

**THE SENATE OF  
CANADA**

**LE SÉNAT DU  
CANADA**

**FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES:  
MAIN REPORT OF THE SPECIAL SENATE COMMITTEE  
ON THE *ANTI-TERRORISM ACT***

Special Senate Committee  
on the  
*Anti-terrorism Act*

*Chair*

The Honourable David P. Smith, P.C.

*Deputy Chair*

The Honourable Pierre Claude Nolin

February 2007

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## MEMBERSHIP

The Honourable David P. Smith, P.C., *Chair*

The Honourable Pierre Claude Nolin, *Deputy Chair*

and

The Honourable Senators:

Raynell Andreychuk  
Joseph A. Day  
Joyce Fairbairn, P.C.  
Joan Fraser

Mobina S.B. Jaffer  
Serge Joyal, P.C.  
Noël A. Kinsella  
\*Marjory Lebreton, P.C. (or Gerald  
Comeau)

\*Céline Hervieux-Payette, P.C. (or Claudette  
Tardif)

\* *Ex Officio Members*

In the First Session of the Thirty-eighth Parliament, the Committee was chaired by the Honourable Senator Joyce Fairbairn, P.C. The Deputy Chairs were the Honourable Senator John Lynch-Staunton (December 2004 to June 2005), the Honourable Senator James Kelleher, P.C. (June 2005 to October 2005) and the Honourable Senator Raynell Andreychuk (October 2005 to November 2005).

In addition, the Honourable Senators Jack Austin, P.C., Sharon Carstairs, P.C., Maria Chaput, Ione Christensen, Anne C. Cools, Pierre De Bané, P.C., Mac Harb, Daniel Hays, P.C., Elizabeth Hubley, Janis G. Johnson, James Kelleher, P.C., Rose-Marie Losier-Cool, John Lynch-Staunton, Terry M. Mercer, Lorna Milne, Grant Mitchell, Jim Munson, Marcel Prud'homme, P.C., William Rompkey, P.C., Nancy Ruth, Terry Stratton, and Rod A.A. Zimmer have participated in this study since it began in December 2004.

### *Research Staff:*

Jennifer Bird, Library of Parliament  
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Heather Lank  
Adam Thompson  
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## ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Tuesday, May 2, 2006:

The Honourable Senator Comeau moved, seconded by the Honourable Senator Tkachuk:

...

After debate,

With leave of the Senate and pursuant to rule 30, the motion was modified to read as follows:

That a Special Committee of the Senate be appointed to undertake a comprehensive review of the provisions and operation of the *Anti-terrorism Act*, (S.C. 2001, c.41) pursuant to Section 145 of the said Act;

That, notwithstanding rule 85(1)(b), the special committee comprise nine members namely the Honourable Senators Kinsella, Andreychuk, Nolin, Day, Fairbairn, P.C., Fraser, Jaffer, Smith, P.C., and Joyal, P.C., and that four members constitute a quorum;

That the committee have power to send for persons, papers and records, to examine witnesses, to report from time to time and to print such papers and evidence from day to day as may be ordered by the committee;

That, notwithstanding rule 92(1), the committee be empowered to hold occasional meetings *in camera* for the purpose of hearing witnesses and gathering specialized or sensitive information;

That the committee be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings;

That the papers and evidence received and taken on the subject by the Special Senate Committee on the Anti- terrorism Act during the First Session of the Thirty-eighth Parliament be referred to the Committee;

That the committee submit its final report no later than October 5, 2006, and that the committee retain all powers necessary to publicize its findings until December 15, 2006; and

That the committee be permitted, notwithstanding usual practices, to deposit its report with the Clerk of the Senate, if the Senate is not then sitting, and that any report so deposited be deemed to have been tabled in the Chamber.

The question being put on the motion, as modified, it was adopted.

Extract from the *Journals of the Senate* of Wednesday, September 27, 2006:

The Honourable Senator Smith, P.C., moved, seconded by the Honourable Senator Watt:

That, notwithstanding the Order of the Senate adopted on Tuesday, May 2, 2006, the date for the presentation of the final report of the Special Senate Committee on the Anti-terrorism Act be extended from October 5, 2006 to December 22, 2006.

After debate,

The question being put on the motion, it was adopted.

Extract from the *Journals of the Senate* of Thursday, December 14, 2006:

Resuming debate on the motion of the Honourable Senator Joyal, P.C., for the Honourable Senator Smith, P.C., seconded by the Honourable Senator Robichaud, P.C.:

That, notwithstanding the Orders of the Senate adopted on Tuesday, May 2, 2006, and on Wednesday, September 27, 2006, the date for the Special Senate Committee on the Anti-terrorism Act to submit its final report be extended from December 22, 2006, to March 31, 2007; and

That the Committee be empowered, in accordance with rule 95(3), to meet on weekdays in January 2007, even though the Senate may then be adjourned for a period exceeding one week.

After debate,

The question being put on the motion, it was adopted.

Paul C. Bélisle  
*Clerk of the Senate*

(This Order of Reference is similar to the Committee's Order of Reference during the First Session of the Thirty-eighth session.)

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**FUNDAMENTAL JUSTICE IN EXTRAORDINARY TIMES:  
MAIN REPORT OF THE SPECIAL SENATE COMMITTEE  
ON THE *ANTI-TERRORISM ACT***

**INTRODUCTION**

In the fall of 2001, in the aftermath of the attacks in New York, Pennsylvania and Washington, D.C., the Parliament of Canada passed the *Anti-terrorism Act*. Rarely has such a complex omnibus bill proceeded so rapidly through the legislative process. Given the perceived necessity to respond quickly and comprehensively to the threat of terrorism, a majority of parliamentarians were willing to support this key element of the government's anti-terrorism plan. Parliament accordingly expedited both the study and passage of the Act. However, the legislation also required that a comprehensive review of the provisions and operation of the *Anti-terrorism Act* be undertaken within three years of royal assent. It was felt that this requirement would allow Parliament to assess both the provisions of the Act and their effect on Canadians after an appropriate period of time. It is this review that our Committee has undertaken. This Report sets out our views and recommendations.

“We should be trying to find the balance between collective security and individual liberties.”  
(Imam Salam Elmenyawawi, Muslim Council)

The government has an obligation to ensure the security of Canadians and to protect the civil liberties that are the basis of our democratic society. Both of these obligations are of fundamental importance, and Canada has committed to fulfilling them in international conventions and agreements such as the Charter of the United Nations, the Universal Declaration of Human Rights, and the Vienna Declaration. Security of the person and various rights and freedoms are also guaranteed by our Constitution and by the rule of law.

“Legislation designed to meet this objective [of security] must be tempered, must respect human rights, and must ultimately strike a proper balance between the two.”  
(Ed Cashman,  
Public Service Alliance of Canada)

It is clear, both in international and our own domestic law, that all rights are of equal value, and that one right cannot be sacrificed in the name of preserving another. However, when dealing with the threat of international terrorism, how best to protect and preserve our rights, obligations and

“[A]n integrated approach to human rights and security or anti-terrorism has the best chance of preventing the human rights violations that are so damaging to individuals, the fabric of our society and the foundation of our democracy.”

(Jean-Louis Roy, Rights and Democracy)

values becomes a complex question for Canadian society and its lawmakers to answer. Our government and courts have already been struggling with this challenge, as demonstrated in the context of the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar and by the constitutional challenges to the *Immigration and Refugee Protection Act*'s security certificate process, which were heard by the Supreme Court of Canada in June 2006. As stated by former Supreme Court of Canada Justices Frank Iacobucci and Louise Arbour in a challenge to the *Anti-terrorism Act*'s investigative hearing provisions, “a response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.”<sup>1</sup> This is the goal of our counter-terrorism legislation. Much thought must therefore be given to constructing an appropriate framework, capable of ensuring that physical security is protected and civil liberties respected.

## The Study

This is the Main Report of the Special Senate Committee on the *Anti-terrorism Act*. It contains numerous comments, observations and recommendations for change respecting the *Anti-terrorism Act* and Canada's national security and anti-terrorism framework, including recommendations regarding the provisions dealing with investigative hearings and recognizance with conditions/preventive arrest, which are scheduled to expire on the 15<sup>th</sup> sitting day of Parliament after 31 December 2006, unless their application is extended by resolution of both Houses of Parliament.

The Committee's authority to conduct its review is found in section 145 of the *Anti-terrorism Act*, which provides:

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<sup>1</sup> [Application Under s. 83.28 of the Criminal Code \(Re\)](#), [2004] 2 S.C.R. 248 at para. 7.

145. (1) Within three years after this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

(2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

We determined that our review must be comprehensive, encompassing more than merely a review of the legislative provisions enacted in 2001. An examination of the workings of the *Anti-terrorism Act* must necessarily refer to the entire Canadian anti-terrorism framework, as it is the cumulative effect of all legislation and policies to address terrorism that is at issue. To merely review the provisions and operation of the *Anti-terrorism Act* would be to take an inappropriately narrow approach, and would prevent the Committee from understanding the full extent of the measures the government has taken to prevent and combat terrorism, as well as the combined effect these measures have had on Canadians. In consequence, the Committee did not limit its study to the *Anti-terrorism Act* itself; rather, we decided to examine other pertinent aspects of Canada's anti-terrorism activities as well.

In the course of our study, the Committee met with government ministers and officials, international and domestic experts on the threat environment, lawyers and academics, people involved in law enforcement and intelligence gathering, civil liberties associations, humanitarian organizations, and representatives of community groups, including victims of terrorism and members of Canada's minorities. We also traveled to Washington, D.C. and London, England for meetings with legislators, government officials and non-governmental organizations, and have connected with other experts around the world through video conferencing. In all, we received the valuable input of over 140 witnesses.

While this Report is intended to address most of the issues raised by witnesses during the course of our hearings, we are aware that Supreme Court of Canada decisions regarding the constitutionality of the security certificate process, which have yet to be rendered, may have an impact on relevant legislation and this study. The Committee may accordingly choose to respond to this development or other ancillary issues at a later date.

## **The Threat Environment**

The *Anti-terrorism Act's* introduction and quick passage in the fall of 2001 was of course a direct consequence of the tragic events of September 11 of that year. The subsequent terrorist attacks in Madrid, Bali, Saudi Arabia, Egypt, Beslan and London – as well as more recent

“We must strike a balance and our response against terrorism must be proportionate with the terrorist threat. There must be no overreaction and there must be no under-reaction.”

(Rohan Gunaratna, Institute of Defence and Strategic Studies, Nanyang Technological University [Singapore])

events such as the arrest of 18 suspected terrorists in Toronto, an alleged plot to bring down ten flights bound from Britain to the United States, an alleged plot to bomb the Sears Tower in Chicago, arrests in Lebanon with respect to an alleged suicide bomb targeting the New York subway system, and the arrest of nine suspected terrorists in Birmingham, England – have demonstrated that the threat has not abated. In fact, the Iraq conflict seems to be exacerbating the situation. Witnesses suggested that the war has not only radicalized many Islamist ideologues, but it has also provided a new terrorist training ground. Recently declassified key opinions from an April 2006 U.S. National Intelligence estimate entitled *Trends in Global Terrorism: Implications for the United States* lend support to this claim.<sup>2</sup>

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<sup>2</sup> United States, Office of the Director of National Intelligence, [\*Declassified Key Judgments of the National Intelligence Estimate “Trends in Global Terrorism: Implications for the United States” dated April 2006\*](#), Press release, Washington, D.C., 26 September 2006.

It is clear to the Committee that the danger to our society is real and palpable, despite some suggestions that Canadians do not feel that they are directly threatened by international terrorism. Prior to 11 September 2001, the bombing of Air India flight 182 was the most lethal contemporary act of terrorism.<sup>3</sup> A total of 329 people were killed, 82 of them children, with the majority being Canadian citizens. Two individuals

“We have failed utterly, not only to prevent this tragedy [of Air India] and convict the perpetrators, but to incorporate the terrorist attack into our history. This has been hurtful to both the families and the entire nation. As a result, we collectively act as if terrorism has never happened here, as if somehow we are immune to the threat of global terrorism. Terrorism in Canada is already a fait accompli. The sooner we learn from it, the better.”

(Nicola Kelly, Air India 182 Victims Families Association)

charged with conspiracy and murder in relation to this bombing were acquitted of these charges in March 2005, and the bombing, its investigation and prosecution are now being examined by a federal Commission of Inquiry. We also know the stories of Ahmed Ressam, a failed refugee claimant who was captured at the U.S-Canadian border on his way to bomb the Los Angeles Airport; Fateh Kamel, a Canadian citizen and mentor to Mr. Ressam who has been convicted in France for his involvement in terrorist crimes; and the Khadr family and others in Canada who are allegedly linked to international terrorist networks. We also note that Al Qaeda media releases have listed Canada as a prime target on more than one occasion. Moreover, while we did not send troops to Iraq, our involvement in the U.N.-sanctioned, NATO-led mission in Afghanistan has been considered a provocative act by certain groups.

