THE THREE YEAR REVIEW OF CANADA'S ANTI-TERRORISM ACT: THE NEED FOR GREATER RESTRAINT AND FAIRNESS, NON-DISCRIMINATION, AND SPECIAL ADVOCATES

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1. Canada's Evolving National Security Policy

There are many reasons why Canadians may be tempted into thinking the ongoing Parliamentary review of the *Anti-terrorism Act*[1] (*ATA*) is not of pressing importance. The *ATA* has been used sparingly with so far only one person charged under its new terrorism offences during its first three years of existence.[2] The Supreme Court of Canada has upheld the constitutionality of investigative hearings, one of the most controversial new investigative powers in the *ATA*.[3] The security certificate process in the *Immigration and Refugee Protection Act*[4] (*IRPA*) was also used more frequently than charges under the *ATA* as a means of detaining and apprehending terrorist suspects. In addition, the *IRPA* was used to allow judges to consider information that affects national security and international relations without disclosure to the suspect and full adversarial challenge. The government's relative restraint in employing anti-terrorism legislation should be factored into the three year review process. However, in my view these developments do not obviate the need for a searching and critical examination of the *ATA* and related laws. Moreover, I suggest that lawmakers can make some concrete amendments to restrain the *ATA* and related laws and make them fairer and more consistent with the goals of Canada's national security policy, including the important policy of non-discrimination.

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[1] S.C. 2001, c. 41, s.145.

[2] One person, Mohammad Momin Khawaja, has been charged with participating in the activities of a terrorist group and facilitating a terrorist activity under ss.83.18 and 83.19 of the Criminal Code.

[3] *Application re Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248.

[4] S.C. 2001, c.27.

Since the controversial enactment of the *ATA* in 2001,[5] the Canadian government has developed a broader and more comprehensive national security policy that includes a formal policy "Securing an Open Society" embracing an all-risks approach to the range of man-made and natural risks to the security of Canadians.[6] The government also created a new Public Safety Ministry[7], and enacted other pieces of legislation such as the *Public Safety Act*[8] to complement the criminal sanctions that are the main focus of the *ATA*. The government has indicated that it will create a new National Security Committee of Parliamentarians to review the government's security and intelligence activities[9] and the ongoing Arar Commission is examining the adequacy of review of the RCMP's national security activities.[10]

The *ATA* now forms only part of Canada's national security policy. To its credit, the Canadian government has officially recognized that terrorism is not only the only threat to the security of Canadians. It has introduced a comprehensive all risks national security policy that acknowledges the threats that diseases such as SARS and natural disasters can cause to the security of Canadians.[11] Although Canada has fortunately not suffered the terrorist attacks of the type that affected New York, Washington, Bali and Madrid, threats of terrorism still exist and Osama bin Laden has named Canada as one of the countries on Al Qaeda's hit list.[12]

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[5] The ATA has already been subject to considerable academic commentary. See for example Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) [*The Security of Freedom*]; D. Daubney et al, eds., *Terrorism, Law and Democracy: How Canada is Changing After September 11* (Montreal: Éditions Thémis, 2002) [*Terrorism, Law and Democracy*]; "Special Issue" (2002) 14 N.J.C.L. 3; K. Roach, "Canada's New Anti-Terrorism Law" [2002] S.J.L.S. 122; D. Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act" (2002) 16 S.C.L.R. (2d) 185 ["Constitutional Casualties of September 11"]; D. Jenkins, "In Support of Canada's Anti-Terrorism Law: A Comparison of Canadian, British and American Anti-Terrorism Law" (2003) 66 Sask. L. Rev. 419 [Jenkins].

[6] Canada, Privy Council Office, *Securing an Open Society: Canada's National Security Policy*, April 2004

[7] Bill C-6, *An Act to establish the Department of Public Safety and Emergency Preparedness and to amend or repeal certain Acts*, 1st Sess., 38th Parl., 2004 (assented to 23 March 2005), S.C. 2005, C. 10.

[8] S.C. 2004, c. 15.

[9] "Deputy Prime Ministers Details Proposed Model for National Security Committee of Parliamentarians" (5 April 2005), online: <http://www.psepc-sppcc.gc.ca/publications/news/2005/20050404-3_e.asp>.

[10] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Policy Review Consultation Paper* (October 2004).

[11] For a defence of such an all-risk human security approach see K. Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) c. 7.

[12] *Ibid.* at 7.

The *ATA* appears destined to remain an important part of Canada's national security policy, despite the fact that existing criminal offences such as murder, conspiracy, attempts, and counseling would catch most acts of terrorism. Certain aspects of the *ATA* like the criminalization of the financing of terrorism are necessary to fulfill Canada's international commitments under various international conventions and resolutions relating to terrorism. The issue that remains is: Has the *ATA* has been optimally structured to fulfill these commitments and contribute to Canadian and international security while at the same time respecting the rights and values of Canada as a free, pluralistic and democratic society? In what follows, I focus on possible amendments to the *ATA* with respect to the definition of terrorism, various offences, the process of listing groups and individuals as terrorists, and the important role that anti-discrimination principles should play in Canada's national security policy. I will also examine the treatment of non-citizens suspected of terrorism and propose that security cleared special advocates under both the *IRPA* and the *ATA* could increase the fairness and accuracy of decisions made on the basis of national security information not disclosed to the affected party.

2. The Need for Greater Restraint in the Definition of Terrorism

In *Suresh v. Canada*[13], the Supreme Court of Canada recognized the difficulty of defining terrorism. It commented that:

> one searches in vain for an authoritative definition of "terrorism". The Immigration Act does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, 'the term is open to politicized manipulation, conjecture, and polemical interpretation'...Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.

After recognizing the difficulties of defining terrorism, the Court came up with its own definition of terrorism which it then read into the undefined reference to terrorism in *IRPA*. It concluded that:

> following the International Convention for the Suppression of the Financing of Terrorism, that "terrorism" in s. 19 of the Act includes any 'act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of

[13] [2002] 1 S.C.R. 3 at paras. 94-95.

> such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'. This definition catches the essence of what the world understands by 'terrorism'. Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism.[14]

Although the Court noted that Parliament could enact a different definition, it is significant that they selected a much simpler and narrower definition of terrorism than is found in s.83.01(1)(b) of the *ATA*. Although that definition does not in itself create a crime, it is incorporated into many of the offences and investigative powers found in the *ATA*. It defines a terrorist activity as:

> (b) an act or omission, in or outside Canada,
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> (i) that is committed
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> (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
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> (B) 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 inside or outside Canada, and
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> (ii) that intentionally
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> (A) causes death or serious bodily harm to a person by the use of violence
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> (B) endangers a person's life
>
> (C) causes a serious risk to the health or safety of the public or any segment of the public
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> (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses A) to C) or,
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> (E) 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 the conduct or harm referred to in any of clauses A) to C).

[14] *Ibid.* at para. 98.

and includes a conspiracy, attempt, or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

1.1 For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition 'terrorist activity' in subsection 1 unless it constitutes an act or omission that satisfies the criteria of that paragraph.

One possibility that should be considered in the three year review is to replace the broad[15] and confusing[16] definition of terrorism in the *ATA* with the far more succinct and narrower definition of terrorism used by the Supreme Court of Canada in *Suresh v. Canada* and now supported by a recent UN proposal.[17] The Suresh definition focuses on acts intended to cause death or serious bodily harm to civilians. The *ATA* focuses on the broader and vaguer concept of endangering a person's life or causing a serious risk to health and safety, and includes substantial property damage that is likely to cause such harms. The *Suresh* definition should be broad enough to cover acts of biological or nuclear terrorism that would otherwise be covered in the *ATA* by reference to endangerment of life and health and safety. The *Suresh* definition would not cover substantial property damage that was likely to cause death, danger to life, health or safety unless the accused intended to cause death or serious bodily injury

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[15] Section 83.01(1)(a) contains a long and complex definition of terrorist activities that incorporates various offences under s.7 of the Criminal Code but only to the extent that they implement various international conventions against the unlawful seizure of aircraft, crimes against internationally protected persons, the taking of hostages, crimes in relation to nuclear materials, terrorist bombings and the financing of terrorism.

