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DROITS DE LA PERSONNE



## ***National Security and Human Rights***

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# National Security and Human Rights

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## INTRODUCTION

In the days that followed the events of September 11, 2001, governments around the world took rapid action to strengthen and expand their security systems.<sup>1</sup> Canada was no exception.<sup>2</sup> Parliament and the Government of Canada gave existing and newly-created Canadian national security organizations more authority and more resources. This led to visible impacts on Canadians such as more screening of air travellers, as well as less visible impacts such as greater surveillance of the financial transactions of individual Canadians. From the outset, the Canadian Human Rights Commission (the “Commission”), along with human rights observers, advocates and academics,<sup>3</sup> expressed concerns about the potential impact of overly sweeping security measures on human rights.<sup>4</sup> Four years later, the Commission reiterated these concerns:

It’s not security or rights, one or the other; it’s how we organize our security systems so that they are not based on discriminating between persons by virtue of an ethnic or other attribute that is protected under the [Canadian] Human Rights Act.<sup>5</sup>

In the decade since September 11, 2001, Canadian officials have worked to strike a balance between safeguarding national security and guaranteeing human rights.<sup>6</sup> This effort has taken place at the same time as court decisions and official inquiry reports have found situations in which security officials have failed to consider the consequences of their actions on the rights of Canadians.<sup>7</sup> Those decisions and reports point to examples of unreliable data and intelligence;<sup>8</sup> bias;<sup>9</sup> and improper information-sharing practices.<sup>10</sup> In addition, it has been found that national security measures have acquired intrusive powers and that the level of independent review of security and intelligence agencies is disproportionate to the reach that these powers have into peoples’ lives.<sup>11</sup> In a small number of cases, the consequences of such shortcomings for individual Canadians have been extremely serious.<sup>12</sup>

Individuals, academics and communities within Canadian society have raised concerns that national security organizations target and profile people based on race, ethnicity, religion and national origin.<sup>13</sup> Canadian authorities insist that these concerns are unfounded.<sup>14</sup>

As part of its efforts to understand these developments and their implications, as well as social trends and shifts in Canadian society, the Commission has undertaken a research initiative on national security. To date, the research has included an overview of the Canadian national security environment and human rights,<sup>15</sup> an analysis of the effectiveness of profiling<sup>16</sup> and the extent to which Canadian security agencies report systematically on the human rights impacts of their work.<sup>17</sup>

## I. THE OBLIGATION TO PROTECT HUMAN RIGHTS IN THE NATIONAL SECURITY CONTEXT

The right to equality and protection against discrimination is a fundamental element of human rights for all members of Canadian society. In addition to the constitutional protection of equality rights in the *Canadian Charter of Rights and Freedoms* (the “Charter”), federal,

provincial and territorial governments in Canada have enacted human rights laws that prohibit discrimination on grounds such as national origin, race, religion, colour, sex, age and disability. Human rights in Canada are also supported by Canada's commitments under international covenants and conventions including the many international human rights instruments that Canada has ratified related to the protection of equality rights and the prohibition of discrimination.

### **Canada's International Human Rights Obligations**

At the international level, the obligation to respect, protect and fulfill human rights rests with national governments.<sup>18</sup> International law recognizes that certain rights may be limited by proportional and justified national security measures. In particular, Article 4 of the International Covenant on Civil and Political Rights ("ICCPR") permits derogations from certain civil and political rights in the context of public emergencies, but explicitly prohibits any derogation based solely on grounds such as race, colour and religion in any circumstance.<sup>19</sup> Canada ratified the ICCPR in 1976.

In 2004, the International Commission of Jurists affirmed the obligations of states both to protect persons from acts of terrorism and to ensure that "counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination."<sup>20</sup> In 2010, these principles were reiterated by the U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>21</sup>

Canada's 2009 report to the United Nations Universal Periodic Review reflects these obligations. It underscores a Canadian commitment to ensure that laws regulating the relationship between security and human rights are drafted to be consistent with Canada's international human rights obligations.<sup>22</sup>

### **Application of the *Canadian Human Rights Act***

The *Canadian Human Rights Act*, RSC 1985, c H-6 (the "*Act*") is aimed at preventing and remedying discrimination. Section 2 provides the *Act*'s "dominant purpose":

[A]ll individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices[.]<sup>23</sup>

Human rights laws in Canada are laws of general application with a quasi-constitutional status.<sup>24</sup> The *Act* applies to matters under the legislative authority of Parliament, which explicitly include defence and therefore national security.<sup>25</sup> The *Act* forms part of the legal framework for human rights in matters under federal jurisdiction and is a key instrument for the federal government to fulfill its obligations to respect and protect human rights, including with respect to the prohibition against discrimination.

