

CANADA

Country Report: Anti-terrorism laws & policing

1. Country summary*

- a. **Government:** Constitutional monarchy that is also a parliamentary democracy and a federation
- b. **Population:** 33 098 932
- c. **Size:** 9 984 670 sq km
- d. **Region:** North America

- e. **General**

In the immediate aftermath of the terrorist¹ attacks on the USA in 2001, the Canadian government attempted to bolster its national security capabilities through two major undertakings. One was the omnibus anti-terrorism legislation, the *Anti-Terrorism Act* 2001. The other was the December 2001 security budget introduced by then Finance Minister Paul Martin. The Canadian Security Intelligence Service (CSIS) has asserted that there is a significant terrorist presence in Canada.² Around 40 terrorist organisations are proscribed in Canada under the *Anti-Terrorism Act* 2001.

Four major events took place in 2006 and 2007 that significantly changed the face of anti-terrorism laws in Canada:

- The Superior Court of Ontario found that the use of sections of the *Security of Information Act* were invalid as they infringed the Charter of Rights and Freedoms. The Court also turned down the Crown's request to have the declaration of invalidity suspended for one year to allow Parliament to formulate new and lawful legislation.
Link: <http://www.cjfe.org/releases/2006/19102006oneill.html>
Link: <http://www.canlii.org/on/cas/onsc/2006/2006onsc16405.html>
- The definition of terrorism used in the *Anti-Terrorism Act* 2001 was struck down by an Ontario Superior Court decision. This left the Act with no definition of terrorism.
Link: <http://jurist.law.pitt.edu/paperchase/2006/10/canada-judge-rules-terror-definition.php>
- The Supreme Court of Canada struck down parts of the security certificate procedures as unconstitutional. It gave the federal government one year from the decision to replace the system with procedures compatible with the Charter of Rights and Freedoms.
Link: <http://www.cbc.ca/canada/story/2007/02/23/security-certificate.html>

* Many thanks to Ashley Carver and Kent Roach for their thoughtful reviews of this report. Their contributions have been relied upon throughout.

- The laws that were passed in 2001 contained a five-year sunset clause. The federal government was not successful in renewing the most contentious aspects of the laws, including the provisions regarding preventative detention and investigative hearings.

Link: <http://www.cbc.ca/canada/story/2007/02/27/terror-vote.html>

2. Relevant legislation

Criminal Code 1985

Security of Information Act 1985

Anti-Terrorism Act 2001 (ATA) –activates tools to identify, prosecute, convict and punish terrorists. The ATA amended a number of federal acts and added extensive new anti-terrorist measures to the *Criminal Code*.

Proceeds of Crime (Money laundering) and Terrorism Financing Act – was amended as part of the *Anti-Terrorism Act* 2001.

Immigration and Refugee Protection Act 2001 – legislated “security certificates”, which allow non-citizens suspected of involvement with terrorism to be detained pending deportation.

Public Safety Act 2002 (as enacted in 2004) – amended numerous existing Acts by adding provisions addressing terrorism.

3. Law summary

A series of new laws were passed in Canada after the attacks on America in 2001. The legislation introduced security certificates, which have proven controversial. A number of significant events occurred in 2006 and 2007, rendering some of the anti-terrorism legislation void or expired (see below).

4. Provisions

a. Definition:

Criminal Code, section 83.01 provides that:

“terrorist activity” means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:


(i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, signed in Vienna and New York on March 3, 1980,

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- (vi) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,
 - (vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, signed in Rome on March 10, 1988,
 - (viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, signed in Rome on March 10, 1988,
 - (ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and
 - (x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(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 to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(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,

(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

(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), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling 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.

Nota Bene:

(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.

“Terrorist group” means

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

and includes an association of such entities.

b. Arrest

Section 83.3 of the *Criminal Code* establishes a preventive arrest measure against terrorism. To make use of this provision, a peace officer must believe on reasonable grounds that terrorist activity will be carried out, and suspect on reasonable grounds that imposing conditions for supervision or arresting a person is necessary to prevent this activity from being carried out. If these conditions are met, the peace officer can bring the person before a court with a summons, or alternatively by arrest with or without a warrant, so that a judge may determine whether or not to order a recognisance to keep the peace. The recognisance, which requires the person to adhere to certain imposed conditions, can be for a maximum period of twelve months.

This provision was not renewed and expired on 1 March, 2007.

c. Detention/custody


Recognisance with conditions: A recognisance is a bail document signed by the accused and sureties stating the terms and conditions upon which the accused is being released. The *Code* does not explicitly provide what the conditions of the recognisance must be.

Section 83.3 of the *Criminal Code* establishes recognisance with conditions. To make use of this provision, a peace officer must believe on reasonable grounds that a terrorist activity will be carried out and suspect on reasonable grounds that imposing conditions for supervision or arrest is necessary to prevent this activity from being carried out. If these conditions are met, the officer lays information before the judge and that judge may decide to order the person to appear before the Provincial Court judge.