[16] The Department of Justice's focus groups of minority views on the *ATA* reported that its summary of the definition of terrorism "was probably the most confusing and difficult to understand in most groups. Some participants seemed a bit overwhelmed by the complexity of even the summarized definition. For those who approved outright, the definition was thought to be clear and if not, it was a good framework, and was at least heading in the right direction, filling a gap....For others, the provision was too broad, too vague and subject to interpretation, and could therefore harm innocent people in 3 main ways- relating to intention, legitimate protest and the targeting of ethnic minorities." Canada, Department of Justice, *Minority Views on the Canadian Anti-Terrorism Act* (31 March, 2003) at 4.3.2.

[17] The recent UN proposal states: "any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing an act." "Terrorism defined in UN proposal" *Globe and Mail* (22 March 2005) A16.

to another person. For this reason, it may be advisable to clarify that the intent referred to in the *Suresh* definition would include knowledge that death or bodily injury was likely to occur. Even with respect to the most serious offences such as murder, knowledge of the prohibited act is a sufficient form of fault.

The *Suresh* definition of terrorism also does not include one of the more controversial aspects of the *ATA*'s definition, namely the reference in s.83.01(b)(I)(E) to serious interference or disruption of essential public and private services. This clause was an expansion of a reference in the United Kingdom's *Terrorism Act, 2000* to the disruption of an electronic system and is so broad that it requires qualification by an exemption for "advocacy, protest, dissent or stoppage of work that is not intended" to endanger life or health or safety. As originally introduced, Bill C-36 only exempted such dissent if it was "lawful", but this was changed after critics raised concerns that the act could define unlawful strikes and protests as terrorism. If, as the Supreme Court claims, the narrower *Suresh* definition of terrorism captures the essence of what the world understands as terrorism, it is not clear why serious disruptions of public or private services should be defined as terrorism if they are not acts intended to cause death or serious bodily injury to civilians. This is not to say that such disruptions of essential public or private services should not be illegal or criminal;[18] rather it is to question the value of including them in the definition of terrorist activities.

My concerns about overbreadth in the definition of terrorism are both normative ones about civil liberties and practical ones about limited resources. Normatively, democracies risk losing the moral high ground if they adopt overbroad definitions of terrorism that could apply to even illegal forms of dissent. Much of the opposition to the *ATA* in civil society among groups such as labour unions and Aboriginal groups might have been significantly diminished if clause E had never been included in the definition of terrorist activities.

On a practical level, security concerns about real terrorism are serious enough that the police and others should not be distracted into thinking that street protests by the anti-globalization movements, strikes concerning essential services, Aboriginal blockades or the destruction of property by the radical arms of animal rights or environmental groups are forms of terrorism. Before and after the terrorist attacks of September 11, the world knew that the essence of terrorism was the murder and

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[18] In this respect it should be noted that the *ATA* adds new specific offences to the *Criminal Code* relating to explosives in places of public use that applies if the accused has the intent to cause death or serious bodily injury or the intent to cause extensive destruction that results or is likely to result in major economic loss. See *Criminal Code* s.431.2. See also a new offence of mischief relating to religious property in *Criminal Code* s.430(4.1). The *ATA* also amends offences relating to attacks on the premises of internationally protected persons and United Nations personnel. See *Criminal Code* ss.431, 431.1.

maiming of innocent civilians and that such activities should be defined as terrorism. Parliamentarians conducting the three year review of the *ATA* should give serious consideration to the *Suresh* definition of terrorism.

If the adoption of the *Suresh* definition is seen as too drastic a measure, Parliamentarians should at least consider the previous recommendation of Irwin Cotler that subsection E referring to the serious disruption of essential public and private services be removed from the definition of terrorism.[19] Again the point is both that such a reform would lessen concerns about overbreadth and the targeting of dissent, and that it also allows for a sharper focus on the greatest threats.

Another important reform of the *ATA*'s definition of terrorist activities would be to remove the reference in s.83.01(b)(1)(A) to the requirement for proof that the accused acted for a political, religious or ideological purpose, objective or cause. As I have argued elsewhere, this clause runs counter to the basic criminal law principle that motive is not an essential element of a criminal offence.[20] It raises concerns that police and others may focus attention on those who share political or religious beliefs with terrorists. Such concerns were partially addressed by an amendment made after the introduction of the *ATA*. This amendment provides that "for greater certainty, the expression of a political, religious or ideological thought, belief, or opinion" does not constitute a terrorist activity unless it otherwise satisfies that definition.[21] Although this amendment provides some restrictions, it seems anomalous that the definition of terrorism is so broad that an exemption for religious or political thought, belief or opinion is required. Surely such a plurality of thought and speech is at the heart of any free and democratic society, especially one that claims the high ground in a war with political and religious extremists.

The abolition of the political and religious motive requirement also has practical benefits. Any trial of an offence based on this definition of terrorist activity has to focus on proof of the accused's religious or political motive beyond a reasonable doubt. In my view, the more appropriate stance at a terrorism trial would be that no motive, including any political or religious motive, excuses the commission of a criminal act. Requirement of proof of religious or political motive complicates what

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[19] Professor Irwin Cotler has recommended that subsection E be removed "to preclude any untoward application of the Act to civil disobedience or even violent conduct that is clearly not terrorist activity." I. Cotler, "Terrorism, Security and Rights: The Dilemma of Democracies" (2002) 14 N.J.C.L. 13 at 36. He added, however, that reference to electronic systems perhaps be added to D.

[20] K. Roach, "Did September 11 Change Everything: Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893 at 903-906.

[21] The most likely concern is that an expression of political or religious belief or opinion could be said in some cases to constitute a "threat" to commit a terrorist activity. Note that terrorism activity includes not only conspiracies, attempts, and counseling to commit such activities but also the vaguer and less well settled concept of a "threat" to commit terrorist activities.

are already extremely complicated proceedings.[22] Evidence of religious and political motive was allowed in the Air India trial under the regular criminal law relating to murder[23], but the trial judge ultimately held that many others in the community would have similar motives to commit acts of terrorism against Indian targets in 1985. In this respect, evidence of motive did not substantially advance the Crown's case. There is, however, a danger that a jury might have given politcal and religious motive evidence a disproportionate weight.[24] The requirement for proof of religious or political motive may also provide an accused with a platform for running a political or religious defence that might not otherwise be relevant in an ordinary criminal trial.

While a repeal of the political and religious motive element of terrorism offences would simplify terrorism trials, it would also effectively broaden the definition of terrorist activities. This prompts concerns about whether terrorist activities could be adequately distinguished from other forms of crime. This is of particular concern given the additional investigative and punitive powers available to prosecute an offence under the *ATA*.[25] The answer to this concern, however, is found in s.83.01(1)(b)(I)(B) which provides that a terrorist activity must be committed with the intention of intimidating the public with regard to its security including its economic security and to compel any person, government, international or domestic organization inside or outside of Canada from acting or refraining to act. This section avoids the dangers of singling out religious and political motives for special scrutiny and focuses on aggravating external circumstances of the activities as opposed to the internal motivations of the accused.

At the same time, there are legitimate concerns that the above provision itself is much broader than similar requirements found in the *Suresh* definition and in related international law definitions of terrorism. The *Suresh* definition is more narrowly

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[22] The Commonwealth Secretariat has recognized that not including a political and religious motivation requirement "reflects a policy approach where the act and purpose alone constitute 'terrorism' and the motivation is of no relevance. This approach is also easier to apply in practice, as there is no requirement to prove motivation as an element of the offence. As well, such an approach is consistent with the definition in the Convention on the Suppression of the Financing of Terrorism...." It prepared two alternative definitions of terrorism, one including motive and the other not, concluding that "this was a fundamental policy decision that each country would need to make." Commonwealth Secretariat *Model Legislative Provisions on Measures to Combat Terrorism* (September 2002) at 42.