While the legal orientation of the *Canadian Charter of Rights and Freedoms* is different from that of the *Act*, both are aimed at the same general wrong.<sup>26</sup> If a measure or standard is discriminatory under human rights laws, the Supreme Court of Canada has directed courts to

seek a “unified approach” to human rights laws and Charter rights.<sup>27</sup> In the area of discrimination law, the Supreme Court of Canada developed an approach for balancing safety and rights in a 1999 case called *Grismer*, and that approach was applied to a discrimination complaint in the national security context in 2010.<sup>28</sup>

Federal laws must be consistent with the *Act* unless they explicitly stipulate otherwise. Accordingly, the *Act* forms part of the operating environment of federal departments, agencies and Crown corporations, including the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment and their respective monitoring or oversight agencies. It applies to government officials whether they are inside or outside Canada.<sup>29</sup> It extends to federally-regulated services such as airlines and railways. These include issues such as passenger screening by private firms for the Canadian Air Transport Security Authority and restrictions on federally-regulated banking services for people on international watch lists.<sup>30</sup>

The application of the *Act* to security agencies is acknowledged. For example, the Security Intelligence Review Committee (SIRC) has affirmed that the operational policies of CSIS, “some of which are sensitive and potentially intrusive, must comply with ... the *Canadian Human Rights Act*”.<sup>31</sup> According to the Special Senate Committee on the *Anti-terrorism Act*, this means at a practical level that “[e]ven in extraordinary times and in response to extraordinary threats, the normal principles of non-discrimination must continue to be followed.”<sup>32</sup>

### **Non-Discrimination in the Area of National Security**

While the obligation to protect human rights may be clear in theory, its application is not always simple in a national security operational context.

National security is a national priority.<sup>33</sup> Public opinion is generally supportive of national security and polls indicate that Canadians tend to rank “security” higher than other government priorities. At the same time, Canadians are becoming more aware of civil liberties issues and favour a rational balancing of risks and rights.<sup>34</sup> As noted by a group of Canada’s leading human rights and social justice organizations, “respect for fundamental rights is an essential condition and a vital component of security.”<sup>35</sup>

Human rights sometimes have been treated as extraneous considerations from an operational security perspective. In one instance, CSIS investigators expressed the view that they were not subject to the Charter, a position that SIRC stated to be an incorrect understanding of the law.<sup>36</sup> This kind of misperception is not limited to the Charter, and it extends to human rights more generally. In the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* [Iacobucci Inquiry], CSIS and RCMP witnesses told the Inquiry that intelligence officials did not have to be concerned about the human rights of a Canadian detainee, and suggested that only Foreign Affairs should have this area of responsibility. The Hon. Frank Iacobucci stated that “This approach is not, in my opinion, satisfactory ... [N]o Canadian officials should consider themselves exempt from this responsibility.”<sup>37</sup>

In Canada, balancing national security considerations with human rights is a well-established approach, and has been the subject of repeated affirmations by all levels of courts, including multiple decisions of the Supreme Court of Canada.<sup>38</sup> Over the last decade in particular, the courts have adopted balanced approaches that seek to integrate human rights into national security systems without jeopardizing the security of Canadians.<sup>39</sup> For example, while Canadian courts show considerable sensitivity to government efforts to protect national security, they have accepted government rationales for constraints on human rights related to actions that seek to manage risk, protect confidential sources and prevent disclosure of information or evidence that may jeopardize our collective security.<sup>40</sup> The jurisprudence shows that the courts have required the government to meet its burden of proof to show that such constraints are rational and justified.<sup>41</sup> However, even in the presence of compelling national security considerations, the Supreme Court of Canada stated in the *Charkaoui* decision that human rights protections still apply:

The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7 [life, liberty and security of the person], meaningful and substantial protection there must be.<sup>42</sup>

The Supreme Court of Canada also has addressed the relationship between national security, human rights and the rule of law:

[T]he challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.<sup>43</sup>

## II. ACCOUNTABILITY, HUMAN RIGHTS AND NATIONAL SECURITY

### Accountability and the Rule of Law

Accountability is at the heart of a functioning and healthy democracy.<sup>44</sup> Our democratic system of government is built on the foundation of the rule of law, which includes access to justice, equality before the law and controls or restraints on the exercise of public power.<sup>45</sup> Effective systems of accountability are vital to all three. The process of accountability is important in order to protect democracy, national interests and public security, and to prevent the abuse of extraordinary intrusive or coercive powers by the State.<sup>46</sup> Accountability is also relevant to public trust in government, in public institutions and in civil servants. The erosion of this trust has resulted in what one expert has called a “collapse of accountability”.<sup>47</sup>

In the area of national security in particular, systems of accountability are said to have been slow to develop,<sup>48</sup> and direct accountability to the Canadian public is said to be largely absent from the system.<sup>49</sup>

It is true that accountability is in certain respects constrained by the importance of secrecy and the highly specialized nature and expertise of internal and external review bodies.<sup>50</sup> Although the context of security and surveillance activities means that not all information

can be made public, these very constraints speak to the need for accountability and for making more, rather than less, explicit both the obligation to protect human rights and to explain how this is being accomplished. This is not only a matter of legality and compliance with the rule of law; it is also an issue of public confidence. However, the findings from official inquiries into national security matters in Canada have not served to enhance public trust.<sup>51</sup> As noted in her 2009 report, the Auditor General of Canada stated that:

Canadians also need to have confidence that the decisions and activities of intelligence agencies are legal, consistent, and appropriate, and that they are subject to examination by independent review agencies for reporting to their minister or Parliament.<sup>52</sup>

The critical importance of human rights and the fact that so much is hidden from public view enhance rather than diminish the importance of accountability in a system that values the rule of law.

