

CASE STUDY: CANADA ANTI-TERRORISM LEGISLATION¹

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I would like to thank the Commonwealth Human Rights Initiative for their continued interest in following anti-terrorism legislation, including their comparison of countries in the Commonwealth. This ongoing study is absolutely essential in these post September 11 times, as most legislation was quickly cobbled together as a reaction to the terrorist attacks, but without the kind of analysis normally allowed during the legislative process, and more particularly, without the kind of debate and scrutiny that Parliament and others are called upon to provide for less 'crisis-driven' legislation. This is certainly more acutely desirable when so many civil rights of citizens were curtailed in favour of the sole right of security. While security was the single most important demand of many citizens, the tools employed and justifications made by most democratic governments closely resembled statements and actions that repressive governments have used to control their citizens, and diminish their rights. It is critical that democratic countries hold their governments accountable to ensure that security gains do not disproportionately outweigh the loss of other rights. To do so would be to defeat the essence of free societies and the gains in human rights that democracy offers its citizens. Therefore, the question is whether the right balance has been struck: It is a question of proportionality.

The second question is whether, at the present juncture, and with some experience and time for reflection, could the gains for security that were sought after September 11, be achieved by some other means than the erosion of rights. Also, experience has shown that powers obtained and continued, in time, are used in ways not first intended. This is an element that must be more fully canvassed.

Critical analysis in Canada has shown that, for example, immigration authorities have used for the sake of expediency, in normal cases, the tools that were provided to them to deal with the most extreme crisis situations. This is far removed from the original intent for which they were given in the first place.

Despite our claims that we are all such different democracies, my experience with September 11 indicated that our responses were strikingly similar, but the devil may certainly be in the details and future operations.

¹ Text adapted from presentation to CHRI Seminar

With this in mind, let me turn to the Canadian experience. By way of background, Canadians (apart from our Aboriginal citizens perhaps), generally see Canada as a relatively young country made up of immigrants who, in many cases, fled some form of repression for the chance to develop and grow in a country conscious to build the freest and most democratic society possible for its citizens, tolerating, and even enriching diversity.

Since many Canadians (and here acknowledging Aboriginals as well) were not immune from experiencing repression in their lives, it was a collective determination to ensure that the new country would offer a human rights legacy from which all Canadians could benefit. The expression of this will culminated, in 1982, in an entrenched Charter of Rights and Freedoms in our Constitution.

However, at moments of 'threats', Canadian governments acted to prioritize security at the expense of human rights. The brunt of these actions was generally felt not by the majority in Canada, but usually minorities, often ones struggling to enter the mainstream and therefore already in a position of vulnerability. One need only remember, at the time of World War I, the internment of Canadians and landed immigrants from Ukraine, Poland, and others of Austria-Hungarian roots, as well as the internment of Japanese and Italians in the Second World War. Also, it is worthy to note, the 'War Measures Act' that was adopted for World War One, and which gave the Canadian government sweeping powers, including the curtailment of citizens rights in times of war, was used in the now famous 'October Crisis' of 1970.

It was only in the 1980's that a revision of the Act led to the conclusion that its invocation and use caught many innocent citizens in its net, thus proving the Act was not necessary and that it needlessly harmed Canadians. Recourse to National Security legislation would surely have proven more appropriate.

In all these instances, and others (such as strike actions), the government moved quickly in apparently volatile situations, and acted by employing, to the fullest extent, the powers at its disposal. Hindsight proved that the actions were found to be too severe, and that they unjustly targeted minorities who, by and large, were loyal to Canada. However, this does not re-assure human rights activists who recognize that Canadians are quick to pride themselves on their country's human rights reputation, but soon forget the lapses.

Canadian leaders use our usually good human rights record to their advantage in Canada and around the world. But a more realistic look would show that when concerns for greater security rises, governments are less inclined to put weight on human rights defences. They fall back to the age old arguments of 'trust us', 'security intelligence we have but can't disclose', 'we need the tools to act quickly' etc. To maintain political power, it appears more expedient to allay the fears of society by diminishing human

rights as opposed to alternative measures. Preparedness in such areas as proper security training and intelligence, for example, is not a priority until it is a crisis.