[23] *R. v. Malik and Bagri*, 2005 BCSC 350 at paras. 222-224, 303, 309, 348-353, 445-454, 529, 595-596.

[24] A public opinion poll suggest that 68% of respondents that had an opinion disagreed with the trial judge's verdict of an acquittal. "Poll finds most in B.C. reject Air-India verdict" *Globe and Mail* (31 March 2005) A1.

[25] S. Cohen, "Safeguards in and Justifications for Canada's New Anti-terrorism Act" (2002) 14 N.J.C.L. 99 at 121-2; S. Cohen, "Policing Security: The Divide Between Crime and Terror" (2004) 15 N.J.C.L. 405.

tailored because it refers only to the concept of intimidating a population without reference to the vague concept of security which is made only vaguer and broader by reference to economic security. The *Suresh* definition also focuses on attempts to influence governments or international organizations, in contrast to the *ATA*'s broader reference to attempts to influence any person, including individuals and corporations, and any domestic organizations, including unincorporated entities.

Some may argue that we have already paid too much attention to the legal definition of terrorism and dismiss debates about the definition of terrorism as a legalistic distraction. I believe that such an approach is mistaken. The *ATA*'s definition of what constitutes a terrorist activity is incorporated in many of the *ATA*'s new offences as well as in new investigative powers that relate to preventive arrest and investigative hearings. For reasons of protecting civil liberties, including the rights of political and religious dissent, and for reasons of concentrating on the essence of what the world understands as terrorism, it is important that Canada's definition of terrorism be as precise and focused as possible.

3. The Need for Greater Restraint in Defining Offences

The exact scope of the new terrorism offences in the *ATA* remains somewhat unclear because of the absence of judicial interpretation to date. In my view, there are some offences in the *ATA* that are overbroad in relation to Canada's obligations to honour its international commitments to combat terrorism. These offences are found both in the *Criminal Code* amendments and in the new Security of Information Act enacted as part of the *ATA*.

Many of the new financing offences in the *ATA* are required by the 1999 *International Convention on the Suppression of Terrorist Financing and the UN Security Council Resolution 1373* which placed great emphasis on combating terrorist financing. Yet some offences under the *ATA* may be overbroad because they apply to transactions with terrorist groups even though the accused has no knowledge of or nexus with terrorist activities. For example s.83.03(b) prohibits making "property or financial or other relating services" available "knowing that, in whole or part, they will be used by or will benefit a terrorist group." Does this mean that those who provide medical or legal services to a person knowing that they will benefit a terrorist group are themselves guilty of a terrorism offence? Similar concerns apply to the prohibition on dealing with the property of terrorists in s.83.08.

The fairness of s. 83.1 is another issue to consider. Section 83.1 makes it a crime punishable by up to 10 years imprisonment for any person in Canada and any Canadian abroad not to disclose to the Commissioner of the RCMP and/or the Director of the Canadian Security Intelligence Service; (1) the existence of property in their possession or control that they know is owned or controlled by a terrorist

group or (2) information about a proposed transaction involving such property. In addition, there is a separate obligation under s.7.1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to make a report to FINTRAC. This offence punishes a failure to act, namely a failure to report to various law enforcement bodies. It goes beyond the special and appropriate duties placed on financial institutions with regard to reporting suspicious financial transactions under s.83.11. The offence could even apply to lawyers despite the importance of solicitor-client privilege and on that basis was opposed by both the Canadian Bar Association and the Federation of Law Societies of Canada.[26]

The forfeiture procedures apply to all terrorist property and not just property related to terrorist activities. All that is required for forfeiture is proof on a balance of probabilities in Federal Court. The proof may include the use of hearsay evidence that cannot be the subject of cross-examination and the property forfeited could include the retainers of lawyers and dwelling houses shared with others. Although there is a long history of the forfeiture of property used in respect of crime, the *ATA* constitutes an extension of civil forfeiture powers into the criminal law.[27] Some of the difficult questions that could arise in forfeiture proceedings as a result of this departure from the criminal law's appropriate focus on individual responsibility can be seen in the exemptions contemplated for innocent third parties. These exemptions purport to protect those who are "not a member of a terrorist group"[28] and family members of accused terrorists who may not have their house forfeited if they appear "innocent of any complicity or collusion in the terrorist activity."[29] It is, of course, not illegal in Canada to be a member of a terrorist group or to appear to be complicit with terrorist activities.

The offence in s.83.18 relating to participation in the activities of a terrorist group contains numerous subsections that seem designed to ensure a broad interpretation of the offence. Information such as the accused's frequent association with persons who constitute the terrorist group or the accused's use of a name, word or symbol associated with a terrorist group is deemed to be relevant as proof of the offence. The net effect of these and other similar provisions[30] is a restriction on the ability of judges to interpret the offence, to determine the relevancy of evidence, and to balance the relevancy and prejudicial value of evidence in specific trials. It is preferable to leave such matters open to judicial interpretation in a case by case man-

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[26] R. Hubbard et al., *Money Laundering and Proceeds of Crime* (Toronto: Irwin Law, 2004) at 666.

[27] *Ibid.* at 579.

[28] *Criminal Code*, R.S.C. 1985, c. C-46, s.83.14(8)

[29] *Ibid.* s.83.14(9).

[30] *Ibid.* ss.83.19(2), 83.21(2), 83.22(2).

ner. Further, ss. 83.18(2)(3) and (4) could all be repealed without affecting the primary decision to criminalize knowing participation in the activities of a terrorist group for the purpose of facilitating the commission of terrorist activities.

One of the deeming provisions in the *ATA*, section 83.19(2) severely qualifies the fault requirement that an accused must knowingly facilitate a terrorist activity. The section provides that it is not necessary that "any particular terrorist activity was foreseen or planned at the time it was facilitated." This provision may well undermine the important fault requirement for facilitation, a factor that becomes even more important since the definition of facilitation is also incorporated into the definition of a terrorist group.[31] This and other deeming sections could be repealed and we can trust that the courts will adopt a reasonable and purposive interpretation of the basic offence.[32] Such amendments would also have the considerable benefit of simplifying an act that is extremely complex.

The *Public Safety Act* added a new crime of hoaxing terrorist activity to the list of terrorist activities. Although a hoax may cause the same level of public fear as a real terrorist attack, it is not clear that the hoaxer has the same level of culpability as the person who is actually involved in terrorism. The issue is not whether a terrorist hoax should be illegal, because it is surely already covered by mischief offences. However, the issue is whether the hoaxer should be exposed to the special stigma and punishment attached to the commission of a terrorist offence. Under s.83.231 of the *Criminal Code* a person can be guilty of this new crime on the basis that they intended "serious interference with the lawful use of operation of property." If a death unfortunately results from the offence, the hoaxer is guilty of an aggravated offence punishable by imprisonment to life even though he or she may have had no subjective or objective fault in causing the death.

An important part of the *ATA* that largely escaped critical scrutiny at the time of enactment was the expansion of the *Official Secrets Act*, re-named the *Security of Information Act (SIA)*. In general, the *ATA* expanded the *SIA* by adding various forms of communications with terrorist groups to the wide array of offences that relate to communication with and assistance to foreign powers. The definition of "terrorist group" is the same as under the *ATA* and includes listed entities.