### **Accountability and the Obligation to Protect Human Rights**

As the previous section of this paper noted, the obligation on the Government of Canada and its departments and agencies to protect human rights is well established in Canadian and international law. It is beyond both the scope of this paper or the expertise of the Commission to address the forms or adequacy of review and oversight mechanisms most appropriate in the security context. However, the specific issue of accountability for human rights is directly relevant to the Act.

At present, there are few explicit requirements for ensuring respect for human rights within the legislative framework of security agencies in Canada. Only the *Immigration and Refugee Protection Act* explicitly refers to the Charter.<sup>53</sup> As noted in Part I, in the absence of explicit legislated guidance, there have been instances where individuals working for security organizations have not seen human rights or accountability for human rights as relevant to the operating environment in which they work, sometimes with devastating consequences for individual Canadians.<sup>54</sup>

Accountability for human rights in national security organizations and situations is influenced by the unique dimensions of national security: first, national security organizations must operate under constraints regarding the disclosure of sensitive and confidential information, and second, the very nature of surveillance and security activities is such that human rights can be placed at particular risk. While these dimensions are unique, they do not prevent national security agencies from developing an accountability framework that reflects human rights principles.

### **Accountability and Reporting**

As noted throughout this report, the Canadian Human Rights Act applies to national security organizations in Canada. But without a corresponding legislative obligation for those organizations to report on their human rights performance, it is very difficult to establish consistently whether the human rights that are identified as being at risk are in fact protected within the context of national security. For example, SIRC is authorized to investigate certain security-related human rights cases under the Act, but it is not legally required to report on human rights impacts more broadly (although, in practice, SIRC does report from

time to time on human-rights related results in expurgated public reports). Requirements to report on human rights issues and impacts are largely absent from the national security system as a whole.

Some national security reports have identified human rights issues in the past, albeit on a more *ad hoc* or discretionary basis, demonstrating that there is no inherent obstacle or risk to reporting on human rights. For example, six public reports from CSIS have contained statements on human rights on a range of issues:<sup>55</sup> human rights are referenced in context of extradition issues,<sup>56</sup> information-gathering practices of foreign partner organizations<sup>57</sup> and security certificates.<sup>58</sup> One report noted internal strategies for CSIS to undertake staff sensitization on human rights.<sup>59</sup>

Another gap affecting accountability is the apparent lack of data collection related to the impact of security measures on human rights. Collecting and analyzing data that is disaggregated based on race, disability, ethnic origin or other grounds can be done in a manner consistent with the Act. Some of the benefits include the ability to:

- prevent or address systemic barriers, for example, the barriers that certain types of technology may pose for people with disabilities;
- show, using data and research, that decisions are based on objectively justifiable criteria and not discriminatory factors;
- improve service delivery, and
- demonstrate a measure's effectiveness if it is challenged, or provide evidence to rebut allegations of systemic discrimination.<sup>60</sup>

These observations on accountability processes, reporting and data also apply, with appropriate modifications, to oversight and monitoring bodies such as SIRC and the Commission for Public Complaints against the RCMP. The significance of these oversight bodies in the national security system makes reporting especially important. Accountability can be achieved through reporting that does not disclose personal information or data that compromises national interests.<sup>61</sup>

The accountability and reporting issue has been considered in relation to human rights in a national security context already. A 2010 United Nations Special Rapporteur report on best practices related to national security and human rights recommended that the person or body that acts as an independent reviewer of the application and operation of anti-terrorism laws should assess, among other things, whether the application in practice of the law relating to terrorism during the period of review has been compatible with international human rights.<sup>62</sup>

These examples illustrate the importance of mechanisms for independent reporting of human rights violations, and of placing responsibility for such reporting in the purview of independent and regular review or oversight mechanism(s) across the national security system.



### III CONCLUSION

The Government of Canada has many departments and agencies that have responsibilities related to national security. Those departments and agencies, as well as their employees whether within Canada or operating in other countries, are obliged to take human rights considerations into account in their work. They are expected to carry out their responsibilities in ways that ensure respect for the equality rights set out in the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act* and Canada's commitments under international agreements.