There has not been any over-arching legislation or policy coordination in this area in Canada. In a democracy, the thwarting of terrorist activity should not be an exercise in wielding blunt authority that undermines other freedoms. In Canada, the final arbitration is in the courts as they interpret the Charter of Rights and Freedoms and consequently, the legislation and the use of power by the government and Parliament.

Prior to September 11, there was no real mechanism for Parliament to oversee the government on terrorist activity or indeed security and intelligence issues. While over the years there had been reviews of particular agencies and policies, they were specific in nature. Certainly the civilian oversight group, known as CIRC, was an effective ongoing oversight of Canada's Security Intelligence Agency (CSIS). The Senate of Parliament had three separate broad mandates to review security and intelligence issues and mechanisms starting in the 1980's. The last report, entitled *The Report of the Special Senate Committee on Security and Intelligence*, was issued in January, 1999. The Committee noted some security improvements and identified further issues for follow-up, some of which the government acted upon.

With respect to security threats, the Senate study pointed out security gaps that could be closed, and identified the need for increased resources, training and co-ordination of security agencies. Bin Laden and Al-Qa'ida were recognized as threats, along with a host of other people and organizations. Money-laundering, drug activity, gang issues were noted as linkages to terrorism. Immigration issues were flagged, and for the first time, charitable activity as a front for terrorist or criminal activity was also cited. However, the Report cautioned that any action against charities should allow for 'due process'.

When September 11 occurred, the Canadian government, as others, was in a state of shock and disbelief. It was this single event that moved the Canadian government to take action, while in crisis mode, on U.N. Resolution 1373, and at the urging of the United States. Fear proved to be the impetus behind the government's swift action. Virtually non-stop press reporting of security threats, and of security lapses, both in our country and elsewhere, was the order of the day. Parliamentarians on all sides questioned the strength of security systems and in particular, at airports and at the border. If one simply listened to the press and government officials, one would quickly conclude that we were in a state of crisis and that the terrorists had the upper hand. For example, much discussion pointed to our 'lax' immigration process. Yet, we had just passed an immigration bill tightening loopholes which, in the eyes of many informed immigration agencies and individual experts, unduly limited due process and gave sweeping ministerial discretion without further Parliamentary input.

Prior to the terrorist attacks on New York, Washington and Pennsylvania, legislation aimed at combating money laundering had been strengthened, criminal legislation added and international involvement in these, and other issues, had been progressing.

In order to address September 11, the Government produced Bill C-36, a sweeping piece of anti-terrorism legislation that amended a number of laws, and gave itself very wide ministerial discretion in a number of areas, void of any scrutiny in some cases, and without the possibility for appeal in others. Most troubling was the curtailment of the Access to Information Act (in some cases unlimited in time), the Privacy Act and the reduction of due process. The focus on rushing to adopt the Bill also excluded the possibility of finding less radical, but perhaps more appropriate solutions to terrorist threats, such as either analysing existing mechanisms, or the National Security Act.

More appropriately, the bill gave implementation authority for the Anti-terrorism Conventions of the U.N., thereby bringing Canada in compliance with all twelve of these U.N. instruments. Also, more resources, both financial and personnel were directed to security agencies and government departments.

Interestingly, the police and security agencies were successful in receiving tools that they had previously requested, but had been denied. Where the government had originally indicated that these tools were unnecessary, or were not in keeping with Canadian justice, or that they unfairly curtailed civil freedom, it then turned 180 degrees from this position, and gave full credence and effect to the measures set out in Bill C-36. In other words, September 11 pushed the government to the curtailment of human rights without nearly as much question as before. All attention was on security. In fact, Parliamentarians and even some academics who had previously advocated human rights, defended C-36 by saying security trumped all other human rights. It was only after other human rights proponents reminded these people of the Vienna Conference on Human Rights, where it was recognized and agreed that the true question at issue was one of proportionality, that some degree of debate concerning other rights began.

Canada's decision to enact such sweeping legislation, I believe, was affected by another trend which continues to exist to this day. Presently there is a tendency to use the enactment of laws as the best or only answer to a societal problem. Increasingly, the demand for so called tougher legislation, especially in criminal law, has been the 'quick fix' approach. However, 'quick fixes', in time, frequently prove to provide wrong answers. Proper implementation of existing legislation, increased resources or training, or a change in modalities of operation, often prove sufficient, as opposed to adopting new legislation.