International and domestic experts who appeared before the Committee also discussed the threat represented by those who infiltrate legitimate charitable or non-profit organizations or create their own non-profit groups in order to fundraise in support of terrorist or extremist causes, and propagate their radical messages in Canada. Such individuals both indoctrinate and coerce support, recruiting “enthusiastic amateurs” to terrorist causes. We have also learned, from the terrorist acts and plots in Britain, as well as the Toronto arrests in June 2006, that homegrown citizens may be as susceptible to

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<sup>3</sup> Jim Judd, Director of CSIS, “How Should a Democracy Respond to Domestic Terrorist Threats?,” Talking Points for 2007 Raoul Wallenberg International Human Rights Symposium, Toronto, 19 January 2007.

recruitment for terrorist purposes as immigrants from the world's numerous centres of conflict.

The reality of the terrorist threat was further confirmed in a report tabled with the United Nations Security Council in September of 2005 relating to Al Qaeda, which found that the movement “remains as pernicious and widespread as at any time since the attacks of 11 September, 2001.”<sup>4</sup> Finally, we note that according to the Security Intelligence Review Committee's 2005-06 annual report, the Counter-Intelligence Branch of the Canadian Security Intelligence Service had 274 individual targets and 31 organizational targets under investigation during the previous year.<sup>5</sup>

### **Laws, Intelligence, Oversight and Citizen Engagement**

The Committee agrees with the general assessment of Canada's national security community that it is only a question of when additional terrorist attacks or attempted attacks directed against our country or citizens will occur. The threat is real and it is not fear mongering to insist that it be addressed by our government. However, this threat must not only be addressed through laws. A successful anti-terrorism strategy requires other key components. The threat of terrorism must also be addressed by effective use of resources to accumulate reliable intelligence regarding terrorists and their activities, by comprehensive review and oversight of the agencies which gather intelligence and protect the safety of Canada, and by the actions of citizens, who have a responsibility to ensure their own security. Good laws, effective intelligence, comprehensive oversight and citizen engagement are all essential, both in terms of preventing terrorist acts and ensuring that terrorists are held accountable for the acts they commit.

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<sup>4</sup> United Nations, Security Council, [\*Third report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 \(2004\) concerning Al-Qaida and the Taliban and associated individuals and entities\*](#), S/2005/572, 9 September 2005, p. 7]

<sup>5</sup> Security Intelligence Review Committee, [\*SIRC Annual Report 2005–2006: An operational review of the Canadian Security Intelligence Service\*](#), Ottawa, 29 September 2006.

## The Impact on Victims and Families

The need for the components in the fight against terrorism just discussed cannot be overemphasized, given the devastating impact terrorist acts have on victims of terrorism, their families, their countries and the

“[I]f one single terrorist succeeds in executing a terrorist act, hundreds of victims and family members suffer the incalculable pain for decades and millions are terrorized by fear for all time.”

(Bal Gupta, Air India 182 Victims Families Association)

international community. The mass deaths resulting from the Air India tragedy provided a horrific example of terrorism’s long-lasting and far-reaching effects in the Canadian context. The bombing of the World Trade Centre in New York, and numerous additional acts of terrorism that have occurred around the world since then, have served to underscore the impact of terrorism. Such events were devastating not only in and of themselves, but also in terms of the impact they had on the family members and friends of those killed, and on society at large.

Terrorist acts cause physical, emotional and psychological wounds to victims and their families that can take years to heal, if indeed they ever do. The Committee empathizes with the victims of terrorism and their families, recognizes the horrible

“The emotional impact for me has been tremendous. I continue to seek treatment from a psychologist at my own expense. I rely on my family, friends and faith.”

(Maureen Basnicki, whose husband was killed in the World Trade Centre on 11 September 2001, as an Individual)

effects that acts of terrorism have had on them, and urges governments to assist them by providing them with the help and support they require.

## The Issues

With respect to Canada’s anti-terrorism framework and the objective of balancing the need to protect the security of Canadians with the need to protect and preserve rights and freedoms, we have identified the following 13 general issues as requiring comment and the attention of government: (1) the definition of “terrorist” activity; (2) racial profiling; (3) the need for a special advocate during certain proceedings; (4) the listing of terrorist entities; (5) the scope of the offences relating to financing and providing services in support of terrorism; (6) the denial or revocation of an organization’s charitable status, (7) issues in relation to the *Canada Evidence Act*; (8) investigative hearings and

recognizance with conditions/preventive arrest; (9) electronic surveillance and the interception of private communications; (10) concerns relating to the privacy of Canadians and the sharing of information; (11) issues in relation to the *Security of Information Act*; (12) detention and deportation under a security certificate; and (13) the need for adequate oversight and review of matters relating to Canada's anti-terrorism framework.

## DEFINITION OF “TERRORIST ACTIVITY”

What constitutes a terrorist activity lies at the heart of Canada’s anti-terrorism framework. It is of central importance not only to the *Anti-terrorism Act*, but also as the basis for the activities that are undertaken to protect our society from terrorist threats. The scope of what constitutes terrorism – whether wide or

“The definition of terrorism is critical ... because we need to differentiate between other types of criminal conduct, and criminal conduct that is motivated by terrorist purposes. We need that definition in order to pass the threshold and invoke the provisions of the legislation that are available to law enforcement to help us do our job and to prevent criminal acts.”

(Vince Bevan, Ottawa Police Service)

narrow – guides security and intelligence agencies in their investigations, police in their enforcement of the law, decisions of the Crown on whether and how to prosecute, and inevitably a court in its judgement to convict or acquit.

The definition of “terrorist activity” introduced into the *Criminal Code* by the *Anti-terrorism Act* classifies an extremely broad array of actions, or failures to act, as terrorist activities. The definition has two parts. In the first part, paragraph 83.01(1)(a), terrorist activity is defined to include any act or omission committed, threatened, attempted or counselled, inside or outside of Canada, that amounts to a terrorist offence referred to in any of ten anti-terrorist international conventions entered into by Canada.<sup>6</sup> Public Safety and Emergency Preparedness Canada and Justice Canada officials indicated that this part of the definition is necessary to enable Canada to comply with the obligations it has assumed in relation to prohibiting terrorist activity under the international conventions it has signed.

The second part of the definition, paragraph 83.01(1)(b), is more general in scope. Most of the commentary the Committee heard from witnesses during its hearings related to this part of the definition. Section 83.01(1)(b) defines terrorist activity as:

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<sup>6</sup> The specific offences are described in various subsections of section 7 of the *Criminal Code*.

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

Under this part of the definition, terrorist activity is defined to include acts or omissions committed, threatened, attempted or counselled, inside or outside of Canada, in whole or in part, for political, religious or ideological purposes, causes or objectives. In addition, to fall within this part of the definition, the activity must be committed with the intention of intimidating the public or compelling a person, government or organization to act a certain way, as well as with the intention to cause one of a number of specified

serious types of harm. For greater certainty, saving provisions exclude certain conduct from the ambit of the definition, namely activities related to lawful armed conflict under international law, advocacy, protest, dissent or work stoppage, and the expression of religious, political or ideological belief that does not intend to intimidate or cause harm.

The definition of “terrorist activity” found in the Act forms the foundation for the new terrorist offences introduced into the *Criminal Code*, as each of the terrorist offences either incorporates the definition of terrorist activity or the definition of “terrorist group,” which includes reference to the term terrorist activity. Accordingly, the scope of the definition of terrorist activity has a bearing on how and when charges are laid for these offences and how prosecutions are conducted.<sup>7</sup>

### **Concerns Regarding the Motivation Clause**

Certain witnesses appearing before the Committee criticized various aspects of the definition of terrorist activity, with some arguing that it was too broad and could encompass legitimate political dissent, others suggesting that it was too complex and difficult to understand, and others recommending that it be done away with altogether and that the government rely on pre-existing *Criminal Code*

“Definitions of terrorism cannot help but be either over-inclusive or under-inclusive; over-inclusive in that they include civil disobedience or violent acts directed at oppressive governments or occupations, or under-inclusive in that they fail to capture violent conduct against civilians that ought logically to be included but is not for purely political reasons.”

(Maureen Webb, Canadian Association of University Teachers)

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<sup>7</sup> Thus far, there have been 19 people charged with one or more of the *Criminal Code* offences relating to “terrorist activity” introduced by the *Anti-terrorism Act*. The first was Ottawa resident and Canadian citizen Mohammad Khawaja, who was charged in March 2004 with several of these new offences, including participation and facilitation offences under sections 83.18 and 83.19 of the Code. Subsequently, in June and August 2006, 18 suspected terrorists were arrested and charged with participation offences under section 83.18 of the Code with respect to an alleged plot to bomb several sites in southern Ontario.

provisions to counteract the terrorist threat. However, by far the most prevalent criticism related to the motivation clause and the unfair effect it could have on the investigation and prosecution of individuals for alleged terrorist acts.

“Limit the definition of terrorist activity far more severely. The goal should be coercion with anti-democratic objectives, with the means being the deliberate targeting of non-combatants for serious violence. ... The special regime for terrorism should be confined to the most deadly activities.”

(Alan Borovoy, Canadian Civil Liberties Association)

Many witnesses were concerned that the definition of terrorist activity, as written, requires police and security agencies to investigate, and for the Crown to

“Adding a political, religious or ideological element to this offence significantly increases the risk of racial, religious or political profiling and other related discrimination.”

(Alex Neve, Amnesty International)

prove, that a terrorist act had been committed for a political, religious or ideological purpose, objective or cause. While the Minister of Justice and Attorney General, Department of Justice officials and law enforcement officials testified that the introduction of a motivation requirement into the definition of terrorist activity actually makes it more difficult for prosecutors to satisfy the burden of proof in terrorist offence prosecutions because, in addition to proving act and intent, the prosecutor must also establish motive. However, numerous witnesses were of the opinion that the motivation clause requires or encourages police and security agencies to inquire into the personal beliefs of those under investigation or to engage in racial and religious profiling.

“As we understand it, that phraseology was put into the [A]ct by the draftspersons to limit the scope of it. ... It imposes a higher standard from an investigative standpoint. When you begin the process of investigation leading to prosecution, you have a higher threshold of proof because you have to address one of those elements [of motive] in order to trigger the responses.”

(Vince Westwick, Canadian Association of Chiefs of Police)

The Committee also notes the U.N. Human Rights Committee’s concluding observations in its review of Canada’s compliance with the *International Covenant on Civil and Political Rights*. In its April 2006 report, the U.N. Committee stated:

The Committee, while noting the existence of a social protest protection clause, expresses concern about the wide definition of terrorism under the *Anti-Terrorism Act*. The State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation and detention.<sup>8</sup>

Our Committee believes that a definition of terrorist activity is necessary and supports the preventive aspects of the *Anti-terrorism Act* that flow from this definition. Offences relating to financing, facilitating, instructing and concealing terrorist activity are essential elements in disrupting potential attacks against our society. We are also of the view that the current definition of terrorist activity, while complex, contains adequate fault requirements and is sufficiently specific in its description of what constitutes terrorist activity. However, we believe the motivation clause in the second part of the definition to be problematic. We concur with witnesses that requiring the police to examine motive, and prosecutors to prove that a terrorist act or omission has been undertaken for a political, religious or ideological purpose objective or cause, may unwittingly target some segments of our population and encourage racial and religious profiling during investigations. Accordingly, the Committee believes that the motivation clause should be removed from the definition of terrorist activity.

#### **RECOMMENDATION 1**

That clause 83.01(1)(b)(i)(A) of the *Criminal Code*, which requires an act or omission to be "... committed in whole or in part for a political, religious or ideological purpose, objective or cause," be removed from the definition of "terrorist activity" found in section 83.01(1).

The Committee notes that the Ontario Superior Court of Justice also recently concluded that the motivation clause in the second part of the definition of terrorist activity should be removed. Mohammed Khawaja, the first person charged with terrorist offences introduced by the *Anti-terrorism Act*, challenged the constitutionality of both the definition of terrorist activity and the terrorist offences with which he was charged before that court. While the Court decided that the terrorist offences with which he was charged

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<sup>8</sup> United Nations, Human Rights Committee, Eighty-fifth session, [Consideration of Reports Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights, Concluding Observations of the Human Rights Committee: Canada](#), CCPR/C/CAN/CO/5, 20 April 2006, para. 12.

withstood scrutiny under the *Canadian Charter of Rights and Freedoms* and that the definition also withstood *Charter* scrutiny in many respects, it found that the motivation clause violated the rights to freedom of religion, expression and association guaranteed under the *Charter*.<sup>9</sup> The Court accordingly severed the motivation clause from the rest of the definition of terrorist activity.<sup>10</sup>

## The Dilemma of Defining Terrorism

While the definition of terrorist activity in the *Criminal Code* is similar, in some respects, to definitions of terrorism enacted in other jurisdictions, such as the United Kingdom, Australia, France and the United States, it is also different from these definitions, being broader than them in some respects and narrower in others. Public Safety and Emergency Preparedness Canada and Justice Canada officials have described the *Criminal Code* definition as “specifically tailored to our domestic needs.”