There have been many well-publicized examples of situations in which people within national security institutions fell well short of the appropriate balance between the legitimate protection of national security and respect for human rights. While there is evidence that those institutions have responded to the need for a more consistent commitment to human rights and anti-discrimination in their work, there is still an absence of accountability, backed up by transparency and data to demonstrate the results that Canadians deserve to expect. Accountability is fundamental to democracy and the rule of law. In the national security context, the particular impacts on human rights are such that accountability is critical to demonstrating compliance with human rights standards, including those in the *Canadian Human Rights Act*. Legislated improvements would provide not only information for Canadians to see that rights are respected but would enable those national security institutions to address the lack of trust that exists in many racial, ethnic and religious communities that still perceive the use of practices such as profiling. Experience shows this transparency to be possible and that it can be accomplished without compromising secrecy requirements related to national security interests and confidential sources.

## Key Terms

**Discrimination:** “Discrimination” means harassing someone or putting that person at a disadvantage because of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted.

**Profiling:** Profiling is a generic term for investigative tools used by security officials to catalogue “socio-demographic particularities as well as individual and psychological dispositions, personality traits, geographic location and the criminal and legal history of various types of criminals.”<sup>63</sup>

**Racial Profiling:** racial profiling refers to the use of race alone or in conjunction with other factors as an indicator of criminality or “the police practice of focusing on members of particular race (or ethnic or national origin) groups for extra surveillance”.<sup>64</sup>

**Security measures:** A standard, policy or practice that ensures or enhances national security, and includes but is not limited to those related to “services” within the meaning of the CHRA such as passenger screening, secondary inspections, no-fly lists and the implementation and use of new technologies such as full body scanners and identity certification techniques.

## ENDNOTES

This paper adopts the *Canadian Guide to Uniform Legal Citation*, 7th ed (Toronto: Carswell, 2010) with some modifications, notably where online sources were available in addition to official printed versions of sources.

- <sup>1</sup> See David Jenkins, “In Support of Canada’s *Anti-Terrorism Act*: A Comparison of Canadian, British, and American Anti-Terrorism Law” (2003) 66 Sask LR 419; for the development of Dutch, British, Italian and German counter-terrorism measures, see Matthias J Borgers & Elias Van Sliedregt, “The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism” (2009) 2:2 Erasmus LR 171. Online: Social Science Research Network, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1469891](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1469891)>.
- <sup>2</sup> See Frédéric Mégret, “Terrorism and Human Rights: A Decade of Canadian Practices” Social Science Research Network (2011), online: <<http://ssrn.com/abstract=1762763>>. For an overview of national security policy in Canada from 2001-2006, see Wesley K Wark, “National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post—9/11 Environment” (Ottawa: Canadian Human Rights Commission, 2006), online: <[http://www.chrc-ccdp.ca/research\\_program\\_recherche/ns\\_sn/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/research_program_recherche/ns_sn/toc_tdm-eng.aspx)> [Wark Report].
- <sup>3</sup> See in particular Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); Kent Roach, “Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism” (2002) 47 McGill LJ 893; David Daubney et al, eds, *Terrorism, Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Les Éditions Thémis, 2002); Thomas Gabor, “The Views of Canadian Scholars on the Impact of the *Anti-terrorism Act*” (Ottawa: Department of Justice, 2004), online: <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05\\_1/rr05\\_1.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_1/rr05_1.pdf)>.
- <sup>4</sup> House of Commons, Standing Committee on Justice and Human Rights. 37th Parl., 1st Sess. 2001 Meeting 37 (30 October 2001) (Michelle Falardeau-Ramsay, Chief Commissioner, Canadian Human Rights Commission), online: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041076&Language=E&Mode=1&Parl=37&Ses=1>> at 1140:

Aside from vagueness in the definition itself, there is also the risk that in the application of the definition [of terrorism] certain groups will be targeted unfairly for the sole reason of their race, ethnic origin, or religion. The possibility of an overly broad interpretation of the definition is particularly worrisome, given the extraordinary police and state powers granted by the bill, which, for the most part, rely on this definition as a safeguard against their abuse.
- <sup>5</sup> House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. Subcommittee on Public Safety and National Security. 38th Parl., 1st Sess. No. 17 (15 June 2005) at 16:55 (Mary Gusella, Chief Commissioner, Canadian Human Rights Commission), online: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1949753&Language=E&Mode=1&Parl=38&Ses=1>>.
- <sup>6</sup> The Auditor General of Canada has noted satisfactory improvements in the following areas: assessing the level of review and reporting to Parliament for security and intelligence agencies; developing an integrated security policy; establishing government-wide lessons-learned analyses after significant security incidents, progress in issues of interoperability and information sharing, and improving the reliability of watch lists of individuals considered to be of interest to intelligence organizations”, Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons. Chapter 1 National Security: Intelligence and Information Sharing* (Ottawa: Public Works and Government Services Canada, 2009),

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online: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200903\\_01\\_e\\_32288.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_01_e_32288.html)> [Auditor General, 2009 Report]. Additional positive developments include the Cross-Cultural Roundtable on Security that was struck in 2005 (see Public Safety Canada, online: <<http://www.publicsafety.gc.ca/prg/ns/ccrs/index-eng.aspx>>), and the *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, SC 2008, c 3 [New IRPA] which was enacted to respond to the Supreme Court of Canada's decision in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [Charkaoui], regarding the unconstitutionality of certain aspects of security certificates.