In Parliament, the new legislation was 'pre-studied' – a mechanism that allows Parliament to study the contents of the Bill before actually receiving it. In the Senate, the

opposition pointed out that, apart from U.N. implementation needs, the current National Security Act, and other legislation, gave the government the powers it needed to face real threats, while giving a substantial degree of oversight and due process to its citizens. However, the government persisted in seeking most of the powers it had requested. There was a feeling that increasing security necessarily meant a substantial loss of rights, thereby releasing the government of its burden to prove all other avenues had been exhausted. Even Parliamentarians in the opposition, in many cases, hesitated to question this balance for fear of being wrong. The Press continued to point out every fact, rumour or scenario as to what could go wrong, despite most reported information turning out to be just rumour or precaution.

In the Senate, the opposition therefore concentrated its efforts on questioning the use of certain extraordinary powers granted to the police and security agencies, as well as the overwhelming unfettered discretion given to government ministers. It placed greatest emphasis, however, on the need for Parliamentary oversight, lapsing provisions for the more arbitrary provisions, annual reviews and a sunset clause for the Bill. The government yielded, to a certain degree, by adding a sunset provision, at section 83.32, to certain clauses, as well as by providing an annual review of the legislation, though not binding itself to any depth or obligations to be contained in the report.

In order to understand the Canadian situation in reaction to the threat of terrorism and international crime, a brief summary of a number of legislative initiatives undertaken in the country since September 11, 2001 is in order.

As previously mentioned, Bill C-36, the *Anti-terrorism Act*, which received Royal Assent on December 18, 2001, is the centrepiece of Canada's anti-terrorism legislation. An omnibus bill, it amends 19 pieces of legislation.

Bill C-36 was hurriedly passed by the House of Commons on November 28, 2001, about six weeks after it was introduced for first reading, and only two and a half months after the terrorist attacks on New York, Washington and Pennsylvania. It received Royal assent on December 18, 2001, just four months after September 11. One may seriously question whether the government set aside enough time to adequately assess the full ramifications of adopting this wide-reaching bill. In order to pacify fears that the Bill may have gone too far, too fast, the government included a section that amends section 83.31 of the Criminal Code, which requires the Attorney General of Canada to prepare and present to Parliament an annual report on the operation of the sections of the Bill dealing with investigative hearings into terrorist offences, as well as the procedure used to obtain a recognizance order as a means of preventing terrorist activities from being carried out.

A number of criticisms can be levelled against the Annual Report. First, it arrived late. Was the government serious about its duty to be accountable to the Canadian public in

respect to the Bill? The Report is also narrowly confined to only two sections of the Bill, though, admittedly, this represents more a weakness of the Bill than of the Report. However, the breadth of C-36, and its potential negative impact for civil liberties certainly justifies more than the scant six-page review focused mainly on describing the bill, that the Report has to offer. It offered little in the way of analysis of the Bill's impact.

Various human rights groups in Canada have demonstrated grave concern with the overarching, and what some have even qualified as 'draconian', provisions of Bill C-36. The International Civil Liberties Monitoring Group on May 14, 2003 observed:

The *Anti-Terrorism Act* (Bill C-36) grants police expanded investigative and surveillance powers, allows for preventative detention, undermines the principle of due process by guarding certain information of "national interest" from disclosure during courtroom or other judicial proceedings and calls for the de-registration of charities accused of links with terrorist organizations. All of these changes occur on the basis of a vague, imprecise and overly expansive definition of terrorist activity.

... (T)his trend in legislative and policy initiative has a far-reaching impact and represents a significant shift in the relationship between citizens and the state in Canada.

The Federation of Law Societies of Canada has pointed out, in a submission to the Senate Committee on Legal and Constitutional Affairs, that under section 83.18(1) of the Bill, a lawyer representing individuals or groups subject to the provisions of the Bill, could be considered to be providing a "skill or expertise", and thereby risk up to ten years in prison. The Federation also expresses fears that lawyers who accept disbursements or professional fees may fall under the scope of section 83.08, which makes it an offence to knowingly deal directly or indirectly in any property owned or controlled by, or on behalf of, a terrorist group. This severely undermines one's right to retain and instruct independent counsel. Risking the severe penalties associated with these provisions, simply for defending a person who is accused of an offence falling under the ambit of the Bill (and not someone who has been found guilty), will very likely cause a great deal of hesitancy before taking on such a case.

