

POST 9/11 CIVIL LIBERTIES – “ARE YOU WITH US OR AGAINST US?”

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This article is not an attempt to legally analyse the legitimacy, constitutionality or moral authority for the present Canadian anti-terrorism legislation. Those efforts have been made by myself and others to the Prime Minister, Parliamentarians and committees of the House of Commons with little effect. Instead, I want, as a Muslim born in Canada, to put a human perspective on the effect the last three years have had on this country's 750,000 law abiding, tax paying Muslims.

The Canadian Bar Association's initial assessment and analysis of Bill C-36 (later to become the Anti-Terrorism Act) appropriately described parts of the legislation as unprecedented, unreasonable and unnecessary.¹

As a former Federal and Provincial Crown Attorney, I along with other Canadians were promised by our former Prime Minister that our fears of racial and religious profiling, civil rights abuses, and intimidation by law enforcement or immigration officers, would not happen. That promise was broken.

Throughout the last two years I have received weekly calls from Muslims throughout the country representing over 50 different cultures who have felt mistreated, intimidated, threatened or abused by Customs and Immigration Officials or law enforcement agencies, including the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (SIS).

Thoughts of secret hearings regarding security certificates, preventative arrest, and changes to the rules of evidence under the *Canada Evidence Act* including hearsay evidence and criminal matters, were unthinkable prior to 9/11. There now exists a climate of fear and ignorance, which results in the curtailment or elimination of civil rights. This curtailment is presently, and mistakenly, thought necessary or jus-

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¹ See Canadian Bar Association, "Submission on Bill C-36, the Anti-Terrorism Act" (October 2001) online: Canadian Bar Association <<http://www.cba.org/PDF/submission.pdf>>.

tified in a free and democratic society. The result is the continuous erosion of these rights, ultimately resulting in the undermining of the very democratic society that we are trying to protect from the “terrorists”.

Many Muslims look at what has happened in Afghanistan and Iraq and wonder who the aggressor really is, and who the “terrorists” really are. When American soldiers (occupiers?) are killed, the story becomes front-page news in every major newspaper in this Country. When innocent Muslim civilians are killed, they are referred to, if at all, as simply “collateral damage”. Tens of thousands of Arab and Muslim civilians have been killed post 9/11 and no one speaks on their behalf. During the violence seen in the West Bank and Gaza, four Palestinians are killed for every one Jewish civilian, with more than half of those killed under the age of 15.

The United States government outwardly demands the strong rule of law, yet continues to undermine it by torture, breaches of the Geneva Convention and illegal pre-emptive strikes against foreign countries. Just last June, it took the United States Supreme Court, voting 6 to 3, to assert that Guantanamo Bay prisoners (enemy combatants or not), are entitled to no less than American citizens when it comes to due process. Previously, the President of the United States ordered that they be denied the specific legal rights to challenge alleged evidence against them, rights to which they were entitled.

In Britain’s High Court, an overwhelming majority of the House of Lords ruled that the English Government cannot detain foreign suspects indefinitely without bringing them to trial. The Court stressed both Britain’s clear and present violation of the Rule of Law as well as the disproportionality of the measures they called “draconian”² that cannot strictly be required by the exigencies of the situation”³.

In Canada, on the other hand, dozens of Muslims have been detained under the cover of immigration or terrorist investigations for months at a time. In fact, five well known Muslims have been incarcerated for a total of 178 months (almost 15 years in total), without formal charges being laid or a transparent trial taking place.⁴ If deported, these men face the risk of being “Arared” – referring to the brutal torture of a well-known Canadian by the name of Mahar Arar. Evidence that clearly indicates his innocence has been blocked for release to the public by the Canadian Government at a Federal Inquiry into his deportation and subsequent torture, notwithstanding

² *A(FC) and others v. Secretary of State for the Home Department*, [2004] UKHL 56 and *X(FC) and Habitger v. Secretary of State for the Home Department*, [2004] UKHL 56 at 188.

³ *Ibid.* at para. 231.

⁴ These men are Mamoud Jaballah, Muhammad Majoub, Hassan Almrei, Mohamed Harkat, and Adil Charkaoui.