Having said this, Canada has also been actively participating in United Nations discussions around the notion of creating an international definition of terrorism and a comprehensive anti-terrorism convention. Canadian representatives

“The experience in the previous 12 [U.N.] conventions is that one cannot arrive at a mutually satisfactory definition because of the difficult issue of dealing with what are often described as ‘freedom fighters.’ It is the question of the moral equivalency of terrorism versus armed conflict.”

(Keith Morrill, Foreign Affairs)

have been supportive of a simpler definition of terrorism on an international level than the one found in the *Criminal Code*, one which would prohibit causing or threats of causing death or serious injury to persons and serious damage to public or private property, with the intent to compel a person, an international organization or a state to do or refrain from doing something. The Minister of Public Safety and the Minister of

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<sup>9</sup> These rights are guaranteed by sections 2(a), (b) and (d) of the *Charter*. The Court also found that the motivation clause was not saved by section 1 of the *Charter*, which allows for reasonable limits to *Charter* rights, as long as those limits are prescribed by law, in certain circumstances.

<sup>10</sup> See *R. v. Khawaja*, [2006] O.J. No. 4245 (Ont. S.C.J.) (QL). The judgment in this case was rendered on 24 October 2006. As most of the definition and the terrorist offences themselves withstood constitutional challenge, Mr. Khawaja was initially scheduled to be tried on the offences with which he has been charged, using the newly modified definition of terrorist activity, in January 2007. However, the trial was postponed, as Mr. Khawaja filed an application for leave to appeal the Ontario Superior Court of Justice’s decision to the Supreme Court of Canada, on the basis that the charges against him should have been quashed.

Justice and Attorney General have stated that Canada has supported a simpler definition during United Nations negotiations on this topic as a result of the need to establish a common basis for action through broad consensus at the international level. Canada's approach before the United Nations reflects both the difficulty in defining terrorism generally, as well as the difficulty in achieving accord on this subject internationally. The United Nations has been struggling for years to develop consensus regarding an international definition of terrorism, yet despite the increased efforts which have been made, no agreement has yet been reached.<sup>11</sup>

“It is obvious that in the end we will need, as the Secretary General [of the U.N.] has said, a general definition of terrorism in order to avoid this debate about freedom fighters and many issues and aspects of international terrorism.”

(Jean-Paul Laborde, United Nations Office on Drugs and Crime)

Our Committee recognizes the importance of having a domestic definition of terrorism that reflects Canada's specific needs, concerns and experiences with terrorism, as well as the importance of developing an internationally acceptable definition of terrorism. We believe that the government should continue to participate in efforts to create an internationally acceptable definition and encourage the government to work towards achieving consensus in this regard. In the event that international consensus is achieved, we are also of the view that Canada should tailor the definition of terrorist activity in the *Criminal Code* to reflect the definition of terrorism or terrorist activity adopted internationally.

### **One Definition of Terrorism in the Canadian Context**

Another point made by witnesses who appeared before the Committee is that Canada currently has two definitions of terrorism, the one outlined above, which is used in criminal matters, and the other developed by case law and used in immigration matters. The definition of terrorism used in immigration matters is the one found in the *International Convention for the Suppression of the Financing of Terrorism*, where

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<sup>11</sup> See, for example, the work of the [United Nations Ad Hoc Committee](#) established by General Assembly Resolution 51/210 of 17 December 1996 (also known as the Terrorism Committee). This Committee has been working on developing a comprehensive convention on international terrorism since 2000.

terrorism is defined as any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.”<sup>12</sup>

This definition is much narrower in scope and less complex than the definition of “terrorist activity” in the *Criminal Code*. Some witnesses suggested, during Committee hearings, that the simpler definition used in the immigration context should also be used in the

“We strongly recommend the definition ... which comes from a United Nations convention ... [T]hat definition has been utilized within the context of immigration law. Having multiple definitions of ‘terrorism’ at work in Canadian law at best creates confusion or uncertainty.”

(Greg P. DelBigio, Canadian Bar Association)

criminal context. However, others pointed out that the simpler definition fails to account for property damage. The Committee is satisfied that the definition of “terrorist activity” in the *Criminal Code*, absent the motivation clause, is sufficiently precise and specifically targets the types of criminal activity the government wishes to prohibit. However, we are troubled by the fact that there are currently two definitions of terrorism operating in the Canadian legal context. We are also concerned by the possibility that, at some future date, the government may choose to enact different definitions of terrorism in different statutes, depending on the subject matter being treated. This is the approach that has been taken by the United States. While this approach does have its advantages, in that multiple definitions of terrorism allow the definitions to be tailored to the requirements of the subject matter, such advantages, in our view, are outweighed by the fact that multiple definitions come with a level of confusion about which definition applies and how it is interpreted in accordance with the *Charter*. Citizens must be in a position to know precisely what conduct comes with criminal, immigration or other consequences. Different definitions serve to make what constitutes terrorism unclear.

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<sup>12</sup> See [Suresh v. Canada \(Minister of Citizenship and Immigration\)](#), [2002] 1 S.C.R. 3 at para. 98, where the Supreme Court of Canada adopts the definition of terrorism found in Article 2(1) of the *International Convention for the Suppression of the Financing of Terrorism* for use in immigration matters.

**RECOMMENDATION 2**

That the government legislate a single definition of terrorism for federal purposes.

## **RACIAL, RELIGIOUS AND ETHNIC PROFILING**

The Committee was moved by testimony on the part of many witnesses indicating that they have been disproportionately affected by the provisions of the *Anti-terrorism Act* and national security and law enforcement practices generally. One of our primary concerns during the course of our study was the sense of marginalization and vulnerability felt by members of the Canadian Arab and Muslim communities, and certain other immigrant or visible minority groups, since 11 September 2001. The Committee believes that this should be a primary concern of Parliament and the government as well. It must be clear that the targeting or profiling of individuals for scrutiny or investigation by government officials in the fight against terrorism solely by reason of their membership in a particular racial, religious or ethnic group is not an authorized practice under the *Anti-terrorism Act*.

### **Political, Religious or Ideological Objectives**

When the Special Senate Committee on the Subject Matter of Bill C-36 was conducting its pre-

“Remove the motive requirement from the definition of terrorism.” (Canadian Arab Federation)
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study of the legislation in 2001, concern was expressed by witnesses that the *Anti-terrorism Act* would indirectly encourage profiling because the definition of “terrorist activity” requires terrorist acts to be motivated by a political, religious or ideological purpose. In the preceding section of this Report, we recommended that the motive requirement be removed from the definition of terrorist activity in the *Criminal Code*. Among other things, our intention is to reduce the likelihood of unfair targeting or prosecution of individuals based solely on their religion, or other irrelevant characteristics.

At this time, we also note that section 89 of the *Anti-terrorism Act* amended the definition of “threats to the security of Canada” set out in section 2 of the *Canadian Security and Intelligence Service Act* (CSIS Act), which guides CSIS in its investigations and collection of information. Paragraph (c) of the definition now states that a threat to

the security of Canada includes “activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state.” Before 2001, reference was made to a political objective only. For similar reasons to those we cited in favour of removing the reference to a political, religious or ideological purpose, objective or cause from the definition of “terrorist activity” in the *Criminal Code*, we believe that the reference to a political, religious or ideological objective should be removed from the definition of “threats to the security of Canada” in the CSIS Act.

The Committee recognizes that the definitions in the statutes are for different purposes. Unlike in the context of the *Criminal Code*, the definition in the CSIS Act is not for the purpose of attributing motive in the commission of an offence or to assign criminal liability. Rather, it is to set out, as well as limit, the capacity of CSIS to investigate certain threats. The reference to a political, religious or ideological objective cannot simply be removed from the CSIS Act, as it would render CSIS responsible for investigating *any* activities involving the threat or use of acts of violence against persons or property, most of which are more properly the responsibility of the police. Still, we believe that paragraph (c) of the definition of “threats to the security of Canada” can be amended to indicate the types of threats that CSIS is to investigate without referring to a political, religious or ideological objective.

For example, the definition might refer to activities involving serious violence for the purpose of terrorism, intimidating the public and/or compelling the Canadian government or a foreign state to act in a certain way. While the purposes of the *Criminal Code* and CSIS Act are different and the provisions of each statute must be tailored accordingly, the definition of terrorist activity in the *Criminal Code* might provide guidance on how to amend the definition of threats to security under the CSIS Act. The drafting goal would be to replace even the pre-existing reference to a political objective with wording to ensure that security and intelligence agencies do not target individuals for improper reasons, and to prevent perceptions of such profiling. If it is no longer

necessary to consider the political, religious or ideological beliefs of a suspected terrorist or person of interest, CSIS and other agencies can better focus on the specific conduct, pattern of behavior, and other relevant information in respect of an individual.

### **RECOMMENDATION 3**

That paragraph (c) of the definition of “threats to the security of Canada” in section 2 of the *Canadian Security and Intelligence Service Act* be amended by removing the reference to a political, religious or ideological objective and replacing it with alternate wording to indicate the type of violent activities against person or property that constitute threats to the security of Canada.

At this point, the Committee wishes to make a clear distinction. Targeting individuals, or selecting them for investigation, solely on the basis of their race, national or ethnic origin, colour or religion, which we will call “racial profiling” for ease of reference, is not only inappropriate and unacceptable, but also violates the equality provisions of section 15 of the *Canadian Charter of Rights and Freedoms*. Subjecting an individual to prosecution on the basis of religious, political or ideological motive also constitutes an infringement of certain fundamental freedoms guaranteed in section 2 of the *Charter*, including those of religion, thought, belief, opinion, expression and association.<sup>13</sup> On the other hand, targeting a person belonging to a particular group or community on the basis of *other* and *relevant* characteristics or information is appropriate and acceptable. The Committee does not wish to place a chill on investigations of terrorism, and acknowledges the very legitimate work of security, intelligence and enforcement agencies who suspect that an individual may be involved in terrorist activity based on his or her comportment, travel history, written communications, association with known or suspected terrorists, and the like.

### **Principles of Non-Discrimination**

In 2001, the Special Senate Committee on Bill C-36 urged the government to place a high priority on ensuring that officials, such as law enforcement and security

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<sup>13</sup> See *R. v. Khawaja*, *supra* at para. 7.

agencies, the judiciary, Crown prosecutors and correctional staff, engage in ongoing training sensitive to the ethnic diversity of Canadian communities. It also suggested that the government create a mechanism to enable representatives of minority groups to share views of methods best suited to achieving the necessary level of cultural and ethnic sensitivity in balancing the new anti-terrorism laws on a non-discriminatory basis. As part of our discussion and recommendations below, we in many ways follow up on the views of the Special Committee in 2001.

We would like to emphasize that the provisions enacted by the *Anti-terrorism Act*, and indeed all

“[A]nti-terrorism policy [should] not be administered in a manner inconsistent with the Canadian Charter.”

(B’nai Brith Canada)

legislation, must be interpreted in light of the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act*, both of which already prohibit discrimination in the application of Canadian laws. We believe that the protections guaranteed by the *Charter* and *Canadian Human Rights Act* warrant particular emphasis where certain measures, investigative techniques, and offence provisions, such as those that exist in the context of Canada’s national security and anti-terrorism framework, risk being applied disproportionately to certain Canadians. **Even in extraordinary times and in response to extraordinary threats, the normal principles of non-discrimination must continue to be followed.**

### **Policies in Place to Combat Racial Profiling**

With respect to racial profiling, and more specifically its avoidance, the Committee was told by the federal government that racial profiling does not occur and that discriminatory practices, including the targeting of minorities, have no place in law enforcement and security and intelligence work. However, we did note an evolution in the views of police, security and intelligence agencies as our work progressed and community members were given the opportunity to express the unease and anxiety they were feeling. By the end of our study, government representatives acknowledged that, despite the fact that racial profiling is not officially condoned, certain groups nonetheless

feel that they have been the targets of racial profiling. They also recognized that policies and practices against racial profiling require monitoring, enforcement and ongoing training.

All of the representatives from law enforcement and national security agencies who testified before the Committee indicated that their organizations now provide some type

“It is an offence under the code of conduct, and anyone who practiced racial profiling would be held accountable. We do the education and the training. We work with our community.”

(Vince Bevan, Ottawa Police Service)

of cultural sensitivity and/or diversity training for their officers, in order to educate them on how to deal appropriately with individuals from different ethnic groups. By way of example, the Minister of Public Safety and Minister of Justice and Attorney General pointed to the Bias-free Policing Strategy implemented by the RCMP in response to the Action Plan Against Racism. Representatives from national security organizations also indicated that they were beginning to engage in community outreach activities to make communities that have felt singled out more aware of their work and what they do, and were actively recruiting more staff from Canada’s diverse communities.

Although efforts have been made on the part of the government to ensure that racial profiling does not take place, many witnesses who appeared before the Committee as representatives of community

“In our view, ethnic and racial profiling has definitely occurred in the implementation of the anti-terrorism legislation. The legislation has had a disproportionate impact on Muslim, Arabs, South Asians and charities serving these groups.”