Parliament has defined as prejudicial to the safety and interests of the State the commission of a terrorist activity as it is broadly defined in the *ATA* and the commission of any offence to benefit a terrorist group that is punishable under either

[31] *Ibid.* s.83.01(2)

[32] See for example David Jenkin's suggestion that s.83.18(4) can "risk inappropriately scrutiny of mere association and political expression not connected with unlawful activities" and that it could be "dropped altogether in favour of reliance upon normal rules of evidence." Jenkins, *supra* note 5 at 444.

provincial or federal law by a maximum of two years imprisonment. In addition, the commission in Canada of any offence under the laws of either Canada or a province of an offence punishable by a maximum of two years imprisonment "in order to advance a political, religious or ideological purpose objective or cause" is included in the definition of "prejudicial to the safety or interests of the state", even if there is no connection with terrorist activity. It is not clear why all offences that are committed with a political or religious motivation are singled out for special treatment under the act especially when the offences are not committed to benefit either a foreign entity or a terrorist group. Singling out crimes committed for religious and political purposes even if not connected with terrorism as subject to the special strictures of the *SIA* seems especially heavy-handed. In a democracy, a crime is a crime but political crimes should not be treated more harshly.[33]

The definition of prejudice to Canada also includes "interfering with a service, facility, system or computer program, whether public or private...in a manner that has significant adverse impact on the health, safety, security or economic or financial well-being of the people of Canada or the functioning of any government in Canada" (s.3(1)(d)) and adversely affecting "the stability of the Canadian economy, the financial system or any financial market in Canada without reasonable economic or financial justification" (s.3(1)(k). Such clauses define national security interests in an extremely broad fashion to include conduct that harms the economic stability of Canada. As with the definition of terrorist activity in the *ATA*, much could be gained both in terms of civil liberties and focusing limited resources by defining the state's national security interests in a narrower, more tightly-focused, fashion.

Another problem with the *SIA* is the extraordinary breadth of some of its offences. Section 20 creates an indictable offence punishable by life imprisonment that applies to every person who at the direction, for the benefit or in association with a foreign entity or a terrorist group, induces or attempts to induce, by threat, accusation, menace or violence, any person to do anything or to cause anything to be done to increase the capacity of the foreign entity or terrorist group to harm Canadian interests or is itself likely to harm Canadian interests. Note that the triggering conduct need not be a crime involving violence or threats thereof, but includes accusations, menaces and threats that may not otherwise be illegal. In addition, the conduct sought falls under the very broad definition of prejudicing the safety or interests of Canada. Although it is important that people are protected against violence and threats thereof by terrorist groups, s.20 is so broadly worded that it could apply to impassioned political speech in Canada or abroad about political struggles abroad if such speech amounts to an accusation, menace or threat. Even if such an offence was

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[33] See K.Roach, "Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses" in A. Sajo, ed., *Militant Democracy* (Amsterdam: Eleven Publishing, 2004).

ultimately read down by the courts, its existence could still chill impassioned political speech.

The broadly defined prohibited conduct in s.20, as well as in other broadly defined *SIA* offences relating to the communication of safeguarded information, is further expanded by s.22 which deems a wide range of preparatory acts to be offences punishable by up to two years imprisonment. The preparatory acts include entering into Canada, obtaining, retaining or gaining access to any information, or possessing any device to conceal the content of information or to surreptitiously communicate the information. These acts of preparation are above and beyond the separate inchoate offences of attempting, conspiring, counseling or being an accessory after the fact to any offence under the *SIA*.[34] Canada already broadly defines the law of attempted crimes[35] and it is not clear that such a broad range of acts in preparation for crimes should themselves be crimes. The three year review should closely examine the *SIA* to ensure that it is not overbroad in relation to Canada's legitimate national security interests in prohibiting the communication of vital information to foreign entities and terrorist groups.

4. The Need for Increased Fairness in the Listing of Terrorist Groups and Individuals

Lists of groups and individuals found by various executive bodies to be terrorists are an important element of recent antiterrorism efforts. Such lists are often used by the United Nations and other bodies to stop the financing of terrorism. Section 83.05 of the *ATA* enables Cabinet to assemble a list of entities on the recommendation of the Solicitor General where there are reasonable grounds to believe that the person, group or unincorporated association or organization[36] knowingly carried out, attempted, participated or facilitated a terrorist activity or is acting on behalf of such an association or in association with a terrorist group. Although this definition is very broad, so far only thirty-five associations are listed as terrorist entities. There are provisions for notice and subsequent judicial and executive review of the listing[37] after it is made, but the legislation does not provide an opportunity for notice or adversarial challenge to the government's case before the listing is made.

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[34] *Security of Information Act*, R.S.C. 1985, c. O-5, s.23.

[35] *R. v. Deutsch*, [1986] 2 S.C.R. 2.

[36] Note that "entity" is defined in s.83.01(1) of the ATA.

[37] In this respect, s.83.07 of the *ATA* is particularly important as it provides for prompt executive review in cases of mistaken identity. A similar provision is found in the *United Nations Suppression of Terrorist Financing Regulations*, S.O.R./2001-360 but unlike s.83.07 does not require a response from the executive within 15 days.

Many more persons have been listed under the *United Nations Suppression of Terrorism Regulations*[38] on the basis that there are reasonable grounds to believe that they have carried out, attempted to carry out or participated or facilitated in the carrying out of a terrorist activity. Once a person is listed, it becomes an offence to have provide financial services to that person. There was at least one case in which a person was listed, but subsequently removed because of concerns that he was wrongly listed.[39] The ability to list a group and a person as a terrorist is a strong executive power and there are concerns that this power will be used in error. *Ex ante* adversarial challenge would be an important restraint on this strong power.

Although *ex post* judicial review of executive listing decisions should be retained, much of the harm is done once a person is publicly and officially listed as a terrorist. *Ex ante* adversarial review of listing decisions is especially important given the possibility that evidence used by the judge in the *ex post* judicial review may never be disclosed or even summarized because of concerns about the national security nature of the information. In some cases, advance notice to the actual person or group about to be listed may be impractical or imprudent but it should be possible to give advance notice to special advocates that can test and challenge the government's case. This proposal will be discussed in greater depth below.

A related objectionable feature of the *ATA* is that simply being a "listed entity" automatically makes a group a "terrorist group" within the meaning of the Act. This means that, in the context of a subsequent criminal proceeding, it may not be possible for a listed group to prove that it is not a terrorist group.[40] Parliament should make clear that the prosecution must prove all elements of a terrorism offence beyond a reasonable doubt, including that the listed group is in fact a terrorist group. The prosecution should not be able to rely on the Cabinet's listing decision as conclusive proof of the existence of one of the essential elements of a new terrorist offence in the *ATA*. Additionally, the Cabinet should only have the power to list groups, and not individuals, as terrorists in this fashion because the determination of individual culpability in a democracy is a matter for judges, not Cabinet or the Legislature.

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[38] S.O.R./2001-360

[39] E. Alexandra Dosman, "For the Record, Designating 'Listed Entities' for the Purposes of Terrorist Financing Offences at Canadian Law" (2004) 62 U.T.Fac.L.Rev. 1 at 15-19.

[40] "Constitutional Causalities of September 11," *supra* note 5.

5. The Need for Commitment to Anti-Discrimination Principles

The *ATA* included new provisions that allow for the deletion of hate propaganda from the Internet and that create a new offence of mischief to religious property if that mischief is motivated by "bias, prejudice, or hate based on religion, race, colour or national or ethnic origin".[41] The inclusion of such provisions in anti-terrorism legislation is based on a belief that racial and religious animus play an important role in many forms of terrorism. The treatment of discrimination in the *ATA*, however, was one sided. It provided the state with new tools to apprehend and punish private conduct that resulted in racial discrimination, but it did not recognize that the state itself could engage in discriminatory conduct. There is a need to reaffirm anti-discrimination principles in the post 9/11 context where there is a risk that some forms of terrorism are associated with particular religions, races and nationalities.