- <sup>7</sup> Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Supplement to Public Report* (Ottawa: Minister of Public Works and Government Services, 2010), online: <[http://dsp-psd.pwgsc.gc.ca/collection\\_2010/bcp-pco/CP32-90-1-2010-eng.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2010/bcp-pco/CP32-90-1-2010-eng.pdf)> [Iacobucci Report, Supplement] at 11-12; see also Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Key Findings of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*, vol 1 (Ottawa: Public Works and Government Services Canada, 2010), online: <[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air\\_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm)> [Air India Inquiry] at 2.
- <sup>8</sup> See e.g. *Re Almrei*, 2009 FC 1263; *United States of America v Khadr*, 2010 ONSC 4338. In both cases, serious concerns were raised with respect to the reliability of evidence provided by national security systems. The Auditor General has noted unsatisfactory progress from CSIS, the CBSA and the Passport Office with respect to watch lists and quality control over the exchange of data to ensure that information is complete. Auditor General, 2009 Report, *supra* note 6 at 30.
- <sup>9</sup> In the Air India Inquiry, for example, Mr. Justice Major found that “[s]urveillants were unable to distinguish one traditionally attired Sikh from another” and that “[e]xcessive secrecy in information sharing prevented any one agency from obtaining all necessary information to assess the threat or to put in place security measures responsive to the threat.” Mr. Justice Major also found that several of the deficiencies noted at the time of the Air India inquiry continue to exist today. Air India Inquiry, *supra* note 7 at 1.
- <sup>10</sup> Mr. Justice O’Connor stated that descriptions of Mr. Arar and Dr. Mazigh as being part of a “group of Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement” as “improper”, “grossly unfair” and “inaccurate, inflammatory and potentially dangerous” in relation to information-sharing practices by Canadian officials, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) [Arar Commission of Inquiry], online: <[http://www.pch.gc.ca/cs-kc/arar/Arar\\_e.pdf](http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf)> at 86; see also Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Final Report* (Ottawa: Minister of Public Works and Government Services, 2010) [Iacobucci Inquiry, Final Report] at 353 para 27, where Mr. Justice Iacobucci describes the information-sharing practices as “deficient”, online: <[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal\\_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm)>.
- <sup>11</sup> The Auditor General noted in 2009 that “at the time of this audit, the extent of independent review was still disproportionate to the level of intrusion these [security] agencies may have into people’s lives. As illustrated in recent testimony and reports by commissions of inquiry, the situation remains unchanged since our 2003 audit.” Auditor General, 2009 Report, *supra* note 6 at para 1.18; Arar Commission of Inquiry, *supra* note 10 at 342-343.
- <sup>12</sup> These include cases of “extraordinary rendition”, arbitrary detention, torture and cruel treatment: see Iacobucci Inquiry, Final Report, *supra* note 10 (the actions of Canadian officials were deficient and contributed to the torture of Canadian citizens) at 363 ff, paras 60-75; Air India Inquiry, *supra* note 7; Arar Commission of Inquiry, *supra* note 10; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44

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[*Khadr*]; *Re Almeiri* (2009 FC 1263) at para 486 ff. In addition, watch lists can pose significant difficulties for people in Canada who are placed in error on the United Nations' 1267 List with the result that their assets and bank accounts frozen and they are unable to receive wages or payments. They must petition the United Nations to access subsistence resources and employers similarly must ask the UN for permission to pay wages. See the *United Nations Act*, RSC 1985, c U-2. At the time of writing, this issue was being contested as a violation of Charter rights by an individual who alleges that he was the victim of such circumstances. See *Abdelrazik v Canada (AG) and Cannon* [Statement of Claim] T-1580-09 (Federal Court of Canada).

- <sup>13</sup> "Arabs and Muslims reported that post September 2001, communities feel targeted, profiled and subject to unequal treatment", Independent Expert on Minority Issues, *Report of the independent expert on minority issues; Addendum, Mission to Canada*, HRC, UNGAOR, 13<sup>th</sup> Sess, UN Doc A/HRC/13/23/Add. 2 (2010) at 2, online: <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.23.Add.2\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.23.Add.2_en.pdf)>; see also Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UNCERD, 70<sup>th</sup> Sess, UN Doc CERD/C/CAN/CO/18 (2007), online: <<http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.18.doc>> at para 4.