(Khurram Awan, Canadian Islamic Congress)

organizations or to address civil liberties matters asserted that racial profiling had occurred and was still occurring. They also explained that the perception of certain communities that they are being targeted or singled out for increased scrutiny and

investigation is a strong one, and that a culture of fear has been created, particularly among Canada's Muslim and Arab groups. Several witnesses also claimed that members of their communities had been intimidated and harassed by police and security officials. It is clear to the Committee

“Since the adoption of Canada’s Anti-terrorism Act, we have witnessed an ever-increasing targeting of people of colour, people of Arab origin and of the Muslim faith. This practice of criminalizing diversity through racial profiling has been allowed to thrive because of the climate provided by Bill C-36 and other related security measures.”

(Canadian Labour Congress)

that some degree of racial profiling takes place in Canada and that measures must be strengthened, not only to ensure that racial profiling is not practiced, but to improve relations generally between security and law enforcement agencies, on one hand, and Arab, Muslim and other minority groups, on the other.

In the September 2006 report of the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, Justice O’Connor stated in his Recommendations 19 and 20 that

“[I]ntelligence, security and police services personnel should be provided with appropriate educational and training programs to promote enforcement of Canadian anti-terrorism laws with appropriate sensitivity to civil liberties and personal and community sensibilities.”

(Ed Morgan, Canadian Jewish Congress)

Canadian agencies involved in national security and anti-terrorism investigations, particularly the RCMP, CSIS and the Canada Border Services Agency, should have clear policies against racial profiling and expand the training given to staff on issues relating to it.<sup>14</sup> With respect to training, we would add that police and other officials should also be made more aware of the diversity of cultural practices and religious observances in Canada. A greater degree of familiarity must be fostered between minority communities and national security agencies, not just so police and security officials are more understanding of community concerns but so community members also fulfill a responsibility to understand the laws that affect them, how Canada’s national security regime functions, and the policies and practices of police and prosecutors.

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<sup>14</sup> 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, September 2006, pp. 355-358.

In the Committee's view, security and law enforcement agencies must understand that the targeting of individuals based on race and ethnicity does not enhance Canada's anti-terrorism goals. Rather, it leads to the deterioration of government-community relationships, and deprives national security agencies of important intelligence. If certain communities believe that they are unfairly targeted and therefore distrust the police or CSIS, they will be less likely to share

"[E]thnic and racial profiling would not accomplish the goal of enhanced security. ... Members of the community that are targeted and the larger community will be alienated and unlikely to cooperate in efforts to root out terrorism."

(National Organization of Immigrant and Visible Minority Women of Canada)

"I believe that racial profiling is a gift to terrorists. Once they know the profile you are looking for, they will send people whom you would never racially profile. You will be following every innocent person, and the one that you want will get through."

(Imam Salam Elmenyawawi, Muslim Council of Montreal)

information regarding actual terrorism-related activity. It was also pointed out to the Committee that if national security or law enforcement agencies focus their attention and resources on individuals with particular characteristics, they may fail to stop terrorist activity on the part of individuals who do not have those characteristics.

#### **RECOMMENDATION 4**

That, in addition to implementing clear policies against racial profiling, all government departments and agencies involved in matters of national security and anti-terrorism engage in sufficient monitoring, enforcement and training to ensure that racial profiling does not occur, the cultural practices of Canada's diverse communities are understood, and relations with communities are improved generally.

## Resolving Complaints and Improving Public Awareness

Despite the existence of public complaints mechanisms, including those through the Commission for Public Complaints against the RCMP, the Director of CSIS, and the Security

“As for official complaints, many in the Muslim and Arab communities do not have much confidence in the complaints system and its ability to offer them justice and redress.”

(Canadian Muslim Lawyers Association)

Intelligence Review Committee, the Committee was told that many members of ethnic communities do not complain about their treatment at the hands of police and security officers because they are either unaware that complaint mechanisms exist or are too afraid to come forward to use them.

We believe that a campaign to increase the public’s awareness and understanding of the available complaints mechanisms will alleviate some of the fear and hesitation experienced by individuals who have concerns regarding racial profiling or any other aspect of police and security practices.

“[T]here may be reluctance on the part of such communities to exercise both their rights and their responsibilities as citizens of this country. In terms of their rights, this means taking advantage of established recourse mechanisms in the event that they feel they have experienced mistreatment by intelligence or security agencies. It also means discharging the responsibility as citizens to help those services in their work to protect all Canadians.”

(Jim Judd, Canadian Security Intelligence Service)

In particular, we believe that the public should clearly know that the Canadian Human Rights Commission and the Canadian Human Rights Tribunal have jurisdiction in relation to any complaint regarding discrimination by a federal department

“We have launched a fairness initiative to provide better context to clients as to what we expect from them and what they can expect from us. ... The Canada Border Services Agency does not condone racial profiling.”

(Claudette Deschênes, Canada Border Services Agency)

or agency. In fact, the Commission released the conclusions of a research project in October 2006 on the extent to which human rights concerns are prevalent in the exercise

of various powers relating to national security.<sup>15</sup> We also note that concerns brought to the attention of the Commission may lead to results. For example, the Commission signed a memorandum of understanding with the Canada Border Services Agency in December 2005, by which the latter agreed to a more proactive and systemic approach to reduce discrimination in relation to members of the public.<sup>16</sup>

In short, Canadians and, in particular, Canada's minority communities must be confident that, particularly when extraordinary national security measures are available to intelligence and law enforcement agencies, there are mechanisms in place to ensure the equality protections to which all individuals are entitled. **As a means of combating racial profiling, the Committee urges an improved RCMP complaints mechanism, as recommended by Justice O'Connor, in December 2006, following the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar.**<sup>17</sup> Finally, we hope that the standing parliamentary committee that we recommend in the last section of our Report would, if created, function to assure the public that discrimination is not tolerated in Canada's anti-terrorism regime. The committee would not only examine the content of anti-terrorism legislation, but also how those laws are being applied.

#### **RECOMMENDATION 5**

That the government launch an information program and produce materials in various languages to increase public awareness of: the proper role and powers of police and national security agencies in the fight against terrorism; the rights of individuals, particularly on questioning or arrest; and the mechanisms that are available to address complaints, particularly those of racial profiling.

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<sup>15</sup> Wesley K. Wark, *National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post-9/11 Environment*, paper prepared for the Canadian Human Rights Commission, Toronto, October 2006.

<sup>16</sup> *Memorandum of Understanding between the Canadian Human Rights Commission and the Canada Border Services Agency*, Ottawa, 7 December 2005.

<sup>17</sup> Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Functions*, Ottawa, December 2006, pp. 543-553 (Recommendations 5 and 6).

## Cross-Cultural Roundtable on Security

In accordance with the 2001 Special Committee's recommendation that the government create a mechanism for consultation with representatives of minority groups, the government announced in April 2004 that it would be establishing a Cross-Cultural Roundtable on Security (CRS) to engage in a long-term

“[The Roundtable] will facilitate a broad exchange of information between the government and diverse communities on the impact of national security issues. It will serve to better inform policy-makers by providing insights on how national security measures may impact Canada's diverse communities, and it will promote the protection of civil order, mutual respect and common understanding.”

(Doug Breithaupt, Department of Justice)

dialogue on matters related to national security and how these matters affect Canada's diverse communities.<sup>18</sup> On 8 February 2005, all 15 members of the CRS were appointed by the government from a pool of over 230 nominees, with one member being replaced in November 2006. Since its establishment, the CRS has held six meetings. The Ministers of Public Safety and Justice are required to meet with the Roundtable at least once per year, and the Minister of State for Multiculturalism is also to be invited.

We would like to first remind the government of the primary objective behind community consultation in matters of national security and anti-terrorism. It is not simply to solicit the views of most or all ethnic and cultural groups in Canada. It is to understand and correct the disproportionate impact that anti-terrorism laws, policies and practices have on those communities most affected by them. The Committee accordingly believes that the mandate of the CRS should be more clearly defined and focused. While obtaining input from all of Canada's diverse communities remains desirable, the objectives of the CRS should more specifically include obtaining insights from those groups most disproportionately affected by the anti-terrorism framework, whatever groups those might be at a given time, as a result of changing circumstances. The point is that national security and law enforcement officials should be sensitized by, and the

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<sup>18</sup> For detailed information about the Cross-Cultural Roundtable on Security, see the web site of [Public Safety and Emergency Preparedness Canada](#).

government should learn from, the experiences of those communities or individuals who have actually been negatively affected by certain investigative techniques, the provisions on terrorist financing or the listing of entities, and the like. By listening to those groups most affected, the government will be in a better position to respond by making the appropriate changes to laws, policies and practices. There should be proper communication strategies and a clear channel from community input to government action.

Representatives of some of the community groups who appeared before the Committee stated that the CRS lacks legitimacy in the eyes of the Arab and Muslim communities because none of its members have

“The perception on the part of the community could be that this is just a tokenistic overture, not a serious one. There is work that needs to be done on the Roundtable.”

(Riad Saloojee, Canadian Council on American-Islamic Relations)

been selected from the largest Arab and Muslim populations in Canada, which are in Montreal and Toronto. While the Committee recognizes that not every region, city or community can be represented on a roundtable that has a maximum membership of 15, and that all minority groups in Canada deserve a voice, we do remind the government to be sensitive to the need for balanced representation when obtaining insights on how national security measures affect those communities left most vulnerable as a result of the enactment of the *Anti-terrorism Act*. Balanced representation also consists of a diversity of spoken languages, for example those spoken by Canada’s main Arab and Muslim communities, whether French, English or the language of their country of origin. If the government believes that it is unable to accommodate all of the groups significantly affected by the national security framework, we see no reason why membership on the Roundtable cannot be greater than 15. It is important that the composition of the CRS reflect the objectives it is trying to achieve.

To further legitimize the CRS in the eyes of minority groups, the Committee suggests that it be detached from the Department of Public Safety and Emergency Preparedness, so that it is more independent, clearly sets its own agenda and priorities,

and speaks for communities rather than the government. The CRS should be ensured permanent status so that it will not be discontinued as a result of a decision on the part of a particular government or department. Moreover,

“It has become evident to us that there is a real gap between government and the communities. Some communities are far more impacted by these legislative changes than others, and they want to understand why these measures have been put in place.”

(Zaheer Lakhani, Cross-Cultural Roundtable on Security)

while we note that three meetings of the CRS have taken place in each of 2005 and 2006, and that its terms of reference currently preclude more than four meetings per year, we believe consideration should be given to a greater number of meetings so that Canada’s communities have more opportunities to voice their concerns. A greater number of meetings, which may also require a greater budget, will enable the Roundtable to meet in more locations throughout Canada, where those groups and individuals affected by anti-terrorism laws and policies reside. In the end, we leave the frequency of meetings and other procedural matters to be decided by the CRS itself, but we want Canadian communities to know that the Roundtable is fully able to receive and communicate their feedback to the government. While we recognize that the CRS is a limited solution in response to issues such as racial profiling, it should be rendered as effective a mechanism as possible.

#### **RECOMMENDATION 6**

That the government strengthen the ability of the Cross-Cultural Roundtable on Security to effect change in matters relating to national security and anti-terrorism by giving it a more focused mandate, ensuring more balanced representation, detaching it from the Department of Public Safety and Emergency Preparedness and increasing its budget, all for the purpose of obtaining input from those communities most affected by anti-terrorism laws, policies and practices.

## PROCEDURAL FAIRNESS: THE NEED FOR A SPECIAL ADVOCATE

An overriding concern on the part of witnesses who testified before the Committee related to a perceived lack of procedural fairness in circumstances where an individual is not able to obtain full disclosure of information, despite the serious consequences that may result from the proceedings. Witnesses drew the Committee's attention to several situations where individuals may be denied access to classified or confidential information, for reasons based on national defence, national security, international relations or the safety of any person, and therefore not be in a position to fully respond to the allegations and arguments against them. While each of these proceedings is referenced again in later sections of this Report, the Committee considered it important to group them together at the outset in order to discuss an overarching theme: the need for a special advocate to represent the interests of the affected party, as well as the public interest in disclosure, where information is withheld by the government.

When entities or individuals are not able to have complete access to evidence that is relevant to them, their right to make full answer and defence is significantly hindered. While the Committee recognizes that information must sometimes be withheld from a party where national security is at stake, it believes that the procedural disadvantages should be reduced through the appointment of a special advocate who would test the government's case. This would provide a more appropriate balance between national security interests and the rights of individuals to a fair proceeding.

The Committee accordingly believes that the assistance of a special advocate is necessary in at least five contexts: judicial review of a decision to list a terrorist entity under the *Criminal Code*;<sup>19</sup> judicial consideration of a certificate having the effect of denying or revoking charitable status under the *Charities Registration (Security Information) Act* (CRSIA); applications under the *Canada Evidence Act* (CEA) with

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<sup>19</sup> Similar proceedings also exist to review the listing of entities under the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* and the *United Nations Al-Qaida and Taliban Regulations*, both of which were enacted under the *United Nations Act* and are discussed in more detail in the next section of this Report.

respect to the disclosure of information; applications under the CEA to vary or cancel a certificate issued by the Attorney General of Canada prohibiting the disclosure of information; and judicial consideration of a security certificate under the *Immigration and Refugee Protection Act (IRPA)*.

