

# Swimming Against the Tide:

## *Human Rights in a Time of Fear*

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**W**e are living through a bad period for human rights, when our easy assumptions about the guarantees found in domestic or international law must seem, in retrospect, naïve. For the moment at least, the human rights well has been poisoned by the events, which transpired in New York on September 11, 2001.

To see the extent to which real or perceived security concerns carry the day, one need only scan the daily media. For example, *The Guardian* on February 6, 2003, reported on a discussion paper prepared for the UK government, which canvassed the possibility of that country withdrawing from the 1951 Geneva Convention on the Protection of Refugees and from some of its obligations under the European Convention on Human Rights. All of this to enable the government to deny asylum more easily to those who might pose a security threat. Unsurprisingly, the authors concluded that the government could not easily abrogate the country's longstanding commitments under these treaties. This conclusion is hardly reassuring when weighed against the remarkable fact that a Labour government, whose party traditions have historically been so closely identified with the ideals of social democracy and protection of disadvantaged groups, would contemplate rolling back human rights protections that have existed for half a century.

On the same day, the BBC reported that four more detainees at the United States prison at Guantanamo Bay had attempted to kill themselves, bringing the total number of attempted suicides to fourteen during the past year. All of the more than 600 Taliban and Al Qaeda suspects imprisoned in this US enclave are denied the rights that would normally accrue to them as prisoners-of-war – for example access to lawyers and

visits from family members. By being detained outside the United States, they also lose the procedural safeguards that would otherwise be available to them under that country's Bill of Rights. To date, none of these individuals have been charged with a crime and very few have been released, a situation that does not appear likely to change in the near term.

In the immediate wake of September 11, 2001, both the United States and the UK passed legislation greatly expanding the powers of law enforcement agencies to arrest and detain those suspected of involvement in terrorist activities. Canada, generally seen as a more benign regime, has enacted its own Anti-Terrorism Act, which came into force on December 18, 2001. Like its American and British counterparts, the Canadian legislation was given an expedited ride through the legislature, where Committee hearings were held under a compressed timetable. A number of groups appeared before the House of Commons Justice Committee, including the Canadian Human Rights Commission, the federal Privacy Commissioner and the Canadian Bar Association. A theme common to many of the presentations was that the powers contained in the law were too undefined and that the government should take the necessary time to achieve an appropriate balance between security concerns and fundamental liberties.

Features of the proposed Canadian law that caused particular concern included the definition of groups deemed to be engaged in terrorist activities (which as initially presented would almost certainly have included certain organizations hitherto viewed as legitimately working towards the achievement of political change); the powers to arrest and detain a person without a warrant if a police officer believed this was necessary

to prevent terrorist activity; and a requirement to answer questions even if to do so might incriminate the person concerned. While some minor amendments to the proposed law were accepted, its fundamentals were not altered.

The potential for police to resort to racial profiling in identifying potential terrorists was an immediate concern of many critics of the new law. Although there is not evidence of any pattern of official abuse by Canadian authorities, representatives of the Muslim and Arab communities remain understandably concerned at the increased surveillance and intermittent hostility to which they have been subjected. In one unfortunate incident, an Iranian law professor who had, ironically, come to Canada to improve his English was arrested and prosecuted for suggesting to a flight attendant who attempted to jam his briefcase beneath his seat that she should be careful or the case might explode. His comments came on the final leg of a long, tiring journey and evidence was given that the word 'explode' could in the Farsi language also mean to burst or pop open. The defendant was granted an absolute discharge by the Court, but only after spending 26 days in jail awaiting trial.<sup>1</sup>

A number of years ago, Pierre Trudeau observed that for Canadians, living next door to the United States was analogous to a mouse sharing its bed with an elephant. If the latter rolls over, we are in trouble. This has proven to be particularly the case for certain Canadians living in or passing through the United States. Individuals unfortunate enough to have been born in countries on the list of states deemed by the US government to be terrorist-supporting have found their Canadian citizenship to offer limited, if any protection. Certainly, it has not prevented some from being detained, for up to a year, with consequential damage to careers and family life. One unfortunate Canadian, born in Syria from which he had departed many years earlier without completing his military service, was unwise enough to travel abroad and return to Canada via New York. He was detained there by US Immigration for several days and then turned up in

Syria, apparently after having been sent to Jordan first (the full facts are still not clear). Neither Canadian consular authorities nor his anxious wife in Ottawa were informed of his detention for several days. The latter was understandably distressed when she eventually learnt of her husband's fate. No apology or explanation has been forthcoming as to why this Canadian citizen was not simply put on a plane to Canada.

Many other examples could be cited where the civil liberties of individuals in Canada have been compromised, primarily if not solely because of their national origin. Their stories do not necessarily show up as statistics of complaints filed with human rights agencies, either because the individual does not wish to draw further attention to an indignity he or she has suffered – such as the public servant of Iranian origin living near the United States embassy whose apartment has been visited on three occasions by Canadian security officials - or because their difficulties occurred outside of Canada's jurisdiction – as was the case with a Canadian physician of Middle Eastern origin who was prevented from delivering a paper at a prestigious medical conference in the United States when he was denied entry, finger printed and detained for several hours, ostensibly for security reasons, after his aircraft touched down.

The excesses associated with the anti-Communist scares of the 1940s and 1950s in the United States are well known. But Canada too has acted in the past to deprive citizens of their rights on grounds that did not withstand the light of subsequent scrutiny. Notable examples were the deportations of political radicals in the wake of a 1919 general strike and the detention in camps and seizure of the property of Japanese Canadians during the Second World War. During this difficult period, it is important not to lose sight of the lessons of history, which teach us that measures deemed necessary at a particular moment are often shown, with the passage of time, to have been overly broad and with pernicious consequences for vulnerable groups in society. ■

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<sup>1</sup> Toronto Globe and Mail, February 6, 2003