See generally the testimony before the Senate's Special Committee on Anti-terrorism, *Committee Proceedings*, 38<sup>th</sup> Parl., 1st Sess., No 1-20 (October 4, 2004 - November 29, 2005), online: <[http://www.parl.gc.ca/common/Committee\\_SenProceed.asp?Language=E&Parl=38&Ses=1&comm\\_id=597](http://www.parl.gc.ca/common/Committee_SenProceed.asp?Language=E&Parl=38&Ses=1&comm_id=597)>; see also International Civil Liberties Monitoring Group, *Report of the Information Clearinghouse on Border Controls and Infringements* (2010), online: <<http://www.canadianlabour.ca/sites/default/files/iclmgreport-en.pdf>> [ICLMG Report]. The ICLMG, a coalition of human rights and social justice organizations, monitors the human rights implications of border controls and security measures such as the Passenger Protect Program.

Among academic writers, see e.g. Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall LJ 1; Reem Bahdi, "No Exit: Racial Profiling and Canada's War against Terrorism" (2003) 41 Osgoode Hall LJ 293; Sunera Thobani, "What's Rights Got to Do with It? Citizenship in an Age of Terror" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis, 2006) 167; Mégret, *supra* note 2 at 10-11.

- <sup>14</sup> The RCMP has stated that that it does not conduct racial profiling: see Royal Canadian Mounted Police, Departmental Performance Report for the Period ending March 31, 2005 (Ottawa: Public Works and Government Services Canada, 2005). The Commission for Public Complaints against the RCMP has reported complaints about racial profiling in both the criminal law context and under the *Immigration Refugee Protection Act*. See also the Arar Commission of Inquiry, *Analysis and Recommendations*, *supra* note 10 at 355.

- <sup>15</sup> Wark Report, *supra* note 2.

- <sup>16</sup> Jimmy Bourque et al, *The Effectiveness of Profiling from a National Security Perspective* (Ottawa: Canadian Human Rights Commission, 2009), online: <[http://www.chrc-ccdp.ca/research\\_program\\_recherche/profiling\\_profilage/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/research_program_recherche/profiling_profilage/toc_tdm-eng.aspx)> [Bourque Report]. Subsequent references are to the PDF version online.

- <sup>17</sup> Cara Wilkie et al, *Human Rights Issues in National Security: An Inventory of Agency Considerations* (Ottawa: Canadian Human Rights Commission, 2008), online: <[http://www.chrc-ccdp.ca/research\\_program\\_recherche/hrins\\_qdpsn/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/research_program_recherche/hrins_qdpsn/toc_tdm-eng.aspx)> [Wilkie Report]. The Wilkie Report examines the extent to which national security agencies and their monitoring entities are: (1) directed to consider human rights issues in fulfilling their obligations; (2) have publicly stated that they have considered such issues; or (3) have reported on human rights issues in their activities.

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- <sup>18</sup> See e.g. Article 2 of the *International Covenant on Civil and Political Rights*, 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976).
- <sup>19</sup> Article 4(1) of the *ICCPR*, *ibid*, provides:
- In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
- <sup>20</sup> International Commission of Jurists, *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, (28 August 2004), Principle 1, “Duty to Protect”, online: <http://www.unhcr.org/refworld/category.LEGAL.ICJURISTS,,41dec1f94,0.html>.
- <sup>21</sup> *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in countering terrorism*, UNHRC, 16<sup>th</sup> Sess, UN Doc A/HRC/16/5. 1 (2010), online: [http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.16.51\\_en\\_AEV.pdf](http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.16.51_en_AEV.pdf) > [Report of the Special Rapporteur].
- <sup>22</sup> See e.g. Canada, *National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1*, UNHRC, 4<sup>th</sup> Sess, UN Doc A/HRC/WG6/4/Can/1 (2009) at para 46 ff, online: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/A\\_HRC\\_WG6\\_4\\_CAN\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/A_HRC_WG6_4_CAN_1_E.pdf).
- <sup>23</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.
- <sup>24</sup> *Insurance Corp. of British Columbia v Heerspink*, [1982] 2 SCR 145 at 157-158. Human rights legislation is described as the “last protection of the most vulnerable members of society,” and as embodying fundamental Canadian values, *ibid* at 158. See also *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at 339.
- <sup>25</sup> *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 91. The Federal Court has ruled that “within the legislative authority” means something over which Parliament has power to legislate. See *Canada (House of Commons) v Vaid*, 2001 FCT 1332 (CanLII) (FCTD) at para 84. For a discussion of the jurisdiction of the federal government and specifically the role of the Executive in national security matters, see *Khadr*, *supra* note 13. On the issue of jurisdiction and national security in relation to evidentiary matters and the Federal Court of Canada, see *R v Ahmad*, 2011 SCC 6.
- <sup>26</sup> The Supreme Court of Canada has held that human rights laws and section 15 of the Charter (equality rights) are aimed at the same general wrong: *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 48.
- <sup>27</sup> *Ibid.* at para 48.
- <sup>28</sup> In *Commission des droits de la personne et des droits de la jeunesse c Bombardier inc (Bombardier Aerospace Training Centre)*, 2010 QCTDP 16 (CanLII) at para 328 ff. The Tribunal relied on the risk analysis developed by the Supreme Court in a case popularly referred to as *Grismer: British Columbia*