### **The Need for a Special Advocate**

The need for a special advocate to respond to the government's confidential information in proceedings to review the listing of a terrorist entity or the denial or revocation of charitable status is

“[O]ur concern stems from the fact that the evidence used to determine whether a person or organization ought to be listed consists of untested intelligence information, including information obtained from foreign governments and their security agencies.”

(Canadian Muslim Lawyers Association)

important due to the serious consequences resulting from these executive decisions. While being listed as a terrorist entity under the *Criminal Code* does not itself constitute a criminal offence, individuals associating with the listed entity may be subject to prosecution for a terrorist offence, crimes relating to the financing of terrorism, and seizure and forfeiture of property. A denial or revocation of charitable status under the CRSIA has significant financial repercussions.

With respect to the CEA, witnesses who appeared before the Committee expressed serious concerns about the fairness of withholding information from parties to administrative or criminal proceedings. Where the Attorney General issues a non-disclosure certificate, or a judge decides to

“[A]n advocate of some sort [should] be appointed to protect the interest of an accused in a secret hearing ... [T]oo frequently the information that is presented by a party may be incomplete or may present only one side of the story. In the absence of complete disclosure and an opportunity for testing, there are risks. Some form of advocate may minimize those risks.”

(Greg P. DelBigio, Canadian Bar Association)

provide only part or a summary of relevant information to a party, the ability of the party to make full answer or defence, or to argue that the information should be disclosed, is severely impeded.

The provisions governing the review of a security certificate proved to be the most contentious during the Committee's hearings. While the IRPA instructs the judge to deal with all matters informally and as expeditiously as is consistent with

“[The special advocate’s task during security certificate proceedings] would in fact be to argue for disclosure of information in all matters as well as argue for non-deportation based on the information over which privilege is claimed.”

(British Columbia Civil Liberties Association)

fairness and natural justice, witnesses were alarmed that crucial information may nonetheless be withheld from the permanent resident or foreign national, as well as his or her counsel. The need for a special advocate is particularly important during the security certificate process, given that no appeal or subsequent review is available and the consequences of the process could be serious, namely indefinite detention or deportation to torture. There is also a relatively low standard of review, in that the judge is not called upon to determine whether the allegations against the individual are true, but only whether the certificate is “reasonable.”

The Committee recognizes that there are current legislative safeguards that ensure some degree of procedural fairness when individuals are not able to obtain access to information that relates to them. For example, affected parties are entitled to receive a summary of the information relevant to their case. However, the fact that certain information may be omitted from the summary, yet still be considered by the judge, demonstrates that additional safeguards are necessary. Without compromising national security interests, the availability of a special advocate would ensure a greater degree of procedural fairness than currently exists under the *Anti-terrorism Act* and related legislation.

Finally, the Committee notes the United Nations Human Rights Committee's comments regarding non-disclosure of information during criminal or other proceedings in its review of Canada's compliance with the *International Covenant on Civil and Political Rights*. In a report issued in April 2006, the U.N. Committee expressed concern regarding the amendments to the CEA introduced by the *Anti-Terrorism Act*, stating that they do not fully abide by the requirements of due process set out in article 14 of the Covenant. The U.N. Committee stated that Canada has an obligation "to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access."<sup>20</sup> Additionally, the U.N. Committee cautioned against invoking exceptional circumstances as a justification for deviating from the fundamental principles of a fair trial.

We believe that the foregoing comments in favour of greater procedural fairness under the CEA apply equally to proceedings to review a decision to list a terrorist entity under the *Criminal Code*, to sign a certificate that has the effect of denying or revoking charitable status under the CRSIA, and to issue a security certificate under the IRPA. To reduce the unfairness to parties who are denied access to information used against them, there should at least be a special advocate who would test the evidence on their behalf, as well as make arguments to persuade the court that information, which the government claims must be kept confidential in the interest of national security, should in fact be disclosed to the affected party.

### **Role and Responsibility of a Special Advocate**

A special advocate having access to classified or confidential information would not be able to disclose it to the party affected by the proceedings. As a result, the special advocate envisioned by the Committee would not directly represent any individual or organization. In other words, there would be no solicitor-client relationship. However, the special advocate would still represent the interests of the affected party, to the extent

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<sup>20</sup> United Nations, Human Rights Committee, [Concluding Observations: Canada](#), *supra*, para. 13.

possible, by arguing in favour of the disclosure of information to the individual and testing the information and evidence against him or her. Such an advocate may be viewed as representing not only the interests of the party, but also the public interest in disclosure, the openness of court proceedings and the integrity of national security matters.

“[There should be] a security-cleared special advocate position to carry out the function of both challenging arguments that information should not be disclosed to the affected party and in challenging information that cannot be disclosed.”

(Jennifer Stoddart, Privacy Commissioner of Canada)

The special advocate would attend *in camera* or *ex parte* hearings in the absence of the affected party and his or her counsel. Being privy to confidential information, the advocate would challenge the Crown or Attorney General’s arguments against disclosure, or the facts alleged against an individual. The Committee does not believe that it is sufficient for the court alone to test the validity or reliability of the confidential information. The Committee is aware of at least one judge who has found it problematic to hear only one party, review materials produced by only one party, and yet be faced with the difficult task of determining what might be wrong with the government’s case and how witnesses ought to be cross-examined.<sup>21</sup> We also note that Justice O’Connor, during the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, benefited from the assistance of *amica curiae*, or independent counsel. Moreover, he recommended, in his December 2006 report, that a new agency to review complaints regarding the national security functions of the RCMP should have discretion to appoint security-cleared counsel, independent of the RCMP, to test the need for confidentiality and to test information that may not be disclosed to the complainant or the public.<sup>22</sup>

<sup>21</sup> James K. Hugessen, Judge, Federal Court of Canada, “Watching the Watchers: Democratic Oversight” in David Daubney *et al.*, eds., *Terrorism, Law & Democracy: How is Canada changing following September 11?* (Montreal: Canadian Institute for the Administration of Justice, 2002), pp. 384-386.

<sup>22</sup> [A New Review Mechanism for the RCMP’s National Security Functions](#), *supra*, pp. 549-552 [Recommendation 5(h)].

Due to the obvious need for confidentiality in matters of national security, the appointment of a special advocate is the best option available to protect the interests of a party who is denied access to certain information. While the special advocate would not

“[W]here information is being processed *in camera* and people who are affected do not have a chance to see it, at the very least, there should be a secured public advocate who can look at all the material and attempt to represent that person’s interests at *in camera* sessions.”

(Alan Borovoy, Canadian Civil Liberties Association)

be the party’s lawyer in the usual solicitor-client sense, and therefore would not be in a position to develop legal strategies that are fully transparent to the party, he or she would nonetheless communicate with the party and his or her counsel. The objective would be to ensure that the process during *in camera* hearings has been or will be as fair and just as possible. Given the obligation to keep confidential information secret, the appointment of a special advocate would not completely guarantee procedural fairness, but would significantly improve the current state of affairs.

The Committee considered the extent to which a special advocate should be able to interact with the affected party, or his or her counsel, *after* receiving confidential information. The inability of the special advocate to communicate with the affected party or his or her counsel after attending *in camera* hearings or receiving confidential information has been criticized in the United Kingdom, where special advocates are generally only able to communicate beforehand (or in very limited situations afterwards, with the approval of the court).<sup>23</sup>

In our view, if the special advocate is able to communicate with the party affected by the proceedings only *before* receiving the confidential information, his or her role is rendered much less effective, as he or she is unable to meaningfully test the reliability of a specific piece of classified or sensitive information, or the validity of keeping it confidential. If the special advocate were to have access to the party and his or her counsel *after* obtaining confidential information, we are confident that the advocate

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<sup>23</sup> See United Kingdom, House of Commons, Constitutional Affairs Committee, [The operation of the Special Immigration Appeals Commission \(SIAC\) and the use of the Special Advocates](#), Seventh Report of Session 2004-2005, 3 April 2005.

would be able to maintain the secrecy of the evidence and not disclose it. That said, appropriate measures or protocols would need to be put in place to ensure that the affected party does not learn the confidential information.

In addition to being sworn to secrecy, and being subject to offences under the *Security of Information Act*, a special advocate should follow clear guidelines when meeting with the

“To be effective, the special advocate must be permitted to speak to the individual’s counsel throughout the proceedings. ... The special advocate will have an ongoing duty to keep the secret evidence confidential.”

(Federation of Law Societies of Canada)

affected party or his or her counsel. For example, he or she might communicate with the client in the company of another person, likewise sworn to secrecy, so that there can be close monitoring of what is discussed and inadvertent errors of disclosure prevented. In other words, the limited ability of the advocate to communicate information to the party must be acknowledged and maintained. The Committee believes that the government is in a position to establish appropriate safeguards to ensure that sensitive information relating to matters of national security is kept secret. The underlying objective would be to permit communication between the special advocate and the affected party, in the interest of procedural fairness, while still maintaining the credibility and integrity of matters involving national security confidentiality.

### **Selection of a Special Advocate**

The Committee considered how a special advocate in proceedings relating to anti-terrorism and national security should be selected. The first option is for a party’s existing counsel to obtain a security clearance in order to gain access to classified, secret or otherwise sensitive information. This, however, is a time-consuming process, would require a waiver of the solicitor’s obligation to disclose all information to the client, and would raise concerns and delay if the counsel did not successfully obtain the clearance. This approach also means that there could be an indefinite number of individuals gaining access to classified information, rather than a limited number who develop an expertise and assist in several matters.

The more preferable approach is therefore to have a roster of security-cleared lawyers, funded by the government, who could act as special advocates, regardless of

“[T]he court could provide the individual with a roster of pre-screened counsel who could function as special advocates. The individual could select a special advocate from this roster.”

(Federation of Law Societies of Canada)

whether an affected party already has his or her own counsel. Without discussing in detail the appropriate selection process or precise qualifications, the Committee believes that these lawyers should have the necessary expertise to represent the interests of an affected party in any of the various types of proceedings where the party is denied access to information in the interest of national security. The pool of special advocates should be from among the private bar, so as to avoid any apprehension of bias in relation to the government. Barring any conflict of interest, the affected party should be entitled to select the special advocate from the list of pre-screened counsel. Finally, depending on the number of anticipated cases where the appointment of a special advocate would be required in order to address information withheld by the government, there should be an appropriate number of individuals on the roster.

### **Proceedings Requiring a Special Advocate**

As already conveyed, there are at least five anti-terrorism-related matters that the Committee believes require the assistance of a special advocate in order to rebalance the proceedings in favour of the disadvantaged party who does not have full access to information. These are now reviewed in greater detail. First, the Committee believes that a special advocate should be appointed to represent the interests of the affected entity during judicial review, under section 83.05 the *Criminal Code*, of a decision to list a terrorist entity. Second, a special advocate having access to confidential information held by the government should be appointed to represent the interests of the affected organization during judicial consideration, under section 5 of the CRSIA, of a decision to sign a certificate that has the effect of denying or revoking charitable status.

Section 83.05 of the *Criminal Code* allows an organization or individual to be listed as a terrorist entity on the basis of reasonable grounds that it has knowingly been involved in a terrorist activity, or is knowingly assisting another terrorist group. A listed entity may apply to the Federal Court for judicial review of the decision. Under the CRSIA, an organization may have its charitable status under the *Income Tax Act* denied or revoked on the basis of a certificate stating that there are reasonable grounds to believe that it has made, makes or will make resources available, either directly or indirectly, to a terrorist entity or in support of terrorist activities. The certificate is automatically referred to the Federal Court for consideration under section 5 of the CRSIA.

On review of the listing of a terrorist entity, or a certificate that has the effect of denying or revoking charitable status, the judge examines, in private, the information on which the decision was based, such as security or criminal intelligence reports. Additional evidence may be heard in the absence of the entity, organization or its counsel, if the government so requests and the judge believes that disclosure would injure national security or the safety of any person. However, the judge is to provide the entity or organization with a summary of the information that may not be disclosed, so that it is reasonably informed of the reasons for the decision to list or to deny or revoke charitable status.

In both types of proceedings, the government may make an application to the judge, in private and in the absence of the affected party and its counsel, to admit information obtained in confidence from foreign or international sources but to withhold the information from the party. If the judge believes that the information is relevant, but that disclosure would injure national security or the safety of any person, the judge must exclude the information from the summary of information provided to the party, but may still consider the information when reviewing the decision under consideration. This possibility underscores the need for a special advocate to represent the interests of the affected entity or organization, as information used by the judge in his or her main decision may be unavailable to the affected party.

Two other types of matters during which a party may be unable to make full answer and defence as a result of secret information exist in the context of the CEA. In particular, the Committee concludes that a special advocate should be available to represent the interests of the affected party during applications for the disclosure of information under section 38.04. We also conclude that a special advocate should be appointed during applications under section 38.131 to vary or cancel a certificate issued by the Attorney General of Canada prohibiting the disclosure of information.