Solicitor-client confidentiality may also represent another potential casualty within the Bill. Section 83.1(1) states that every person in and beyond Canada shall disclose to the authorities the existence of property in his or her possession or control that he or she knows is owned or controlled by, or on behalf of a terrorist group, and information about any transaction or proposed transaction in respect of such property. A lawyer who falls afoul of this section is liable to ten years in prison or \$100,000 in fines. The Federation

fears that, in this way, the Bill may force lawyers to act as witnesses against their own clients if they wish to avoid such imposing penalties.

Section 83.28 represents a potentially serious attack on principles of fundamental justice, due process, including the right to remain silent, and may also gravely undermine solicitor-client privilege. The section authorizes investigative hearings to be used to compel individuals, who police believe may possess information relating to terrorist acts that have or may be committed, to appear before a judge to answer questions and produce materials. The role of the judiciary in this process is blurred by placing it considerably closer to the government's role in the investigatory process. Judicial independence, therefore, becomes seriously compromised. Also, investigative hearings that involve lawyers asked to give testimony against their clients discard any notion of solicitor-client privilege. In an additional blow to principles of fundamental justice and due process, section 83.29 grants judges involved in such proceedings the power to issue a warrant for the arrest of individuals who have been ordered to appear at investigative hearings, despite the fact that no charges have been laid, and no trial in an open court is taking place. To date, according to the Annual Report, the government has indicated that these sections were not used. However, the International Civil Liberties Monitoring Group observed at least one case of the use of these sections, although no charges were laid.

As the Federation of Law Societies of Canada stated in its submission to the Senate Standing Committee on Legal and Constitutional Affairs, "Weaving these procedures into the *Criminal Code* will make these extraordinary measures part of normal criminal procedure."

Bill C-36 amends provisions of the *Access to Information Act* in a manner that adversely impacts principles of fair and open government. Section 104 of the Bill gives the government the power to suspend the *Access to Information Act* in the interests of national security. Neither the Information Commissioner nor the courts would be able to inspect government documents to check whether the government had used this power appropriately.

The Bill also has the potential to indefinitely nullify parts of the *Privacy Act* by ministerial fiat. It grants power to the Attorney General to personally issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security. The effect of issuing a certificate not only means that classified information cannot be released, but also that the Privacy Commissioner can no longer review the information in question. Therefore, there would be no oversight in respect of a government decision to withhold information.

According to Bill C-36, 'terrorist activity' is 'an act or omission, in or outside Canada' that is motivated 'in whole or in part for a political, religious or ideological purpose,

objective or cause ...' It is very possible that such a vague and expansive definition catch much more than terrorist activities in its net. Union activity could fall within this definition, as could the activities of other public interest groups such as environmental organizations.

The inclusion of religion as a motive for 'terrorist activity' within the Bill may cast a pall over one's faith. The Muslim and Arab communities of Canada have already expressed that many of their members consider that they have fallen victims to racial or cultural profiling because of the Bill. People have expressed fear that sections of the Bill may make them guilty simply because of their association with members of their community. They recognize that members of their community, under threat of arrest according to the section of the Bill that compels people to give evidence against terror suspects, may feel that they have to submit to 'voluntary interviews', thus unduly creating suspicion and tension within the community.

Bill C-36 may also adversely affect the work of charity organizations. If the Solicitor General or the Minister of National Revenue has reasonable grounds to believe that an organization is involved in making resources available to an entity that has committed, or is plotting to commit an act of terrorism, they may issue a security certificate seeking to revoke the organization's charitable status. Assets may even be frozen. The certificate is reviewed by a judge of the Federal Court of Canada, who may exercise authority limiting disclosure on the grounds of 'national security'. The court does not have a record of being receptive to issues of disclosure. In the past twenty years it has rarely ordered the release of information for which an exemption from release was sought. Not only is there yet another serious breach of fundamental rules of due process, but there is great potential for a 'chilling effect' on charity work. Given the loose definition given to the term 'terrorist organization', Charitable organizations may opt out of serving certain regions of the world in order to avoid the serious repercussions that could flow from the issuance of a security certificate.