A person in custody will be brought before a judge within 48 hours, or as soon as possible if a judge is not available within that time. The judge will determine whether or not to order a recognisance. The recognisance, which requires the person to adhere to certain imposed conditions that the judge considers desirable for preventing the carrying out of a terrorist activity, can be for a maximum period of twelve months. If a person refuses to enter the recognisance, the judge may send him or her to prison for a term not exceeding 12 months.

This provision was not renewed and expired on 1 March 2007.

Detention based on security certificates: Under section 77 of the *Immigration and Refugee Protection Act 2001*, security certificates enable the removal from the country of a person who poses a danger to national security or to the safety of any person. This only applies to foreign nationals (they can nevertheless be permanent residents). A certificate is only issued when the case involves sensitive information



that needs to be protected for reasons of national security or for the safety of any person. It is signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration.

A foreign national who is named in a certificate is automatically arrested and detained. A permanent resident may be arrested and detained if a warrant is issued. Within 48 hours of the arrest, the Federal Court must commence a review of the reasons for the detention of the permanent resident and must do so at least once every six months following each preceding review.

Once signed, the certificate is referred to the Federal Court of Canada. The judge examines the information and evidence in private, in the absence of the person named in the certificate and their counsel. Upon examining the information and evidence, the judge determines what information cannot be disclosed for reasons that its disclosure would be injurious to national security or to the safety of any person. The Federal Court judge will then resume the proceeding and will determine the reasonableness of the certificate. The determination of the judge is final and is not subject to appeal or judicial review. If a certificate is determined to be reasonable, it is considered conclusive proof that the permanent resident or foreign national named in the certificate is inadmissible and it constitutes a removal order.

If the individual has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, a Federal Court judge may, on application by the individual, order the individual to be released if the judge is satisfied that the individual will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person.

These were ruled unconstitutional by the Supreme Court of Canada on 23 February 2007, as security certificates were violating the Charter of Rights.


d. Immunity/accountability

Section 83.31 of the *Criminal Code* requires the Attorney General of Canada to present an annual report to Parliament on the operation of investigative hearings (see below) and recognisance with conditions. However, provisions allowing the investigative hearings and recognisance expired on 1 March 2007 and a motion to extend them was defeated in Parliament.

e. General

The ATA creates a number of new offences, including participating in or contributing to an activity of a terrorist group to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity. Recruiting a person to receive training, facilitating a terrorist activity, instructing a person to carry out such activities, and acting for the benefit of or at the direction of a terrorist group are new offences as well. The Act also creates offences that target the financing of terrorism, including collecting or using property for the purpose of facilitating or carrying out a terrorist activity. Moreover, there are prohibitions against dealing with property that is owned or controlled by a terrorist group.

The *Public Safety Act* 2002 mainly introduced a new offence called “hoax regarding terrorist activity”, punishable by a maximum of 5 years if no one is harmed, and by 10 years if someone is harmed.



The investigative hearing was another preventive measure introduced: provisions in section 83.28 and 83.29 of the *Criminal Code* allow a police officer, "for purposes of an investigation of a terrorism offence", to apply *ex parte* to a judge for an order to gather information relevant to that investigation. It authorizes the judge to order the examination of a material witness who may possess information regarding a terrorist offence that has been or may be committed. These witnesses are protected by subsection 83.28(10) from their statements being used in any criminal proceedings against them. Other safeguards of the individual's rights are built into the procedure.

The investigative hearings provision was not renewed and expired on 1 March, 2007.

5. Examples:

Deportation of Suspected Terrorists: In Canada, the government's security certificate program permits deportations of alleged terrorism suspects to countries where there is a risk of torture. Since the 2001 terrorist attacks in the USA, the program has allowed authorities to incarcerate terror suspects without charge or bail based on secret evidence. In some of these cases, the Canadian government has sought assurances against torture from receiving states such as Egypt and Morocco. As discussed above parts of the security certificate procedure have been found to be unconstitutional.

Link: <http://www.worldrevolution.org/article/1826>

The Maher Arar Case: A young Canadian citizen of Syrian birth, on his way home to Montreal from a vacation in Tunisia with his wife and infant, was arrested by USA authorities at an airport in New York. His arrest was based on unchecked and erroneous data which had been provided by the Canadian secret service to the USA authorities as part of an anti-terror information exchange program. Arar was held incommunicado in New York for two weeks. He was then taken by CIA plane to Syria where he was imprisoned and subject to torture for a year. The Canadian embassy's involvement was noted as 'unhelpful' to Mr. Arar's position. The details of this case were revealed at a subsequent commission of inquiry exposing the shortcomings of rushed anti-terror measures.

Link: <http://www.ararcommission.ca>

¹ In the absence of internationally accepted definitions of the terms "terrorism", "terrorist" and "terrorist act", in this report these terms refer to either the definition as enshrined in the country's legislation, or the common use of the term. The use and meaning of these terms is addressed in CHRI's report "Stamping Out Rights: The impact of anti-terrorism laws on policing" (2007).

² For further comments on the *Anti-terrorism Act* 2001, see Gabor, T (2004) *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*: http://www.justice.gc.ca/en/ps/rs/rep/2005/rr05-1/rr05-1_a_10_01.html as on 28 February 2007.