The failure of the *ATA* to address the danger of discrimination from the state is particularly striking given that when the present Minister of Justice, Irwin Cotler, was a back bencher, he called for an anti-discrimination clause to be added to the *ATA* after it was first introduced.[42] The government subsequently created a "Cross-Cultural Roundtable on Security...comprised of members of ethno-cultural and religious communities from across Canada". The roundtable will "engage in a long-term dialogue to improve understanding on how to manage security interests in a diverse society".[43] In my view, it is consistent with this policy to include some form of non-discrimination clause in the *ATA*.

A properly constructed anti-discrimination clause might respond to fears that people of Arab origin and/or adherents of the Islamic faith could be the subject of discriminatory application of the broad offences and investigative powers under the *ATA*. If a general amendment applied to all investigative activities in the *Criminal Code*, this could also respond to concerns about racial profiling of Aboriginal people, African-Canadians and other groups.[44] The anti-discrimination clause would

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[41] *Criminal Code*, R.S.C. 1985, c. C-46, s.430(4.1)

[42] Professor Cotler, then a backbencher, wrote: "There is a potential in the expansive powers of the Act for possible singling out of visible minorities for differential treatment. The inclusion of a non-discrimination clause respecting the application of the Act in matters of arrest, detention and imprisonment would have important as well as substantive value. Such a provision now exists in section 4(b) of the *Emergencies Act*....and it would seem desirable to include such a provision in this Bill." Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Daniels, Macklem and Roach, eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001) at 128.

[43] *Supra* note 6 at 2.

[44] See Ontario Human Rights Commission, *Paying the Price: The Human Costs of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003); *Johnson v. Halifax (Regional Municipality) Police Service* [2003] N.S.H.R.B.I.D. No. 2.

allow Parliament to make a clear and principled statement that common law or statutory powers should not be used in a manner that results in discriminatory profiling.[45]

Several important design issues arise with the inclusion of an anti-discrimination clause. Irwin Cotler previously suggested a general anti-discrimination clause of the type in the *Emergencies Act*.[46] This clause was included in recognition of the injustice suffered by people of Japanese origin interned during World War II, and the mistreatment of people of Ukrainian origin during World War I. Section 4(b) of that Act provides:

> 4. Nothing in this Act shall be construed or applied so as to confer on the Governor in Council the power to make orders or regulations ...
>
> (b) providing for the detention, imprisonment or internment of Canadian citizens or permanent residents as defined in the *Immigration Act* on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision focuses on detention, imprisonment and internment. Although the reference to imprisonment and internment represents a regrettable phase in Canadian history, it remains underinclusive to contemporary Canadian commitments to equality. Indeed, there is some danger that prohibiting the worst excesses of the past may implicitly open the door to other abuses that may in comparison seem less grave.

The reference to detention in the *Emergencies Act* tracks references to legal rights in ss.9 and 10 of the Charter and could be read fairly broadly. Nevertheless, there are concerns that the reference to detention is underinclusive of the discriminatory practices that should be prohibited in a modern and multicultural Canada. For example, modern electronic technology allows various forms of intrusive searches to be conducted without detention of the search's target. Another problem with the non-discrimination clause in the *Emergencies Act* is that it only applies to Canadian citizens and permanent residents. This section was drafted before the Supreme Court's landmark decision in *Andrews v. Law Society of British Columbia*[47] that recognized all non-citizens, not just permanent residents, as an analogous and vulnerable group that is protected from discrimination. Finally, a simple declaratory anti-discrimination clause could be criticized as a symbolic gesture without teeth and one that only duplicates non-discrimination standards already found in human rights codes and the Charter.

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[45] S. Choudhry and K. Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 293.

[46] S.C. 1988, c. 29.

[47] [1989] 1 S.C.R 143.

A more robust anti-discrimination and anti-profiling clause was proposed to the special Senate Committee on Bill C-36 in a brief prepared by my colleague Sujit Choudhry and myself in November, 2001. Drawing on a proposed American federal *The End Racial Profiling Act of 2001* that enjoyed bi-partisan support prior to September 11, we proposed the following amendment to the *ATA*:

Racial and Ethnic Profiling

Definitions

1. "racial and ethnic profiling" means the practice of a law enforcement agent relying, to any degree, on race, ethnicity, or national origin in selecting which individuals to subject to investigation or heightened scrutiny.

"law enforcement agent" includes any peace officer or person exercising law enforcement power under federal legislation;

"law enforcement agency" includes the Royal Canadian Mounted Police, Canadian Customs, the Canadian Security Intelligence Service, and other police forces exercising powers under ss.82.28 and 83.3;

Ban on Racial and Ethnic Profiling

2. (a) No law enforcement agent or law enforcement agency shall engage in racial and ethnic profiling.

(b) Racial and ethnic profiling does not include reliance on race, ethnicity or national origin in combination with other identifying factors when the law enforcement agent is seeking to apprehend a specific suspect whose race, ethnicity, or national origin is part of the description of the suspect.

Enforcement

3. A finding that a law enforcement agent or law enforcement agency has engaged in racial and ethnic profiling shall allow a court to award any remedy that is appropriate and just in the circumstances including damages, injunctions, declarations and costs. In addition to the award of remedies, the court may also refer the matter to a human rights commission that has jurisdiction with respect to the particular law enforcement agent or law enforcement agency.

Data Collection

4. The Attorney General of Canada shall prepare and cause to be laid before Parliament and the Attorney General of every province shall publish or otherwise make available to the public an annual report on racial profiling for the previous year. The report shall include:

(a) Any steps taken to ensure that law enforcement officers and law enforcement agencies not engage in racial and ethnic profiling;

(b) Data on enforcement practices that is sufficiently detailed to determine whether law enforcement agencies are engaged in racial and ethnic profiling; and

(c) Reports made under s.83.31 shall, subject to the exceptions in s.83.31(4)(a)-(c),include information on the racial and ethnic origins of those subjected to investigative hearings under s.83.28 and preventive arrests under s.83.3.

Our proposal does not limit itself to the imprisonment, internment or detention of persons, but rather applies to all law enforcement powers under federal legislation. Thus search powers, powers of preventive arrest, and investigative hearings are included. Nevertheless, the reference to law enforcement may be underinclusive and should be expanded to include all forms of investigation. A private member's bill before Parliament would extend the prohibition on racial profiling to custom, aviation and immigration officials.[48] It could be argued that the our proposal should also include other grounds of discrimination, notably religion and perhaps all the enumerated and firmly recognized analogous grounds of discrimination under s.15 of the *Charter*. At the same time, our proposal applies to everyone, not just Canadian citizens and permanent residents.

Our proposal adopts a broad definition of profiling that includes investigative decisions based in any part on race or ethnic origin. Some may argue that this is too broad a prohibition and one that may unduly restrain law enforcement. However, it would not, as has been suggested, prevent police and others from using race, ethnicity or national origin when they are part of a description of a particular subject. The aforementioned private member's bill has a narrower definition of profiling that prohibits the use of stereotypes rather than reasonable suspicion in singling out individuals for greater scrutiny or different treatment.[49]

Other important design issues for a non-discrimination clause include the collection of profiling data and remedies. The *ATA* itself imposes data reporting requirements on provincial law enforcement authorities and could serve as a model for an anti-discrimination clause. Our proposal attempts to ensure that the reports include data about prevention and remedies for profiling and not just raw numbers reflecting what happened in the past. It includes existing restrictions on data reports that prohibit reporting information injurious to ongoing investigations, dangerous to the life

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[48] Bill C-296, *An Act to eliminate racial profiling*, 1st Sess., 38th Parl., 2004 (first reading 18 November 2004).