Under section 38.04 of the CEA, a judge of the Federal Court may hear an application with respect to the disclosure of information that has been withheld by the government in any criminal or administrative proceeding. The application is confidential. Under section 38.06, the judge may or may not authorize disclosure, depending on whether disclosure would be injurious to international relations, national defence or national security, and whether the public interest in disclosure outweighs the public interest in non-disclosure. The judge may authorize the disclosure, with or without conditions, of all of the information, part of it, a summary, or a written admission of facts.

Under section 38.131 of the CEA, a judge of the Federal Court of Appeal may hear an application to vary or cancel a certificate issued by the Attorney General prohibiting the disclosure of information. An affected individual does not have access to the information referred to in the certificate unless disclosure is

“In the criminal law context, the federal Attorney General’s power under s. 38.13 overrides the fundamental rights of the accused in the justice system: rights which are meant to protect the individual when the overriding power of the state is pitted against him. These include the right to a fair trial, the right to full disclosure from the Crown of inculpatory or exculpatory evidence, and the right to make full answer and defence.”

(Canadian Association of University Teachers)

authorized by the judge. The judge is required to confirm the certificate and the confidentiality of all information that he or she determines relates to information obtained in confidence from a foreign entity, or in relation to a foreign entity, national defence or

national security. In both types of proceedings under the CEA, a special advocate is necessary in order to test the government's assertion that information must be kept secret.

Finally, the Committee believes that a special advocate is necessary to represent the interests of the permanent resident or foreign national during judicial consideration of a security certificate under section 78 of the IRPA. Under section 77 of that Act, a security certificate may be issued stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. The grounds for inadmissibility on the basis of security include engaging in terrorism under section 34. The certificate is then referred to the Federal Court for a determination of its reasonableness.

During consideration of a security certificate, the judge examines all information and evidence in private, ensuring the confidentiality of the information on which the security certificate is based. The judge is required to provide the affected individual with a summary of the information that may not be disclosed, so that he or she is reasonably informed of the circumstances giving rise to the security certificate. However, as when a court reviews the listing of a terrorist entity or a decision to deny charitable status, if the judge believes certain information is relevant, but that disclosure would injure national security or the safety of any person, the judge must exclude the information from the summary of information, but may still consider the information when reviewing the security certificate. Again, it is the ability of the court to consider information that is entirely withheld from the affected party that the Committee considers particularly problematic. If an individual may be deprived of a specific piece of information that the judge inevitably relies on to uphold the security certificate, there should be a special advocate available to test that piece of evidence during the proceedings that the individual is not entitled to attend.

While courts have thus far upheld the security certificate process as constitutional, the process was challenged before the Supreme Court of Canada in the context of the appeals of Mohamed Harkat, Adil Charkaoui and Hassan Almrei in June 2006. A

decision had not yet been rendered at the time of the preparation of this Report. However, regardless of the outcome of those appeals, the Committee echoes comments made by certain witnesses that nothing precludes Parliament from granting more than the minimum guarantees required by the *Canadian Charter of Rights and Freedoms* to satisfy the principles of fundamental justice and due process.

The Committee notes that the listing of a terrorist entity under the *Criminal Code* is subject to subsequent ministerial review, which occurs automatically every two years, as well as on application of a listed entity. An organization that has been denied charitable status or has had it revoked under the CRSIA may apply for review if there has been a material change in circumstances. A decision not to authorize disclosure under section 38.06 of the CEA is subject to appeal. However, in the Committee's view, the availability of a subsequent review or appeal does not compensate for a lack of full procedural fairness during the initial process. Two, or even many, opportunities to challenge a particular decision do not reduce the disadvantages arising from non-disclosure if an individual remains unable to fully respond to the information against him or her at every stage. The Committee also points out that an appeal is not currently available from a decision to confirm a certificate of the Attorney General prohibiting disclosure, or to uphold a security certificate.

The Committee is also aware that if the inability to obtain disclosure under the CEA is in the context of criminal proceedings, the trial judge may make any order that he or she considers appropriate in the circumstances to protect the accused's

“The concern is both that there will not be adversarial contestation about whether evidence can legitimately be disclosed to the affected party without adversely affecting national security, and that evidence that cannot be disclosed for valid national security reasons will not be subject to adversarial challenge and testing.”

(Kent Roach, University of Toronto)

right to a fair trial, such as an order dismissing specified counts, or staying the proceedings altogether. However, we note that information may also be withheld under the CEA during administrative proceedings, and that these remedies would not apply. More importantly, the possibility of a stay of proceedings, or other order to ensure

procedural fairness, does not entirely alleviate concerns regarding non-disclosure if the accused is not able to fully argue in favour of the particular order that he or she believes should be granted. A possible remedy on the part of the judge does not replace full procedural fairness. Further, during all of the proceedings discussed above, a judge may receive into evidence anything that he or she believes is reliable and appropriate, even if it would not otherwise be admissible under Canadian law. This departure from normal evidentiary rules demonstrates the importance of having a special advocate who would test the relevance and reliability of the evidence.

#### **RECOMMENDATION 7**

That in proceedings where information is withheld from a party in the interest of national security and he or she is therefore not in a position to make full answer and defence, a special advocate having access to the confidential information held by the government be appointed to represent the party's interests, as well as the public interest in disclosure, by challenging the facts and allegations against the party and the government's arguments for non-disclosure.

#### **RECOMMENDATION 8**

That the special advocate be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending *in camera* hearings, and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security.

#### **RECOMMENDATION 9**

That the party affected by the proceedings be entitled to select a special advocate from among an adequately sized roster of security-cleared counsel who have the appropriate expertise and are funded by, but not affiliated with, the government.

## LISTING OF TERRORIST ENTITIES

The *Anti-terrorism Act* introduced provisions into the *Criminal Code* allowing Cabinet to establish a list of terrorist entities. Under these provisions, found in sections 83.05 to 83.07, the Minister of Public Safety recommends listing, based on criminal and security intelligence reports received from law enforcement and security agencies, and Cabinet decides whether or not to list. The basis for listing an entity is that there are reasonable grounds to believe that the entity, which may be an organization or an individual, has knowingly been involved in a terrorist activity or is knowingly assisting a terrorist group. The Minister of Public Safety is required to review the list of entities every two years to determine whether or not reasonable grounds to keep the entity on the list remain, and makes a recommendation to Cabinet about whether or not the entity should be retained on the list.

Entities are not allowed to challenge or make submissions with respect to the listing decision before it has been made. They can, however, apply to the Minister to be removed from the list once they have been added to it and, if refused, may apply to the Federal Court for judicial review of the Minister's decision. As stated earlier in this Report, during the judicial review process, the security and intelligence reports forming the basis for the listing decision are examined by the judge in private, and additional evidence may be heard in the absence of the entity or its counsel if the judge believes that disclosure would injure national security or the safety of any person. The judge is, however, required to provide the entity with a summary of the undisclosed information.

It is not a crime to be a listed entity in Canada. However, becoming a listed entity under the *Criminal Code* can have serious consequences, because listing means that the entity is thereby automatically defined as a terrorist group, and those who associate with terrorist groups may be charged with terrorism-related offences.

## **Moving Towards Harmonized Lists of Terrorist Entities**

Currently, there are 40 entities on the *Criminal Code* list, none of which are individuals. There are, however, two other listing regimes for terrorist entities in Canada. One was created under the *United Nations Al-Qaida and Taliban Regulations* (UNAR) and the other was created under the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* (UNSTR). Both sets of regulations were enacted under the *United Nations Act*.

The UNAR list was created in 1999 in direct response to United Nations Security Council Resolution 1267, which called on states to prohibit dealings with Usama bin Laden,<sup>24</sup> Al-Qaida and the Taliban. The UNAR contain provisions designed to make it illegal to deal with property of, or provide services, arms or technical and military assistance to, the Taliban, Usama bin Laden and entities associated with them. In contrast to the *Criminal Code* list, both individuals and organizations are found on the UNAR list, as it mirrors the list of entities established by the United Nations 1267 Committee, which oversees state implementation of sanctions imposed by the Security Council on individuals and entities belonging or related to the Taliban, Usama Bin Laden and Al-Qaida.

The UNSTR list was created in October 2001 to allow Canada to comply with United Nations Security Council Resolution 1373, which, among other things, called on states to freeze terrorist assets without delay. The UNSTR contain provisions designed to make it illegal to deal with property of, provide services to, and collect funds for listed entities. The provisions contained in sections 3 and 4 of the UNSTR are roughly equivalent to the terrorist financing offences found in sections 83.03, 83.04 and 83.08 of the *Criminal Code*. Like the UNAR list, the UNSTR list contains names of both individuals and organizations. Both the UNAR and UNSTR lists are the responsibility of the Minister of Foreign Affairs, although it appears that the Minister of Public Safety

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<sup>24</sup> Usama bin Laden is also known as Osama bin Laden. While the second spelling is more commonly used in Canada, the first spelling is used in this section of the Report because it is the one found in the *United Nations Al-Qaida and Taliban Regulations*.

makes recommendations to Cabinet as to who should be added to the UNSTR list. Under section 2 of the UNSTR, the Minister of Public Safety is the individual to whom entities apply if they wish to be removed from this list.

The UNAR list contains hundreds of names, and, until recently, so did the UNSTR list, because it contained all of the names on the

“The ... listings of terrorist entities that currently exist should be consolidated into one central list.”

(B’nai Brith Canada)

UNAR list as well as some of the names on the *Criminal Code* list of terrorist entities. However, in June 2006, the government made amending regulations that had the effect of reducing the number of names on the UNSTR list to 36. This was done in order to avoid duplication in terms of listing. Now, entities, be they individuals or organizations, may not be listed on the UNSTR list if they are on either the UNAR or *Criminal Code* list. The June 2006 regulations also modified the process by which those listed under the UNAR or UNSTR may challenge decisions to list them. Now, judicial review is essentially available in the same way as it is for a listing under the *Criminal Code*.

The Committee recognizes that different consequences flow from being on each of the three lists. As stated previously, when one is placed on the *Criminal Code* list of terrorist entities, one is automatically considered to be a terrorist group under the *Criminal Code*. This means that if someone is charged with a terrorist financing offence for dealing with an entity on this list, the Crown merely needs to show proof of listing in order to substantiate that the person in question was, in fact, dealing with a terrorist group. By contrast, being placed on the UNAR or UNSTR list does not automatically make one a terrorist group under the *Criminal Code*. If someone is charged with a terrorist financing offence for dealing with someone on the UNAR or UNSTR list, the Crown must prove that the listed entity “has, as one or more of its purposes or activities facilitating or carrying out any terrorist activity,”<sup>25</sup> before the listed entity is considered to be a terrorist group.

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<sup>25</sup> See paragraph (a) of the definition of terrorist group in section 83.01(1) of the *Criminal Code*.

The Committee is encouraged to see that the government has taken steps to avoid duplication of names on the three lists of terrorist entities currently in effect in Canada. The previous state of affairs, where an individual or organization might be found on more than one list, was confusing, and made it difficult for those listed to determine which set of listing provisions applied to them and what steps they needed to take to challenge their listing decisions. We are likewise encouraged to see that the processes for challenging the listing decisions have been harmonized, so that no matter which list an entity finds itself on, it is able to challenge the listing decision in Federal Court. Further, the Committee is pleased to see that at least one of these lists, the UNAR list, mirrors the United Nations list. While the Committee recognizes that Canada may consider it necessary to deviate from the United Nations list for the purpose of the other two lists as a result of evidence provided by Canada's own security services, the Committee believes that the government should be required to provide clear justification for its decisions. In particular, there should be an explanation in cases where the government lists an individual or group on the UNSTR or *Criminal Code* list that is not on the United Nations list, or where it decides against listing an individual or group that is on the United Nations list, should that situation arise.

#### **RECOMMENDATION 10**

That the government provide written justification for listing each terrorist entity under its three listing regimes.

#### **The Listing of Individuals**

The Committee notes that to date, the government has not listed any individuals on the *Criminal Code* list of terrorist entities. However, we urge the government to exercise caution in listing individuals on any of the three terrorist lists. The Committee is mindful of the case of one individual who ran a money service business, and who was placed on both the United Nations 1267 Committee list of entities and Canada's UNSTR list as a result of a November 2001 decision of the United States to include him on a list of individuals who supported terrorism. As a result of these listing decisions, the

individual's bank account was frozen for several months, his business was shut down, and it became a crime for anyone to deal with him financially. While the individual in question was eventually able to prove that he was not associated with terrorist groups and terrorist activities and was ultimately removed from both the U.N. and the UNSTR lists, the initial listing decision had serious personal consequences for him.

The Committee believes that the listing of individuals is a delicate and sensitive matter, given the severe impact that listing can have on individuals, as opposed to organizations, and the residual prejudice that individuals may suffer even after being removed from the list. In addition, as the above case demonstrates, when one country decides to list an individual, it can increase the likelihood that other countries and the United Nations will follow suit, adding the individual in question to their own lists of terrorist entities. The Canadian government should accordingly exercise care when deciding whether or not to list individuals as terrorist entities under any of its three listing regimes. Furthermore, in the event that the government decides to remove an individual from any one of its three lists, it should ensure that its reasons for de-listing the individual are shared with other states and international organizations that may have placed that individual on their own lists of entities.