Commissioner Justice O'Connor's order to release the documents after he was satisfied that they present no risk to national security. Here we have our Canadian Government opposing the very Commissioner they appointed to "get to the bottom" of an embarrassing misapplication of justice.

The critical issue post-9/11 is how to strike the proper balance between the need for security versus civil rights. I have been appalled and shocked at the questions put to Canadian Muslims as part of national security investigations. For example, "How many times do you pray?", "Do you consider yourself to be very religious?" or "What do you think of George Bush and his policies?". Not only are these questions inappropriate, but also what is the result of truthfully answering these questions? Will the detained person be deported, charged, or will threats be made to his family regarding their immigration status?

In Canada, the Security Certificate process was upheld by the Federal Court of Appeal and will no doubt make its way to the Supreme Court of Canada. Last year, the Honourable Chief Justice of the Ontario Court of Appeal, Roy McMurtry, attended the Islamic Centre of Southwest Ontario for the historic opening of the Superior Courts of Southwest Ontario. In his keynote address, the Chief Justice quoted an American author that stated, "some say Americans prefer their security over their Liberty".

My experiences as a trial lawyer and the numerous accounts I have heard from Canadian Muslims post 9/11 have not been pleasant. It is not uncommon for Canadian security and police agents to give false pretences to Muslims as to why they are being questioned. Muslims are strongly dissuaded from speaking to a lawyer and are even prevented from continuing their livelihoods or education during "immigration investigation regarding potential irregularities". There are numerous accounts of Muslims in this country where members of their families have been threatened with deportation if certain information is not provided. On university campuses throughout the Country, numerous Muslim students report that they are aggressively harassed to work for our intelligence services as confidential informants. In addition, they are being interviewed directly at their places of work or educational facilities, with their professors, administrators or employees being advised that law enforcement is "interested in speaking to that particular person". It is sadly not surprising that many employers or future employers lose interest in an employee after a visit from our intelligence services. Unsubstantiated allegations of being a terrorist, or knowing someone who might be, can destroy a person's life in Canada forever.

Law enforcement and security forces know little of our religion and belief system. For the most part, what they know are the "myth conceptions" that continue to be perpetuated through the media. The Garvie Report, which dealt with the role of the RCMP post-9/11, indicated that the police force did not even have the capacity

or ability to properly conduct post-9/11 security investigations. This has also been my own personal experience when dealing with security or intelligence officers while they interview my clients. Their lack of knowledge on the issue of Islamic religion and their own innate, although perhaps unintentional, bias was quite surprising to me. "Project Thread"⁵ is an excellent example of what can go wrong and how innocent men can be detained under the auspice of an immigration or terrorism investigation. They were first declared to be national security risks and were torn from their families for months with no charges or trial date announced. Subsequently a joint RCMP/Citizenship and Immigration investigation concluded that there was no evidence that these individuals placed Canada's national security at risk.

Fortunately, a parliamentary review of the applicable anti-terrorism legislation is currently being undertaken by the Justice Sub-Committee on Public Safety, chaired by University of New Brunswick alumni Paul Zed. One can only hope that the above-mentioned concerns and injustices will be taken into account when the Committee reports back to the Government. The irony that exists is that many Canadian Muslims and non-Muslims are now more convinced than ever that the climate of fear, the questionable legislation and the systematic mistreatment of Muslims in this country has increased national security risks rather than decreased them. We all remember the black and white view of the world that George Bush inflicted on all of us when he said, "you are either with us or against us".

Muslims in this country want to know, when it comes to civil liberties, are you, the Canadian lawmaker, with us or against us?

⁵ For more information on Project Thread, see e.g. Ontario Council of Agencies Serving Immigrants "Project Thread" (November 2003) online: OCASI <http://www.ocasi.org/sys/report_detail.asp?ReportID=37555711> and CBC News, "19 Pakistani Men in Toronto Believed to Have Terrorist Links" (22 August 2003) online: CBC <http://www.cbc.ca/stories/2003/08/22/pakistani_arrests030822>.