[49] *Ibid.* s.2.

or safety of any person or prejudicial to a legal proceeding. It does not include the blanket restriction in s.83.31(4)(d) on information that would "otherwise be contrary to the public interest" because of concerns about the vagueness of the term "public interest".[50]

Our proposal contemplates enforcement by both courts and human rights commissions. It enables courts to award appropriate and just remedies including damages, costs, injunctions and declarations. The anti-discrimination clause could also include a provision for sentence reductions, though this would only benefit those profiling victims convicted of some offence. At the same time, it seems unwise to rely on expensive civil litigation before the Federal Court as the sole means of enforcement. By allowing for the referral of some matters to the appropriate human rights commission, the wording of the clause recognizes that in some cases systemic remedies such as training and education may provide the only lasting solution to problems of discriminatory profiling. Courts could also have the power to retain jurisdiction after ordering injunctions in some cases.[51]

6. The Need for Fairness and Non-Discrimination in the Treatment of Non-Citizen Terrorist Suspects

A non-discrimination or anti-profiling amendment to the *ATA* would go some of the way towards responding to concerns about the discriminatory application of anti-terrorism laws. However, such an amendment would not address Canada's most controversial and draconian anti-terrorism measure: the use of immigration law as anti-terrorism law. An anti-discrimination clause that did not address the *IRPA*'s disparate treatment of citizen and non-citizen terror suspects would be little more than symbolic window-dressing.

A threshold issue for the three year review committee will be whether it should examine the anti-terrorism provision of the *IRPA*. Technically, section 145 of the *ATA* only requires a comprehensive review of the provisions and operation of the *ATA* and not the *IRPA*. Nevertheless, the practical operation of the *ATA* depends on the use of the immigration law as an alternative and indeed more frequently used anti-terrorism device. The Supreme Court of Canada recognized the importance of immigration proceedings in anti-terrorism efforts when it held the immunity provisions for investigative hearings in the *ATA* underinclusive because they did not apply to deportation hearings.[52] The three year review process might also be underinclusive if it ignored the operation of the anti-terrorism provisions of the *IRPA*.

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[50] *R. v. Morales*, [1992] 3 S.C.R. 711.

[51] *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3.

[52] *Re Application under s.83.28 of the Criminal Code*, *supra* note 3 at paras. 74-76. I am indebted to Rayner Thwaites for bringing this point to my attention.

It is unfortunate that more connections were not drawn between the *ATA* and the *IRPA* in late 2001 when both laws were enacted.[53] One ground of comparison is how each Act treats membership in a terrorist organization. Such membership is criminalized in the United Kingdom's *Terrorism Act, 2000.* Although much of the *ATA* is based on the UK Act, membership in a terrorist organization is not a crime under the *ATA*. Under s.34 of the *IRPA*, however, a non-citizen may be declared inadmissible because he or she is "a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage" in terrorism. The much lower standard of proof in immigration law aggravates the disparity between the treatment of citizens and the treatment of non-citizens under Canada's anti-terrorism laws.

Another example of a disparity between the *ATA* and *IRPA* is with respect to preventive or investigative detention. Under s.58(1)(c) of the *IRPA*, immigration authorities can detain a non-citizen on the basis that "the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international human rights". Detention under this provision, like preventive arrests under the *ATA*, is subject to review within 48 hours. However, investigative detention is much harsher under the *IRPA* because under the immigration law such detentions are capable of continuous extension by way of 30 day reviews as opposed to the 72 hour outer limit on preventive arrest under the *ATA*. Canadian authorities used the power of investigative detention in connection with Project Thread, in which 21 non-citizens from South Asia were arrested to headline news of a suspected al Qaeda cell. It now appears that these people were guilty of, at most, typical immigration law violations. Their detention as suspected terrorists has forced some of them to claim refugee status. The use of harsher anti-terrorism laws against non-citizens than against citizens must be justified in light of concerns about discrimination and in light of the fact that the threat of terrorism is not limited to non-citizens.

Security certificates are the most draconian instrument under the *IRPA* to deal with terrorist suspects who are not citizens. Section 78(g) of the *IRPA* specifically authorizes judges to consider information that if disclosed would injure national security in determining whether a Ministerial security certificate is reasonable. However, the reviewing judge may make his decision without disclosing even a summary of the information to the detainee. This can produce a situation where a judge makes a decision to deport a person from Canada on the basis of evidence not even summarized for the person and without any adversarial challenge to the evidence. In such a proceeding, the government presents evidence to the judge in a closed *ex parte* hearing. It should be noted that in upholding the predecessor of this section, the

[53] But see Audrey Macklin, "Borderline Security" in *The Security of Freedom*, *supra* note 5 at 383.

Supreme Court of Canada stressed the important role of the summary in treating the non-citizen fairly.[54]

The architecture of the *ex parte* and *in camera* procedures of the *IRPA* is duplicated in several areas of the *ATA*. Similar provisions are found in ss.83.05 and 83.06 of the *Criminal Code*, as amended by the *ATA*, and in ss. 5 and 6 of the *Charities Registration (Security Information) Act* also enacted by the *ATA*. In addition, ss. 38.06 and 38.13 of the *Canada Evidence Act (CEA)*, as amended by the *ATA*, also contemplate that evidence in criminal terrorism proceedings may not be disclosed to the accused.[55] An important difference between criminal law and immigration law, however, is that s.38.14 of the *CEA* specifically contemplates a criminal trial judge ordering a stay of proceedings[56] to protect the accused's right to a fair trial. No such provision is found in the *IRPA*, even though immigration proceedings can result in prolonged detention and possibly deportation to face torture.

The Federal Court of Appeal's recent decision in *Charkaoui v. Canada*, rejecting a Charter challenge to security certificates, does not end the case for reform. Although it recognized that security certificate procedures "derogate in a significant way from the adversarial process normally adhered to in criminal and civil matters"[57], the Federal Court of Appeal maintained that the procedures did not violate s.7 of the *Charter*. The Court relied on the government's duty to make full disclosure of the facts in its possession and the judge's "pro-active role in the interest of ensuring fairness" to make this finding.[58] Decary and Letourneau JJ.A. argued:

> the threat of terrorism or a threat to national security does not represent or reflect a situation of normality, at least not in our country....If we were to accept the appellant's position that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined

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[54] *Chiarelli v. Canada*, [1992] 1 S.C.R. 711 at 745-746.

[55] Although s.38.06 allows for balancing of the competing interests in national security and the need for disclosure, the Federal Court of Appeal has suggested that it may only allow disclosure of national security information in cases where innocence is at stake. *R. v. Ribic*, 2003 FCA 246 at para. 27. An Attorney General's certificate under 38.13 would preclude any balancing of competing interests.

[56] A criminal trial judge, however, might have difficulty concluding that a stay was necessary because a fair trial was impossible when that judge might not even have access to the information that is not disclosed to the accused under either ss.38.06 or 38.13.

[57] *Charkaoui v. Canada*, 2004 FCA 421 at para. 75.

[58] *Ibid.* at para. 80.

in that Constitution. We fail to discern any legislative intention along those lines, quite the contrary.[59]

These passages embrace what has aptly been called "the permanence of the temporary."[60] They suggest that the new normal after 9/11 will be a permanent state of emergency, in which the government can derogate from the rights of non-citizens without having to justify its actions under s.1 of the *Charter* and without using the constitutional override under s.33. The Federal Court of Appeal stresses the public's interest in indefinitely incapacitating non-citizen terrorist suspects over the need to ensure that such suspects receive fair treatment. Key to such fair treatment is the suspects' right to mount an adversarial challenge to government's case against them, a case that may be based on faulty intelligence either from governments or from terrorists who are being held under extreme conditions. Miscarriages of justice in past terrorism cases resulted in large part because the state did not disclose all the evidence to the accused.[61] If such miscarriages can occur in criminal trials and appeals, they can certainly occur under the truncated procedures of the immigration law. [62]

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[59] *Ibid.* at para. 84.

[60] D. Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers Be Normalized?" in *The Security of Freedom, supra* note 5 at 21.

