue that we have learned from these unfortunate circumstances, but have we? Are we not dangerously close to committing something just as terrible? What about the civil liberties of those persons who are labeled as “terrorists” or “potential terrorists”?

The Second World War, at least, had definite parameters. When that conflict officially ended in 1945, the internment of Japanese Canadians came to an end. The consequences lingered, of course, but the measures were temporary. The “war on terror”, much like the other moral panics mentioned above, does not have a definite ending. Nor is Canada at war with an identifiable state. Rather, we are waging a battle against an amorphous enemy in unclear territory. Our “enemy” is a person who is or may be engaged in a “terrorist activity” or who is or may be involved with a “terrorist group”. The definitions of these two phrases have been criticized for being too broad and too vague. For example, because of the way that the legislation is worded, it is very difficult, if not impossible, to distinguish terrorist activity from protest or dissent.²⁴ It is also difficult to distinguish freedom fighters from terrorists.²⁵

Perhaps because of these overly broad definitions, and because of the public’s need to feel secure, it becomes tempting to fight terrorism by profiling visible minority persons who “look suspicious”. That is, the public is not interested in persecuting those engaged in peaceful protest, but wants to feel protected from extremists who are willing to die themselves while engaging in violent acts. Those in authority seem to have determined that persons who engage in this behaviour are from a particular minority group (usually Arab, Palestinian or East Indian and Muslim or Sikh) or those who look like they might belong to one of those categories. While only a small number of Arab followers of a form of Islam were responsible for the events of 9/11, there are hundreds of millions of people around the world who belong to these larger religious and ethnic categories. They are peaceful, law-abiding citizens; many publicly denounce the events of 9/11 as immoral and illegal, as well as against their religion. In contrast, when Timothy McVeigh, a homegrown white American terror-

²² Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Irwin Publishing, 1982) at 113.

²³ Brian Mulrooney, Art Miki “Canadian Race Relations Foundation, Redress Agreement” online: <http://www.crr.ca/en/FAQs/RedressAgreement/eFaq_RedressAgreement.htm>.

²⁴ W. Wesley Pue, “The War on Terror: Constitutional Governance in State of Permanent Warfare?” (2003) 41 *Osgoode Hall L.J.* 267 at para. 9 to 14.

²⁵ Pue, *Ibid* at para. 21.

ist, bombed the Federal Building in Oklahoma City, we did not immediately begin to suspect all Caucasians as being involved in terrorist activities.

Thus, we are leaving the fate of many law-abiding people to authorities, some of whom may be inclined to human rights violations and racially discriminatory law enforcement. The abuses are not potential ones; they are real. Who have been the victims of Neo-McCarthyism in Canada? People from religious and ethnic minorities, or those who have written about or supported these people. Some examples to illustrate this point:

- Canadian businessman Liban Hussein was listed as a “terrorist entity” in 2001. His assets were frozen, and he was subjected to extradition proceedings. It was later admitted that there was no evidence linking him to terrorism. But it was too late for Mr. Hussein: he lost his job and his income;²⁶
- The Canadian Security Intelligence Agency (CSIS) facilitated the transfer of Mansour Jabarah, a Canadian citizen to the United States;²⁷
- Canada failed to protest “the disappearance, secret detention and deportation by American authorities of Maher Arar and a half dozen other Canadian citizens of Arab or Islamic origin”;²⁸
- Ottawa Citizen reporter, Juliet O’Neill, had her home and office searched under the Security of Information Act by the R.C.M.P., because they wanted clues on who had leaked information to her about Maher Arar, whose deportation to Syria by U.S. authorities is the subject of an inquiry;²⁹
- The CSIS and the R.C.M.P. questioned Kassim Mohamed, a Canadian citizen, who was later detained in an Egyptian prison because he video-taped the CN Tower and other Toronto landmarks to show his family back in Egypt;³⁰
- The following people (among others) are being held in detention on CSIS security certificates:³¹ Mohammed Mahjoub (since June, 2000), Mahmoud

²⁶ Alan Borovoy, “Security’s Serpentine Coils” 1 August 2002 *The Globe and Mail* A21.

²⁷ *Ibid.*

²⁸ Canadian Bar Association, “In the Shadow of the Law: A Report by the International Civil Liberties Monitoring Group in Response to Justice Canada’s 1st Annual Report on the Application of the Anti-Terrorism Act (Bill C-36)” (14 May 2003), online: Canadian Bar Association <<http://www.cba.org/cba/news/pdf/shadow.pdf>>.

²⁹ CTV, “Arar-related search a violation, says reporter” (23 January 2004), CTV News online: <<http://www.ctv.ca>>.

³⁰ Shephard, Michele, “Terror fears lead to man’s ordeal: CN Tower tape raised suspicions; Suing government to clear his name” *The Toronto Star* (20 September 2004).