Without a doubt, Bill C-36 represents a serious assault on civil liberties in Canada. One may applaud the Bill's limited sunset clause, which stipulates that the provisions dealing with investigative hearings and preventive arrests terminate after five years, unless a resolution is made by both Houses of Parliament to re-enact the statute for up to five more years. However, as already observed, there is no sunset clause whatsoever in respect of the remainder of the legislation. It should apply more broadly to other sections of the Bill, such as the ones identified above, which also seriously compromise civil liberties.

In addition to Bill C-36, the government has passed other laws that seek to confront the threat of terrorism and organized crime.

With the enactment of Bill C-35, the Royal Canadian Mounted Police were given primary responsibility to ensure security for the proper functioning of intergovernmental conferences. The Bill also protects persons attending conferences by granting privileges and immunities under legislation, similar to immunities and privileges enjoyed by diplomats. The Bill went to first reading on October 01st, 2001, a little over two weeks after September 11. It came into force on April 30th, 2002, in time for the June 2002 G-8 summit held in Kananaskis. Bill C-35 represents an imbalance between freedom of expression and movement on the one hand, and the power to restrict protestors, on the other. By allowing the police the right to determine this balance, it is inconsistent with their traditional role to protect citizens and hence the fear of imbalance between the right of assembly and expression with that of the right of security.

Bill C-24, *An Act to amend the Criminal Code (organized crime and law enforcement)*, came into force January 7, 2002, except for a few provisions that became enforceable law one month later. The purpose of the Bill is, in part, to increase police powers to combat crime. This includes allowing the police to engage in a wide range of activity that otherwise would be illegal, when investigating criminal activity, as well as providing broader measures for investigation and prosecution in connection with organized crime through the expansion of the concepts of criminal organization and criminal organization offence.

According to Canada's Solicitor General, the Act can also be applied to investigate terrorist groups. Because the powers are so broad and loosely framed, there is real potential for abuse.

The following bills have amended Canada's privacy rights in a manner that limits the scope of such rights. Bill C-44, which received Royal Assent on December 18, 2001, authorizes the operator of any aircraft, departing from, or arriving in Canada to provide to the competent authorities in foreign states, any information relating to persons on board or expected to be on board the aircraft. The Bill states that only information relating to protecting national security or public safety, or for the purpose of defence, is to be collected or disclosed.

Bill C-22, which was assented to June 29th 2000, establishes, in part, an independent agency, called the Financial Transactions and Reports Analysis Centre of Canada. The Agency maintains the power to collect, analyse, assess and disclose information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities. It has authority to disclose information to various law enforcement agencies and other entities.

Finally, amendments made to the Customs Act in 2001, gives the Ministry of National Revenue the power to require 'a prescribed person or a prescribed class of persons', to

provide access to information about any person on board any vehicle aircraft or ship before the person's arrival in Canada.

As the International Civil Liberties Monitoring Group mentioned in "In the Shadow of the Law":

We could soon find ourselves in a situation where all personal information on Canadians will be in the hands of, and managed centrally by American security agencies unaccountable to Canadian Parliament and the Canadian public. There is a very disturbing trend in this emerging discourse that "security" will only be achieved at the expense of sovereignty and the civil liberties that Canadians have always regarded as fundamental.

As these bills curtail privacy rights, it is important to recognize that a balance must be struck between ceding our privacy rights, and responding to security concerns for ourselves, and that owed to our neighbours. We have found from past experience that, even with the best intentions, and when the best of protocols are put in place, it is difficult to ensure that the information contained in data banks will be exclusively used for their intended purpose.

There is also a possibility that other anti-terrorism related legislation that has been tabled, but that has not yet become law, could affect fundamental human rights in the future.

Bill C-18, *An Act respecting Canadian Citizenship*, is presently at Committee stage before the House of Commons. The Bill sets out the process by which a person's Canadian citizenship may be revoked in the event that one is declared inadmissible on grounds such as security concerns, or maintaining connection to organized crime. In determining whether or not Citizenship is to be revoked, a judge sitting on the matter would have the power to decide that, due to national security concerns, or for the safety of an individual, the requirement for full disclosure may be waived. The Bill puts into jeopardy due process, transparency, the right to appeal, or independent review.