[61] See K. Roach and G. Trotter, "Miscarriages of Justice in the War Against Terror" (2005) 134 Penn. St. L. Rev. (forthcoming) for an examination of the Birmingham Six, Guildford Four, Maguire Seven and Judith Ward cases, all involving wrongful convictions for IRA bombings. We also argue that contemporary miscarriages of justice in terrorism cases are probably more likely to occur in immigration proceedings such as the security certificate process than under the criminal law. For example, the Federal Court in *Charkaoui, supra* note 57, at paras. 17-18, indicates that the applicant was recognized in photographs by two terrorists as having been present in training camps in Afghanistan, but no detail is provided on the conditions and methods of identification. On the frailties of eyewitness identification and proper procedures for using multiple photos for identification purposes see Hon. Peter Cory, *The Inquiry Regarding Thomas Sophonow* (Winnipeg: Queens Printer, 2001). Combatant status review tribunals have recently been held to violate the guarantee of due process under the 5th Amendment of the American Bill of Rights, in large part because the failure to disclose classified information to detainees deprived them of the ability to effectively contest the allegations made against them and, in particular, to contest the credibility and significance of statements against them that may have been obtained through torture or coercion. *In re Guantanamo Detainee Cases* 31 Jan. 2005 (U.S.D.C.) per Green J.

[62] For contrasting views about the ability of designated judges to probe the evidence offered in the security certificate process in the absence of adversarial challenge, compare the confidence expressed by the Federal Court of Appeal in *Charkaoui, supra* note 57 at para. 80 in the judge's "pro-active role in the interest of ensuring fairness" with the statements of Judge Hugessen of the Federal Court Trial Division that "we do not like this process of...having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined...If you have a case that is only being presented on one side, you are not going to get a good case....I sometimes feel like a bit of a fig leaf." J. Hugessen, "Watching the Watchers: Democratic Oversight" in *Terrorism, Law and Democracy supra* note 5 at 384-386.

The Federal Court of Appeal's impassioned defence of security certificates as a means to prevent terrorism seems simplistic in light of Canada's new national security policy. That policy aims to protect Canadians both at home and abroad and stresses linkages between the international environment and threats of terrorism in Canada. The detention and deportation of non-citizen terrorist suspects is not a magic bullet that can protect us from terrorism. Indeed, in a world of international terrorism, the deportation of such suspects may not even ensure the security of Canadians, to say nothing of others.

The House of Lord's recent landmark decision in *A. v. Secretary of State for the Home Department*[63] also underlines the need for Canadians to rethink reliance on immigration law to deal with terrorist suspects. The impugned law in A allowed British authorities to detain non-citizen terrorist suspects indefinitely where they could not be deported because of concerns that they would be tortured, and where another country would not accept the person. It was enacted shortly after 9/11, subject to a formal derogation from fair trial rights, but not equality rights. In an 8:1 decision the House of Lords found that the derogation was disproportionate to the terrorist threat and discriminated against non-citizens. Although the legal details are different, the major principles articulated in the judgment could apply in the Canadian context.

Many of the Law Lords stressed that the government could not justify a harsh law that only applied to non-citizens suspected of terrorism when it was clear that some British citizens were also terrorist suspects. This approach, which requires the government to treat citizens and non-citizens equally, finds support in the Supreme Court of Canada's first equality rights case, which recognized that non-citizens were a group particularly vulnerable to discrimination because of their lack of political power. Warnings from both the United Nations Human Rights Commission and the Inter-American Human Rights Commissions about the dangers of discrimination against non-citizens and related dangers of ethnic and cultural stereotyping and profiling in anti-terrorism efforts were also considered by the House of Lords.[64] The mere fact that non-citizens do not have a right to remain in Canada is not a satisfactory basis on which to decide the issue of discrimination.[65] Rather, the focus should be on the truncated procedures and indefinite detention of non-citizen terrorist suspects that is allowed under Canadian immigration law. It is not fair and equal to impose the risk of harsh treatment and perhaps erroneous determination of terrorist connections on non-citizens simply because they are already disadvantaged in

[63] [2004] UKHL 56.

[64] *Ibid.* at paras 62, 69.

[65] *Chiarelli v. Canada, supra* note 54 at 733-734.

Canadian law and politics. The immigration law shortcut in dealing with terrorist suspects raises the question of why we enacted the *ATA* with its many new offences, restrictions on the use of national security information and investigative powers. If the *ATA* is so necessary and valuable, why rely on the short-cuts and displacement strategies of the *IRPA*?

The British law that was held disproportionate and discriminatory in A was enacted in part because the British government to its credit accepted that its commitments to human rights precluded deporting a terrorist suspect to torture. Hence, the impugned indefinite detention regime was deemed by the government to be necessary to deal with terrorist suspects who could not be deported because they would be tortured. The British government now has decided to follow the House of Lords decision and repeal the indefinite detention for terrorist suspects who cannot be deported and replace it with a new system of control orders that applies to both citizens and non-citizens.[66] Control orders were rightly very controversial in Britain and the government responded to this controversy by providing that the law would expire in one year.

Are British-style control orders needed in Canada? In my view, they are not. Preventive arrests, including recognizances of one year duration, are already available under s.83.3 of the Criminal Code, as added by the *ATA*. Unlike British control orders, s.83.3 has the virtue of requiring prior judicial authorization in all cases and a requirement of reasonable grounds to believe that a terrorist activity will be carried out.[67] This is not to suggest that preventive arrests are benign. Even the judicial imposition of conditions on the basis of reasonable suspicions is not something to be taken lightly. The use of such powers is appropriately subject to approval by an Attorney General, special reporting conditions and a renewable five year sunset. Nevertheless, release subject to peace bond type conditions is a more proportionate restriction of liberty than the security certificate process under the *IRPA* which places no explicit limits on detention and allows non-citizens to be detained for years before they are deported and does not clearly instruct judges to impose only proportionate

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[66] *Prevention of Terrorism Act 2005* (U.K.), 2005, c.2.

[67] Section 83.3 (8) of the *Criminal Code* allows a provincial court judge to order that a person enter into a recognizance for up to 12 months. The order may be made if the judge is satisfied there are reasonable grounds to suspect that such conditions are necessary to prevent the person carrying out a terrorist activity.

restrictions on liberty. [68] The Canadian government has not demonstrated the necessity for British-style control orders.

The Supreme Court in *Suresh v. Canada*[69] refused to say that deportation to torture would always be unconstitutional and held out the possibility that undefined exceptional circumstances might make such action constitutional even without explicit statutory authorization or an explicit override of *Charter* rights. The combination of the *Suresh* torture possibility with the security certificate process means that Canada lags well behind Britain in treating non-citizens suspected of terrorism in a fair manner consistent with international standards of non-discrimination and protection against torture. The idea that deportation to torture could be constitutional in Canada is something of an international embarrassment. The Government of Canada should, through an amendment to the *IRPA*, commit itself to never seeking to make use of the *Suresh* exception concerning deportation to torture.

7. The Need for Special Advocates

Michael Ignatieff has stressed the importance of "adversarial review procedures" even within each branch of government[70] in the new battle against terrorism. Adversarial review procedures, however, are absent in parts of the security certificate process and in other parts of the *ATA*. Two main concerns arise. The first is that there will not be adversarial contest to determine whether evidence can legitimately be disclosed to the affected party without adversely affecting national security. The second is that evidence that cannot be disclosed for valid national security reasons will not be subject to adversarial challenge and testing. In my view, a group of security

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[68] Adil Charkaoui, a man detained under a security certificate for more than 20 months, has recently been released subject to strict conditions. *Re Charkaoui*, 2005 FC 248 (T.D.). This decision is consistent with a recent New Zealand case holding that the legislature had not clearly precluded the possibility of bail under their version of security certificates. *Zaoui v. The Attorney General* (Supreme Court of New Zealand, 25 Nov. 2004) [*Zaoui*]. The New Zealand Supreme Court stressed that it was possible for a person to be determined a danger to the security of New Zealand if allowed to remain in the country while still not being an immediate danger if released on fixed conditions for the duration of the lengthy proceedings. *Ibid.* at para. 66. The Federal Court of Appeal has noted that the complex grounds for detaining those under a security certificate are "an overlapping and entanglement of the notions of public danger, danger to public safety or security, danger to the security of Canada, danger to national security, detriment to the national interest and danger to the safety of any person: a veritable abstract work of art in which everyone can see or discover what they wish." *Re Charkaoui*, 2004 FCA 421 at para. 118. Despite this recognition, the court rejected the argument that the security certificate process violated the Charter because it deprived detainees of the right to bail.