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(*Superintendent of Motor Vehicles*) v *British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 25 to balance national security and human rights in the context of a discrimination case. As well, in 2008, both the Quebec and Ontario human rights commissions reached settlements with General Motors of Canada and Bell Canada, respectively, following complaints about the application of the U.S. International Traffic in Arms Regulations and its restrictions on employees on the basis of citizenship and place of origin. See Ontario Human Rights Commission, News Release, “Human rights settlement reached with General Motors Canada Ltd with respect to workers with citizenships other than Canadian or American” online: <<http://www.ohrc.on.ca/en/resources/news/gm/view>> Commission des droits de la personne et des droits de la jeunesse, News Release, “Application of ITAR: A settlement is reached with Bell Helicopter following a complaint to the Commission des droits de la personne et des droits de la jeunesse” (17 January 2008) online: <[http://www2.cdpcj.qc.ca/Documents/COMM\\_Itar\\_settlement\\_2008.pdf](http://www2.cdpcj.qc.ca/Documents/COMM_Itar_settlement_2008.pdf)>.

- <sup>29</sup> Section 40(5) of the CHRA limits the Commission’s authority to handle complaints about incidents that occur outside Canada where the person concerned is not Canadian or a permanent resident. However, where the circumstances provided by s. 40(5) do not apply, the Canadian Human Rights Tribunal has noted that Foreign Service officers posted in other countries are representatives of Canada and there “is no reason why the principles of the CHRA should not apply to their activities.” *Navqi v Canada (Employment and Immigration Commission)*, [1993] CHR 2 (CHRT) at 40-41.
- <sup>30</sup> The United Nations list of individuals associated with Al Qaida (the “1267 List”) is a resolution of the United Nations Security Council and restricts the rights and freedoms of individual alleged to be associated with specified terrorist-related entities and their regimes. It calls upon states to freeze, without any limit of time, the resources and assets of an individual on the list. It also prohibits listed individuals from travelling internationally. The regime of the 1267 List in Canada is given effect through the *United Nations Al-Qaida and Taliban Regulations* enacted pursuant to the *United Nations Act* RSC, 1985, c U-2.
- <sup>31</sup> Security Intelligence Review Committee, *SIRC Annual Report 1998-1999: An Operational Audit of the Canadian Security Intelligence Service* (Ottawa: Public Works and Government Services Canada, 1999) at 61, online: <[http://www.sirc-csars.gc.ca/pdfs/ar\\_1998-1999-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_1998-1999-eng.pdf)>.
- <sup>32</sup> Senate, Special Senate Committee on the *Anti-terrorism Act, Fundamental Justice in Extraordinary Times: Main Report of The Special Senate Committee on The Anti-terrorism Act* (February 2007) at 21 (Chair: David P. Smith ), online: <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.pdf>>.
- <sup>33</sup> “Just as criminals threaten Canadians’ personal safety, terrorists threaten our country’s security. [...] Canada faces real, significant and shifting threats. Our Government will take steps to safeguard Canada’s national security.” Canada, *Speech from the Throne* (March 10, 2010), online: <<http://www.speech.gc.ca/eng/media.asp?id=1388>>.
- <sup>34</sup> Frank Graves, “The Shifting Public Outlook on Risk and Security” in *One Issue, Two Voices*, issue 4: *Threat Perceptions in the United States and Canada: Assessing the Public’s Attitudes toward Security and Risk in North America* (Washington DC: The Canada Institute, Woodrow Wilson International Center for Scholars, 2005), online: <<http://www.wilsoncenter.org/topics/pubs/threats.pdf>>.
- <sup>35</sup> International Civil Liberties Monitoring Group, *Report of the Information Clearinghouse on Border Controls and Infringements* (2010), online: <<http://www.canadianlabour.ca/sites/default/files/iclmgreport-en.pdf>> [ICLMG Report]. The ICLMG, a coalition of human rights and social justice organizations, monitors the human rights implications of border controls and security measures such as the Passenger Protect Program.
- <sup>36</sup> SIRC was told by a CSIS investigator that a suspect was not “read his rights” because CSIS does not consider itself to be a police service. According to SIRC, this response—subsequently confirmed in writing by the Service—demonstrates “a misunderstanding of the application of the Charter to government

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representatives carrying out their official duties.” Security Intelligence Review Committee, *SIRC Annual Report 2006–2007: An operational review of the Canadian Security Intelligence Service* (Ottawa: Minister of Public Works and Government Services, 2007) at 20-22, online: <[http://www.sirc-csars.gc.ca/pdfs/ar\\_2006-2007-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2006-2007-eng.pdf)>.