Given the recent activity in the area of anti-terrorism legislation, can Canadians truly claim to be safer and better off, from a security perspective, than before any of these laws were adopted? Will we be further well protected if the proposed pieces of legislation become the law of the land? A number of signals, raised by people concerned with the trend toward according fundamental human rights second place to security, point to a genuine apprehension with the present direction upon which we are set. It has been noted that each piece of new legislation is drastic and 'probably unwarranted'. The cumulative effect will certainly diminish and erode civil rights, especially as it pertains to due process and privacy rights.

Bill C-36, and all the accompanying anti-terrorism bills, both adopted and proposed, offer at best a partial answer to our present security concerns. To be sure, September 11 was a stark reminder of the importance that security matters must play in society. The Universal Declaration of Human Rights recognizes everyone's right to the security of the person. I therefore support the ratification of all twelve U.N. anti-terrorism conventions. One must also recognize, however, the need to attain proportionality between human rights and security.

The government of Canada has taken away aspects of fundamental human rights, in the name of security, through the adoption of various anti-terrorism and anti-crime laws. However, there is little evidence that these new laws have gained a greater measure of security for Canadians. Threats still exist, and informed opinion still places greater support for better intelligence gathering, for instance, as the root for greater security. The new bills and other policies place (hitherto unknown in our system) unfettered judicial and administrative powers in a handful of ministries and bureaucrats, often without review.

The deepest concern surrounding the present state of human rights, is trying to foresee how the government is going to exercise its newly acquired powers over citizens. We can only guess as to the extent that the recently adopted legislation is going to impact our lives in any given crisis in the future.

Finally, because we have had limited use of anti-terrorism legislation up until this point, we must question its necessity in the first place. Are we safer today than we were two years ago? The verdict is still out. Were there adequate tools already existing to deal with the threat of terrorism, even before the events of September 11?

The general consequence of anti-terrorism legislation on human rights in Canada has been the chill effect. The rights that we have enjoyed until so recently in Canada were acquired not without difficulty. They represent hard-earned gains that have been won over the centuries. From the Magna Carta of 1215 to the Supreme Court decisions of today; The struggle against arbitrary and unjust rule is a constant one that is as relevant in contemporary society as it was in feudal times. Governments must not be given the latitude to ignore the significance of all that has been gained to protect citizens against the misuse or abuse of state power.

Therefore, a degree of proportionality must be found when seeking to balance the security requirements of society and fundamental human rights. Unfortunately, this symmetry risks being lost in Canada. There is a way, however, to recover rights that have been taken away. New laws that offer better or different proportionality can be adopted. Laws that undermine our rights and freedoms can be either amended, or repealed. Organisations such as the International Civil Liberties Monitoring Group, as well as law

societies, among other professional organizations, must continue to monitor the activities of our government, and highlight those areas where our fundamental rights and freedoms are being seriously undermined. Above all, it is the duty of Parliamentarians to continue to monitor, to critique, to question and to review the actions of government and the workings of legislation in order to ensure that freedoms are maintained, and security established.

The adage stating that when a society gives up rights for security, it ends up with neither, remains, undoubtedly, truly pertinent at this time. Our rights and freedoms can never be guaranteed, or taken for granted, even in an open and democratic society. However, they can be slowly whittled away, leaving nothing more than a husk of the open and democratic society in which they used to strive. It is our collective responsibility to make sure that this never happens.

Thank you

Addendum

Since the presentation on June 05, 2003, the Supreme Court of Canada imposed a sweeping ‘gag order’ on its first case that considered whether the country’s new anti-terrorism law is a violation of constitutional rights. The case, as gleaned from meagre press reports, relates to a witness, who is not a suspect, in the 1985 Air India bombing case, but who is indicating that he is being forced to testify at a hearing that is not a trial. This hearing is allegedly the secret ‘investigative hearing’ process created in Bill C-36. The Parliamentary Press Gallery is on record indicating its anger at the denial by the Court for notification of this process. It has said: “The new procedure was said to mark a historic departure from the open court principle and other charter guaranteed principles of fundamental justice in Canada. The Gallery is, therefore, extremely concerned that any Supreme Court of Canada hearings into a historic constitutional challenge be conducted in an open court.” The final determination is yet unknown.