³¹ This power has been in place since before 9/11, but it is interesting to note the ethnicity suggested by the names listed. The British House of Lords recently held that its anti-terrorism legislation violates

Jaballah (since August, 2001) Hassan Almrei (since October, 2001), Mohamed Harkat (since December, 2002) and Adil Charkaoui (since May, 2003); most of the time they are being held in solitary confinement. The Canadian government seeks to have them deported, even to countries where they may face torture, without providing reasons;³²

- Mahmoud Namini was detained for over a month for carrying in his luggage a book which details an uprising of freedom fighters against the Khomeini regime in Iran during the early 1980s. He was released after a successful detention review and an intensive public campaign demanding his release;³³
- Police failed to respond to hate crimes against Muslims, and on “hundreds” of occasions, threatened Arab and/or Muslim community leaders with preventive detention if they failed to provide “voluntary” interviews;³⁴ and
- On February 26, 2004, Senator Mobina Jaffer spoke to the Senate about how her husband was stopped at Ottawa International Airport and questioned based on his appearance. When Senator Jaffer inquired about why he was stopped, she was told it was because “he looked like a terrorist.”³⁵

What were some of the most significant consequences of McCarthyism in the 1950's? Economic consequences were the most prevalent. People were blacklisted (e.g., Leonard Bernstein, Charlie Chaplin, Burl Ives, Dorothy Parker, Pete Seeger, and Orson Welles, to name a few), and could not find work in their field.³⁶ Ralph Brown, a Yale Law School professor, estimated that roughly 10,000 people lost their jobs.³⁷ This estimate does not include those whose applications were rejected, those who resigned under duress, or those who were ostensibly dismissed for other reasons. Often political undesirables identified by one agency were persecuted or fired

the European Convention on Human Rights because it discriminates against non-citizens, allowing them to be held indefinitely. See: *A(F.C.) v. Secretary of State for the Home Department*, [2004] H.L.J. 45

³² Campaign to Stop Secret Trials in Canada, “Family, Friends of Canadian Secret Trial Detainees to Seek Meeting with Prime Minister Monday, August 25” online: <<http://www.adilinfo.org/ottawa-press.htm>>.

³³ Matthe Behrens, “‘Dangerous Book’ Detainee Likely to be Released Friday Morning” online: Toronto Action for Social Change <<http://www.homesnotbombs.ca/naminitobefreed.htm>>.

³⁴ Canadian Bar Association, *supra* note 29.

³⁵ Debates of the Senate (Hansard) 3rd Session, 37th Parliament, Volume 141, Issue 17, February 26, 2004.

³⁶ See: Albert Fried, “McCarthyism: The Great American Red Scare”, online: <<http://www.spartacus.schoolnet.co.uk/USAmccarthyism.htm>>.

³⁷ Schrecker, *supra* note 7

by another agency.³⁸ Roughly 150 persons went to prison, usually for refusing to name others as communists. After conviction for espionage, two persons, Julius and Ethel Rosenberg, were put to death.³⁹

What have been some of the consequences of Canada's Neo-McCarthyism? A list of "terrorist entities" is compiled under the ATA by the Solicitor General.⁴⁰ There is evidence that persons have lost their livelihoods as a result of being placed on this list. Persons who are identified by other countries as suspicious are being listed or being held indefinitely in Canada. Individuals who are believed to have information about terrorism can be forced by a judge to answer questions; if they refuse, they can be penalized. The right to remain silent under section 11(d) of the Canadian Charter of Rights and Freedoms is thereby eliminated in these circumstances. Persons of colour, especially those of Arab and/or Muslim descent are being subjected to racial profiling.⁴¹

The human cost of thinking we are safer has been great. It would be at least somewhat palatable to endure civil liberties violations if they actually resulted in greater security. But, are we really safer? As noted by Wesley Pue, "[W]hile there have been violations of essential liberties, there has been no obvious gain in security."⁴² So, at the unfair cost to people of particular ethnic and religious origins, we have gained very little. In fact, we may actually be undermining national security by inappropriately targeting an entire group. The ultimate irony is that we have traded our civil liberties to address behaviours that were all proscribed in Canada's Criminal Code before the anti-terrorism legislation was passed. Perhaps in the future, people will regard this era in Canadian civil liberties and human rights with the same disdain as when they examine the McCarthy era.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Criminal Code*, R.S.C. 1985, c. C-46, section 83.05.

⁴¹ Current Justice Minister Irwin Cotler indicated when he was a backbencher that an anti-discrimination clause should be added to the anti-terrorism legislation. Perhaps this will occur after the upcoming legislative review.

⁴² Pue, *supra* note 23 at para. 61.