<sup>37</sup> Iacobucci Report, Supplement, *supra* note 7 at para 5.

<sup>38</sup> See e.g. *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177; *Charkaoui*, *supra* note 6; *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [*Suresh*]; *Németh v Canada (Justice)*, 2010 SCC 56.

<sup>39</sup> The Supreme Court of Canada has noted that the appropriate process is one of balancing fundamental rights with other relevant factors, in a contextual manner (*Suresh*, *ibid.* at para 45). For a discussion of the balance between the constitutional responsibility of the executive to make decisions on matters of foreign affairs and appropriate remedies, taking into account Canada’s broader national interests, see *Khadr*, *supra* note 13 at para 39-41.

<sup>40</sup> See the Wark Report, *supra* note 2, and *Re Harkat* 2010 FC 1242 (FCTD).

<sup>41</sup> *Charkaoui*, *supra* note 6 at para 34.

<sup>42</sup> *Charkoui*, *ibid.*

<sup>43</sup> *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248 at para 7

<sup>44</sup> See Reg Whitaker & Stuart Farson, “Accountability in and for National Security” (2009) 15:9 IRPP Choices, online: <<http://www.irpp.org/choices/archive/vol15no9.pdf>>.

<sup>45</sup> See generally Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) at 137.

<sup>46</sup> Whitaker and Farson, *supra* note 43 at 2.

<sup>47</sup> Donald J. Savoie, *Court Government and the Collapse of Public Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008).

<sup>48</sup> Wark Report, *supra* note 2 at 22.

<sup>49</sup> *Ibid.*

<sup>50</sup> Ministerial accountability means that ministers are responsible for the departments they lead and are accountable to the public, through Parliament, for the performance and administration of their departments. See the Wark Report, *supra* note 2.

<sup>51</sup> See inquiry reports at *supra*, notes 11, 13; see also Julian N Falconer & Sunil S Mathai, “The *Anti-Terrorism Act* and the *Arar* findings: Democracy protected or democracy eroded?” (2006-2007) 21 NJCL 49; Mégret, *supra* note 2.

<sup>52</sup> Auditor General, 2009 Report, *supra* at note 6.

<sup>53</sup> Section 3(3) of the *Immigration and Refugee Protection Act* [IRPA] provides that the IRPA is to be construed and applied in a manner that is consistent with the Charter, including equality and non-discrimination principles. There is no legislative requirement to consider human rights in the following statutes: *Royal Canadian Mounted Police Act*, RSC 1985, c R-10; *Canadian Security Intelligence Service Act*, RSC 1985, c. C-23, s 33 (excepting the authority to investigate human rights complaints related to



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national security-related matters as set out in the CHRA); *Charities Registration (Security Information) Act*, SC 2001, c 41, Part 6; *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17. The following statutes make general reference to the Charter in their preambles: *Anti-terrorism Act*, SC 2001, c 41; *Emergencies Act*, RSC 1985, c 22 (4th Supp). See Wilkie, *supra* note 18.

<sup>54</sup> See Part I, *supra* at notes 11, 13; Iacobucci Inquiry, Supplement, *supra* note 7 at para 5.

<sup>55</sup> Wilkie report *supra* note 18 at 17, note 41; see also the following reports from the Canadian Security Intelligence Service: *Public Report 2008-2009* (Ottawa: Public Works and Government Services Canada, 2009), online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2008/rprt2008-eng.asp>> [CSIS, Public Report 2008-2009]; *Public Report 2007-2008* (Ottawa: Public Works and Government Services Canada, 2008), online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2007/rprt2007-eng.asp>> [CSIS, Public Report 2007-2008]; *Public Report 2006-2007* (Ottawa: Public Works and Government Services Canada, 2007), online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2006/rprt2006-eng.asp>> [CSIS, Public Report 2006-2007]; *Public Report 2005-2006* (Ottawa: Public Works and Government Services Canada, 2006), online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2005/rprt2005-eng.asp>>.

<sup>56</sup> CSIS, Public Report 2008-2009, *supra* note 56.

<sup>57</sup> CSIS, Public Report 2007-2008, *supra* note 56.

<sup>58</sup> CSIS, Public Report 2006-2007, *supra* note 56.

<sup>59</sup> Canadian Security Intelligence Service, *Public Report 2004-2005* (Ottawa: Public Works and Government Services Canada, 2005), online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2004/rprt2004-eng.asp>>.

<sup>60</sup> Data collection should follow accepted data-collection techniques, privacy laws and other applicable legislation, and should be collected for a purpose that is consistent with the CHRA. See generally Ontario Human Rights Commission, *Count me in! Collecting human rights-based data* (Toronto: OHRC, 2010), online: <<http://www.ohrc.on.ca/en/resources/Guides/countmein>>.

<sup>61</sup> Whitaker and Farson, *supra* note 45 at 10.

<sup>62</sup> Report of the Special Rapporteur, *supra* note 22 at 11.

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