[69] [2002] 1 S.C.R. 3 at para. 78. For my criticisms of this exception and arguments that it should be considered a derogation from rights under the *Charter* and international law see my "Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience" (2005) 40 Tex. Int'l L.J. (forthcoming).

[70] M. Ignatieff, *The Lesser Evil* (Toronto: Penguin Canada, 2004) at 10.

cleared lawyers or special advocates could play a valuable role in challenging the government's case with respect to both types of decisions. Special advocates should be senior and independent lawyers who are Queens Counsel, or their equivalent and who could receive a high level security clearance. Such a group could serve as a form of Loyal Opposition whenever proceedings are conducted in an *ex parte* manner because of national security concerns. Special advocates could build on the admirable tradition that senior and respected barristers can act as one of Her Majesty's counsel even while they vigourously oppose measures undertaken by lawyers representing the government of the day. Special advocates could help oppose a culture of secrecy and risk aversion that can develop in the absence of full adversarial challenge.

The McDonald Commission considered an earlier version of the special advocate procedure in its 1981 report. It concluded that "the adversarial element afforded by such a procedure might be rather artificial and would make the process of approving applications unduly complex...an experienced judge is capable of giving adequate consideration to all relevant aspects of an application without the assistance of an adversarial procedure."[71] These recommendations were made almost a quarter of a century ago without the benefit of a model such as the more recent British special advocate procedure. Many contemporary factors, such as the possibility of long-term security certificate detention, the knowledge that non-disclosure of evidence has led to miscarriages of justice in past terrorism cases,[72] and concerns about the reliability of intelligence obtained through the use of extreme interrogation techniques abroad all suggest that there is a need today for full adversarial challenge of the government's case for a security certificate.

Canadian courts have so far been reluctant to appoint such special advocates. To my knowledge, there has only been one case in which a court allowed a security cleared lawyer, employed by the Attorney General of Canada, to serve as a special advocate.[73] The Federal Court of Appeal has adverted to the British experience with

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[71] Canada, *Commission of Inquiry Concerning Certain Activities of the RCMP Second Report*, vol. 1 (Ottawa: Queens Printer, 1981) at 586.

[72] *United States of America v. Burns*, [2001] 1 S.C.R. 283; Roach and Trotter "Miscarriages of Justice in the War Against Terror" *supra* note 61.

[73] For a decision refusing to appoint a respected lawyer to serve as a amicus curiae in a security certificate case see *Re Harkat*, 2004 FC 1717 at para. 42, on the basis that such a procedure is not consistent with the intent of Parliament, was made late in the proceedings and was not necessary because of the proactive role of the designated judge. Note that a security cleared lawyer employed by the federal government was appointed as an amicus in at least one criminal case in which evidence could not be disclosed to the accused by virtue of national security concerns under s.38 of the Canada Evidence Act. The courts recognized that having a lawyer from government serve as a special advocate was not ideal, but was the only practical route given the on-going criminal trial and the length of time required for private counsel including the accused's lawyers to receive security clearances. *Canada (Attorney General) v. Ribic*, 2003 FCA 246 at paras. 42-45, 54.

special advocates, but concluded that it was a policy matter for Parliament.[74] The courts are looking to Parliament for leadership on the issue of special advocates.

Should Parliament establish something like the British special advocate procedure, detainees' lawyers should still have access to as much as the government' case as possible, and they should continue to challenge that case. This is desirable because special advocates will be unable to discuss the national security information with their nominal client. It will be important for special advocates to have access to their nominal clients before they receive protected information. They should also have access to security-cleared experts and even security-cleared surrogate clients who can provide them with additional background information about relevant countries in which the government alleges their nominal clients engaged in terrorism. At the same time, special advocates will continue to be at a disadvantage because they will be unable to hear the affected person's response to the national security information. In addition, open hearings should be held wherever possible.[75] The special advocate approach is not perfect in all respects, but it would help ensure that information that is not disclosed because of concerns about national security would be subject to adversarial challenge.

An alternative that is sometimes used in the United States where courts allow the detainee's lawyer to obtain the necessary security clearance, something that should be possible given the duration of most security certificate cases.[76] In such cases, however, lawyers cannot discuss classified information with their clients. This raises serious ethical issues about distorting the solicitor-client relationship.[77]

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[74] *Re Charkaoui, supra* note 57 at para. 124.

[75] For adverse judicial comments on the mandatory *in camera* provisions in ss.38.02 and 38.11 of the *Canada Evidence Act* see *Ottawa Citizen Group v. Canada (Attorney General)*, 2004 FC 1052 at paras. 34-35, 38 (T.D.). See also *Ruby v. Canada*, [2002] 4 S.C.R. 3 at paras. 52-60.

[76] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (U.S.D.C. 2005) (Green J.). The Federal Court of Appeal has concluded that it is "impractical" for lawyers to obtain security clearances in the middle of a criminal trial. *Canada (Attorney General) v. Ribic*, 2003 FCA 246 at para. 55.

[77] In *Re Vancouver Sun*, [2004] 2 S.C.R. 332 at para. 49, the Supreme Court seemed to disapprove of a judge's order that counsel for the accused in the Air India be able to attend an investigative hearing of a potential Crown witness but not discuss the content of the investigative hearing with their clients. Iacobucci and Arbour JJ. stated that it was "difficult...to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate. In any event, these issues can be left for another day, and should be debated amongst the professional bodies involved so that court-imposed conditions can properly consider ethical standards and best practices in the professions involved."

8. Conclusion

The three year review of the *ATA* provides Canadians with an excellent opportunity to ensure that the *ATA* and related anti-terrorism legislation accord with the goals of Canada's evolving national security policy. The government should give serious thought to narrowing the definition of terrorist activities to focus on the essence of the terrorist threat: violence to innocent civilians. Such a revision would respond to the risk that unlawful protests could legally constitute terrorism and that resources could be misallocated to groups that, while they might satisfy present broad definitions of terrorism, present less serious threats to human security than terrorists intent on murder and maiming. A more minimal reform would be removal of the following controversial references in the description of "terrorist activity" in the *ATA*: disruptions of public and private services, the requirement for political and religious motive, and the reference to crimes intended to influence the behaviour of persons as opposed to governments and organizations. In addition to revisions of the definition of terrorist activities, a few overbroad offences in the *ATA* and the SIA could be defined in more precise and narrower terms to ensure fairness and appropriate targeting. The process of listing terrorist groups could be improved by ensuring that individuals are not listed; ensuring that executive designation as a terrorist group is open to challenge in subsequent criminal proceedings; and providing for ex ante adversarial challenge to the government's case.

Canada should ensure that its anti-terrorism efforts advance the goals of non-discrimination by including an anti-discrimination and anti-profiling clause in the *ATA*. It should also make this commitment real by reconsidering the security certificate process. This process, at present, could result in a terrorist suspect's detention for years and then, on the basis of evidence not disclosed or even summarized for him, deportation, possibly to torture. One reform would be to allow security cleared special advocates to challenge those parts of the governments case not disclosed to the affected party. Such adversarial challenges could help improve both the fairness and accuracy of the government's anti-terrorism efforts.

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