“Our view is that the power to list should not include citizens and permanent residents, individuals. There is reason to doubt the necessity of going that far.”

(Alan Borovoy, Canadian Civil Liberties Association)

### **Due Process Concerns in Respect of *Criminal Code* Listing**

During the course of the Committee's hearings, witnesses expressed additional concerns relating specifically to the *Criminal Code* list of terrorist entities. In particular, several witnesses claimed that the

“We need to think about a means to have an *ex ante* adversarial challenge before someone is put on the list. You may eventually get your name removed, but once you are on that list, you are a virtual pariah. No one will deal with you for the legitimate fear of being charged with various criminal offences.”

(Kent Roach, University of Toronto)

procedure for challenging the Minister's recommendation through judicial review was unfair, first, because entities can only challenge the listing decision after it has been made, and second, because the entity and his

“The listing of terrorist entities by ministerial decision is unjust because it entails insufficient notice and a lack of procedural fairness in the absence of an open and transparent appeal mechanism for redress.”

(Warren Allmand, International Civil Liberties Monitoring Group)

or her counsel are not automatically entitled to be present at the judicial review hearing, and may only receive a summary of the evidence heard by the judge. Comments were also made about the fact that the Minister of Public Safety is responsible for initially recommending the listing of an entity to Cabinet, conducting the initial review of an entity's application to be removed from the list, and reviewing the list every two years to see whether to recommend continued listing. It was felt that having the same authority perform all three roles would make it much more difficult for entities to be de-listed when circumstances warranted it, and that having some type of independent third party review the initial listing decision before it was made, and at the two year review point, would help to ensure that the evidence provided by law enforcement and security agencies in support of listing received a thorough review.

With respect to the judicial review process and the fact that evidence may be presented in private and kept secret, the Committee is of the view that its earlier recommendations regarding the appointment of a special advocate to represent the interests of the affected entity during judicial review would address this issue. Allowing a special advocate to test secret evidence presented by the government would enable listed entities to more effectively challenge decisions to list them. The appointment of a special advocate would provide more balance between the need to keep certain information confidential for national security or safety reasons and the rights of individuals to respond to allegations and arguments against them.

With respect to the inability of a person to challenge the listing decision until after it has been made, and concerns that the Minister of Public Safety is involved in both the initial recommendation and review stages of the listing process, the Committee agrees

that there should be more elements of due process. We believe that this could be achieved by having another organization provide input as to the appropriateness of an initial listing decision and whether to retain or remove an entity from the list after two years. The Committee does not believe that additional input is necessary with respect to the ministerial review of an entity's application to be removed from the list because a decision not to remove the entity may be challenged in Federal Court.

As to who should provide input at the time of the initial listing and every two years, we believe that the person or organization should be within government, due to the fact that the information provided to the Minister of Public Safety is likely of a kind that could injure national security or the safety of persons if released. The Committee feels that the Department of Justice should be responsible for reviewing the security or intelligence reports provided by law enforcement and intelligence agencies upon which the initial decision to recommend listing is based, as well as the information provided by these agencies at the time of the two year review. The review of information by a separate department experienced in reviewing and evaluating the strength of evidence would help to ensure that recommendations to list, or to retain entities on the lists, are well-founded.

**RECOMMENDATION 11**

That the Department of Justice be required to review and provide an independent evaluation of the information that security and intelligence agencies provide to the Minister of Public Safety before he or she recommends to Cabinet the listing of a terrorist entity, retaining one on the list, or removing one from the list.

## **FINANCING AND PROVISION OF SERVICES IN RELATION TO TERRORISM**

The *Anti-terrorism Act* introduced many provisions designed to prevent and combat the financing of terrorism. First, the Act introduced new offences into the *Criminal Code* to prohibit persons from providing any assistance, including monetary assistance, property or services, to terrorist groups or in support of terrorist activities, whether directly or indirectly. Second, the Act amended the *Proceeds of Crime (Money Laundering) Act*, renaming it the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA). The amendments to the PCMLTFA were designed to allow the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to track and investigate suspicious financial transactions and transactions over \$10,000 related to terrorism, or to money laundering, and to provide information to law enforcement agencies, or to the Canadian Security Intelligence Service (CSIS), if the transactions relate to a threat to the security of Canada.

### **Terrorist Financing Offences**

With respect to the terrorist financing offences, new offences introduced into the *Criminal Code* by the Act included:

- section 83.02, which prohibits the collection and provision of property for terrorist or certain other purposes when done willfully and without lawful justification or excuse;
- section 83.03, which prohibits providing property or services or making property or services available to persons when one intends or knows they will be used for terrorist activities;
- section 83.04, which prohibits using property for terrorist activities or possessing property knowing it will be used for such activities;
- section 83.08, which prohibits knowingly dealing in property owned or controlled by a terrorist group, knowingly entering into or facilitating any transaction in respect of such property, and knowingly providing financial or other related services in respect of such property;
- section 83.18, which prohibits knowingly participating in or contributing to the activity of a terrorist group;
- section 83.19, which prohibits knowingly facilitating a terrorist activity;
- section 83.21, which prohibits knowingly instructing a person to carry out any activity for the benefit of, at the direction of, or in association with a terrorist group; and

- section 83.22, which prohibits knowingly instructing any person to carry out a terrorist activity.

The *Anti-terrorism Act* also introduced reporting requirements, accompanied by penalties, into the *Criminal Code*. Under section 83.1, for example, persons in Canada or Canadians outside Canada are required to disclose the existence of property in their possession and control that they know is owned or controlled by or on behalf of a terrorist group to the Commissioner of the Royal Canadian Mounted Police and the Director of CSIS. They are also required to disclose information about a transaction or proposed transaction in relation to such property. Failure to do so is an offence under section 83.12 of the *Criminal Code*. Finally, freezing and forfeiture provisions specifically designed to deal with terrorist property were also introduced by the *Anti-terrorism Act*.

### **Are Due Diligence Defences Necessary?**

Several witnesses who appeared before the Committee were of the opinion that some of the offences designed to prevent or suppress the financing of terrorism were too broad in scope, and that the wording used in some of them was vague or unclear. These witnesses

“I am concerned about the reach and breadth of those parts [of the Act] that deal with facilitating terrorist activities. You have to worry about the remoteness of the connection between the activity of the person and any subsequent terrorist activity that might or might not be committed. As the connection becomes more remote, the cost to the rights of individuals becomes more difficult to justify.”

(Jamie Cameron, Osgoode Hall Law School)

referred to section 83.19 of the *Criminal Code* to illustrate this point. Section 83.19 prohibits knowingly facilitating a terrorist activity, but then goes on to state that a terrorist activity is facilitated regardless of whether or not the facilitator knows that a particular activity is facilitated, any particular terrorist activity was planned or foreseen at the time it was facilitated, or any terrorist activity was actually carried out.

“Section 83.19(2) severely qualifies that fault requirement that an accused must knowingly facilitate a terrorist activity by providing that it is not necessary that ‘any particular terrorist activity was foreseen or planned at the time it was facilitated.’”

(Kent Roach, University of Toronto)

Several witnesses feared that persons could find themselves charged under section 83.19 for performing acts that unwittingly or unintentionally facilitated terrorist activity. It was suggested that those engaged in the

“The Canadian Red Cross is concerned about the possibility that its humanitarian activities in favour of vulnerable persons in conflict or former conflict areas where ‘terrorist groups’ or ‘listed entities’ operate may be considered as an offence under the Criminal Code.”  
(The Canadian Red Cross Society)

international funds transfer system known as “hawala” might be at risk in this regard. This is problematic because in some parts of the world, where people live far from banks or where the banking system is not dependable, the hawala money transfer system is the only reliable way for persons in Canada to send money to family members overseas.<sup>26</sup> It was also suggested that charities could be at risk of being charged with facilitation and other terrorist financing offences when providing aid in situations like the December 2004 tsunami disaster, or simply by giving to humanitarian organizations that provide assistance or distribute aid in a wide variety of countries and situations, such as the Red Cross. Some witnesses asserted that charities working in particular countries are vulnerable to having aid appropriated by terrorist groups due to the effective control these groups have over certain territories within these countries.

To date, no charities have been charged with terrorist financing offences as a result of aid or assistance provided during the tsunami or other disasters,<sup>27</sup> and there have been no reported cases of persons being charged with terrorist financing offences as a result of hawala money transfers. As a result of their concerns, however, some witnesses recommended that the ambit of the terrorist financing offences be limited by narrowing

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<sup>26</sup> See Kalyani Mushani, [International Informal Banking Systems Operating in the Greater Toronto Area](#), paper prepared for the Law Commission of Canada and York University’s Nathanson Centre for the Study of Organized Crime and Corruption, March 2005. See also R. Cheran and Sharryn Aiken, [The Impact of International Informal Banking on Canada: A Case Study of Tamil Transnational Money Transfer Networks \(Undiyal\), Canada/Sri Lanka](#), paper prepared for the Law Commission of Canada and York University’s Nathanson Centre for the Study of Organized Crime and Corruption, Spring 2005.

<sup>27</sup> It is important to note, that at the time of the tsunami disaster, which had a devastating effect on Sri Lanka as well as several other nations, the Liberation Tigers of Tamil Eelam (LTTE), which is based in Sri Lanka, was not a listed organization on the *Criminal Code* list of terrorist entities, and was thus not automatically considered a terrorist group for the purposes of terrorist financing offences contained in the Code. The LTTE was added to the *Criminal Code* list of terrorist entities on 8 April 2006.

the definition of terrorist activity in section 83.01(1) of the *Criminal Code*. Others recommended that due diligence defences be created for these offences.

For their parts, the Minister of Public Safety and the Minister of Justice and Attorney General indicated that the terrorist financing provisions in the *Anti-terrorism Act* were enacted to enable Canada to meet its obligations to the inter-governmental Financial Action Task Force (FATF)

“It is important to realize that donors to charities that misuse their funds for terrorist or other purposes may be victims who have been failed by the regulatory regime in Canada, rather than being villains funding, facilitating or contributing to terrorism. ... This committee should review the *mens rea* requirements with this consideration in mind.”

(Blake Bromley, as an Individual)

as well as its obligations under the *International Convention for the Suppression of the Financing of Terrorism* and U.N. Security Council Resolution 1373.<sup>28</sup>

The Ministers also indicated that concerns over persons being charged with terrorist offences as a result of inadvertently or unintentionally providing assistance to terrorist group or in furtherance of terrorist activities were unfounded, as all of the terrorist financing offences contain words like “willfully,” “intending” and “knowingly” and are true criminal or full *mens rea* offences. As such, the Crown is required to prove culpability or a guilty state of mind before anyone can be convicted of these offences. There is therefore little chance that someone could be convicted of providing unintentional or inadvertent aid in furtherance of a terrorist activity or to a terrorist group. In addition, the Ministers argued that because these offences are true criminal offences, there is no need to provide due diligence defences for them, whereby persons would be able to avoid conviction by demonstrating that they took all reasonable steps to ensure that they were not providing aid or assistance to terrorist groups or to further terrorist activities. They believe due diligence defences would be inappropriate and unnecessary,

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<sup>28</sup> U.N. Security Council Resolution 1373 calls on states to prohibit the willful provision and collection of funds by their nationals or in their territories that will knowingly or intentionally be used to carry out terrorist acts. It also calls on states to prohibit persons or entities from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

since persons may only be convicted of these offences if the Crown is able to prove subjective intent.

The Committee notes that the Ontario Superior Court of Justice was asked, in the recent *Khawaja* case, to evaluate whether or not the *mens rea* or intent required to commit offences under sections 83.18, 83.19 and 83.21 of the *Criminal Code* had been so watered down by qualifying language that these offences were fundamentally unfair, violating the rights to life, liberty and security of the person guaranteed by section 7 of the *Charter*. The Court found that these offences required sufficient subjective intent, on the part of an accused, to withstand *Charter* scrutiny.<sup>29</sup>

Our Committee is of the view that the objective of maintaining national security and denying terrorists access to funds and resources must be reconciled with the possibility of an individual being charged under the *Criminal Code* as a result of making a charitable donation or sending funds to family members, where those funds somehow make their way to a terrorist group. As with so many other aspects of the *Anti-terrorism Act*, there is a need for a balanced approach. However, the Committee is reassured by the fact that to date, no charities or individuals who have transferred money using the hawala banking system have been charged with terrorist financing offences. This indicates that police and prosecutors have been acting with appropriate judgment and caution. The Committee also accepts the explanation provided by the Ministers as to the high level of intent required before individuals or organizations can be convicted of these offences. We therefore believe that it is unnecessary to expressly provide due diligence defences for these offences in the *Criminal Code*. However, the Committee is also of the view that any court asked to interpret these offences in the future should interpret the level of intent required in accordance with the statements made by the Ministers. In other words, if a person is able to demonstrate that he or she has taken all reasonable steps to ensure that the money they have donated or transferred does not make its way to a terrorist organization or is not used to further terrorist activity, he or she should not be found guilty.

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<sup>29</sup> See *R. v. Khawaja*, *supra* at paras. 28-42.

## Are Special Exemptions Necessary to Protect the Right to Counsel?

It is a fundamental principle of our legal system that persons charged with offences have the right to retain and instruct counsel.<sup>30</sup> The right to counsel helps to ensure that persons accused of crimes receive fair and full defences. Accordingly, some witnesses appearing before the

“Section 83.1 requires every person to disclose the existence of property or information about a transaction or proposed transaction in respect of certain property. The concern is that the provision might well capture a lawyer who, while providing legal services, receives information from a person within the context of providing those legal services and that information is privileged.”

(Greg. P. DelBigio, Canadian Bar Association)

Committee expressed concern that certain terrorist financing offences, most notably sections 83.03 (providing property or services or making property or services available for terrorist or other purposes) and 83.18 (participating or contributing to the activity of a terrorist group), as well as the reporting requirements in section 83.1, could negatively effect the provision of legal services. They claimed that the new offences and reporting requirements, given their broad wording, could significantly interfere with the solicitor-client relationship by hampering the ability of members of terrorist groups or those accused of committing terrorist activities to retain the counsel of their choice, pay for the

“Section 83.03 makes it an offence to make financial or other related services available knowing that the services will be used by or will benefit a terrorist group. ‘Other related services’ are not defined. Legal services may be a related service.”

(George D. Hunter, Federation of Law Societies of Canada)

services of counsel, and be assured of solicitor-client privilege in their dealings with counsel. Some witnesses therefore recommended that special exemptions be created to exclude lawyers performing their duties as counsel from the reporting requirements in section 83.1, and to prevent them from being charged under sections 83.03 and 83.18.

In response, the Ministers stated that lawyers could potentially be convicted under section 83.03 of making property, financial or other related services available for terrorist activities by creating a trust or other vehicle for a terrorist group. However, in order to be

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<sup>30</sup> The right to retain and instruct counsel is guaranteed by section 10(b) of the *Charter*.

convicted, the Crown would have to prove that the lawyer knew or intended to provide the property or services to further a terrorist activity. They also stated that under no circumstances might a lawyer be convicted, under either section 83.03 or 83.18, for providing legal advice in defence of an accused person, since that would not be considered provision of a related service, and providing legal advice would not be considered knowingly participating in or contributing to the activities of a terrorist group. With respect to the reporting requirements under section 83.1, the Ministers were of the view that the obligation to declare the possession of property or information about transactions concerning terrorist property does not fall within the ambit of solicitor-client privilege. In their view, that privilege extends to communications between solicitor and client and to legal advice provided to clients only.

The Committee has concluded that no special exemptions need to be created for lawyers when providing legal services to or representing those accused of terrorist offences. Solicitor-client privilege does not appear to be placed in jeopardy by section 83.1 of the *Criminal Code*, and the Crown would be required to prove subjective intent, on the part a lawyer, before he or she could be convicted under sections 83.03 or 83.18.

### ***The Proceeds of Crime (Money Laundering) and Terrorist Financing Act***

With respect to the reporting requirements introduced by the PCMLTFA, and the role FINTRAC plays in investigating suspicious transactions in relation to terrorism, the Committee notes that the system appears to be functioning well. In its 2005-06 annual report, FINTRAC advised that it had made 168 case disclosures to law enforcement agencies and/or CSIS during the past year, and that the dollar value of transactions disclosed was \$5 billion. These numbers are up from 142 case disclosures totaling just over \$2 billion in 2004-05.<sup>31</sup>

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<sup>31</sup> See Financial Transactions and Reports Analysis Centre, [FINTRAC Annual Report 2006](#), Ottawa, 25 August 2006.

The Committee also notes that Parliament passed *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act* (Bill C-25) in December 2006. This legislation enhances information sharing between FINTRAC, law enforcement and other agencies, both domestically and internationally;

“Section 11 of the [A]ct explicitly excludes solicitor-client privilege from the reporting requirement. ... I would be happier if there were some reporting requirement for lawyers because, at present, the reporting we get is not by them but about them by other financial institutions. ... More generally, by not having them report, we are, in essence, making it possible for them to be sought out by, or targeted by, unsavoury elements for the purpose of conducting transactions that would otherwise be reportable in other institutions. From a FINTRAC perspective, that is undesirable.”

(Horst Intscher, FINTRAC)

creates a registration regime for money service businesses like hawalas (these businesses were already subject to reporting requirements under the PCMLTFA); increases information available in FINTRAC disclosures; creates an administrative and monetary penalty regime; and deals with reporting requirements for legal counsel.<sup>32</sup> The government should continue its current dialogue with the legal community on the subject of reporting requirements,<sup>33</sup> and work with money services businesses like hawalas to ensure that these international fund transfer businesses understand their reporting requirements and their obligations with respect to registration.

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<sup>32</sup> See Finance Canada, [Backgrounder on Amendments to the Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#), Ottawa, 5 October 2006.

<sup>33</sup> Our Committee notes the recommendation made by the Senate Standing Committee on Banking, Trade and Commerce in this regard. See Recommendation 5 in Senate Standing Committee on Banking, Trade and Commerce, [Stemming the Flow of Illicit Money: A Priority for Canada](#), Ottawa, October 2006, p. 14.

## DENIAL OR REVOCATION OF CHARITABLE STATUS UNDER THE *INCOME TAX ACT*

Sections 113 and 125 of the *Anti-terrorism Act* created the *Charities Registration (Security Information) Act* (CRSIA), which provides a process through which applicants for status as registered charities under the *Income Tax Act* or charities already registered under that Act may have their applications for status denied or their existing charitable status revoked. The process requires the Minister of Public Safety and the Minister of National Revenue to issue a certificate stating that, based on information, there are reasonable grounds to believe that an applicant or registered charity has made, makes or will make resources available, either directly or indirectly, to a terrorist entity or in support of terrorist activities as defined in the *Criminal Code*. Once the certificate has been signed, the matter is automatically referred to the Federal Court for review. The certificate must be upheld by a Federal Court judge as reasonable before an applicant can be denied status as a registered charity or an organization can have its charitable status revoked.

The evidentiary provisions under the CRSIA, which are similar to those found in the *Criminal Code* with respect to listing terrorist entities, do not allow the applicant or registered charity to have access to confidential information that forms the basis of the certificate. Witnesses discussed the fact that the charities and their counsel are not automatically entitled to be present during the judicial review hearing, and might only receive a summary of evidence from the judge. We believe that we have appropriately addressed these issues through our recommendation for a special advocate, discussed earlier in this Report.

“Under these provisions, Canadian charities valuably working in desperately conflicted regions around the world can be easily stripped of charitable status on the basis of hearsay or spurious allegations ... In violation of due process, the charity is precluded from testing the quality or credibility of the information against it, and in many cases will not even know what information or sources are being used against it.”

(Canadian Association of University Teachers)

The remaining issues raised by witnesses regarding the CRSIA can be divided into two categories: other procedural concerns, and concerns over the effect that the CRSIA has had or could have on charitable giving or work. With respect to additional procedural concerns, witnesses were worried about the fact that, as in the listing process

for terrorist entities under the *Criminal Code*, charities are unable to challenge decisions to issue certificates against them until after the certificate has been signed by the Ministers. This was a particular preoccupation, given that there is no appeal from the decision of the Federal Court, which reviews the certificate. The Committee is of the opinion, however, that its earlier

“Under the Anti-terrorism Act, the onus is on the person making the charitable donation to be absolutely sure that their funds will not be used for terrorist purposes. ... We recommend that in the interest of fairness, [Canada Revenue Agency] inform a charity about its reservations before the denial or revocation of charitable status and provide the latter with a reasonable opportunity to appeal or justify its work.”

(Anu Bose, National Organization of Immigrant and Visible Minority Women of Canada)

recommendation regarding the appointment of a special advocate to represent the interests of affected organizations would also help to alleviate this additional procedural concern. Implementing a greater degree of procedural fairness during judicial review would provide a registered charity or applicant for charitable status an improved opportunity to challenge the certificate decision generally. This should compensate for the lack of ability to appeal the Federal Court decision and the fact that applicants or charities are only able to challenge the Ministers’ decisions to issue certificates after the fact. As the consequences under the CRSIA are primarily financial, rather than entailing possible criminal liability, we believe that a special advocate is a sufficient safeguard in this context.

With respect to witness views about the effect that the CRSIA has had or could have on charitable giving or work, some stated that the CRSIA, coupled with the new terrorist financing offences added to the *Criminal Code* by the *Anti-terrorism Act*, have created a “chill”

“We are concerned that even by providing assistance in accordance with the fundamental principles of the Red Cross, especially the principle of impartiality, that we may be viewed as being in violation of the Charities Registration Act and face deregistration. This would severely impair our ability to conduct humanitarian operations.”

(David Pratt, Canadian Red Cross Society)

with respect to charitable giving or work. They make donors reluctant to give to charities for fear of being charged with terrorist financing offences, and create anxiety for charitable organizations over the prospect of being de-registered or denied charitable status as a result of providing aid or assistance that unintentionally or inadvertently makes its way to a terrorist organization or group. Some witnesses suggested that in

order to counteract these effects, a due diligence or humanitarian defence should be provided to registered charities or applicants for charitable status under the CRSIA.

“A registered charity should be able to rely on having devoted reasonable efforts, given its size and resources, to ensuring against inadvertent or unwitting association with terrorist groups or terrorist activity.”

(Peter Broder, Imagine Canada)

For their parts, the Minister of Public Safety and the Minister of Justice and Attorney General stated that, to date, the power to issue a certificate under the CRSIA has not been used. They also advised that, in their view, charities are vulnerable to abuse by terrorists and terrorist organizations because they can provide a cover for terrorist activities and hide support for terrorism. Accordingly, providing due diligence or humanitarian defences to charities could have the effect of making charities more attractive targets for infiltration by terrorists. Finally, the Ministers asserted that putting certain types of aid or aid organizations beyond the reach of the CRSIA and its administrative checks, by creating due diligence or humanitarian defences, would make it difficult for Canada to meet its international obligations to suppress terrorist financing.

The Committee is reassured by the fact that, to date, the power to issue a certificate under the CRSIA has not been used. In our view, this indicates that the government is exercising appropriate restraint with respect to denying charitable status to or de-registering charities. We further accept the Ministers’ statement that adding a due diligence or humanitarian defence to the CRSIA could have the unintended effect of making charities more vulnerable to being used as front organizations for terrorists. The Committee is also satisfied that the appointment of a special advocate, by specifically addressing problems inherent in the judicial review process, would help to address witness anxiety about the “chill” effect of the CRSIA on charitable giving or work. The special advocate would test the evidence raised against charitable organizations in security and intelligence reports, and better enable them to respond to allegations that they have made, made or will make resources available to terrorist groups or in support of terrorist activities. The availability of a special advocate during judicial review would therefore restore balance to the processes under the CRSIA, helping to ensure that charities are treated fairly. Having said this, however, the Committee urges the government to use its powers to deny or revoke charitable status under the CRSIA with

caution, in order to ensure that charities are not penalized for legitimate aid activities that might occasionally tangentially benefit terrorist organizations or groups.

## **NON-DISCLOSURE OF INFORMATION UNDER THE CANADA EVIDENCE ACT**

Section 43 of the *Anti-terrorism Act* made significant amendments to the *Canada Evidence Act* (CEA). The new provisions make it easier for the government to prevent the disclosure of information in court or during other proceedings, on the basis that disclosure could injure international relations, national defence or national security. The Attorney General of Canada may also issue a certificate prohibiting the disclosure of information for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity, or to protect national defence or national security. Such a certificate, which must be published in the *Canada Gazette*, expires after 15 years but may be reissued.

The need for a special advocate to represent the interests of the individual from whom confidential information is withheld during an application with respect to the disclosure of information, and on review of a certificate of the Attorney General prohibiting disclosure, has already been discussed in this Report. Our Committee believes that providing a special advocate in this, as in other contexts, will help to ensure that individuals without access to certain evidence are better able to mount defences in court proceedings and to know and understand the case against them in proceedings generally. This section of the Report will now address some of the other issues raised by witnesses who testified before the Committee regarding the provisions of the CEA.

### **References to “International Relations”**

“Sensitive information” means “information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.” [CEA, section 38]

“Potentially injurious information” means “information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.” [CEA, section 38]

A common point made by certain witnesses was that the definitions of “potentially injurious information” and “sensitive information,” found in section 38 of the CEA, are overly broad and give the government too much latitude in terms of what may be excluded from disclosure. In particular, there is a somewhat vague reference in each of the definitions to information that

“‘Sensitive information’ is defined so broadly that much of the information held by the Department of Foreign Affairs, for example, will be subject to a privilege since most, if not all, of it relates to international relations and likely the government seeks to safeguard this information.”

(British Columbia Civil Liberties Association)

“‘International relations’ should be removed from the provisions found in section 38 of the Canada Evidence Act.”

(Confederation of Canadian Unions)

could injure, or that is relating to, “international relations.” Some suggested that if the objective is to protect information obtained in confidence from a foreign government or entity, this should be clearly stated. Others went so far as to say that the reference to international relations should be removed altogether, as only information from a foreign entity that would injure national defence or national security should be protected, and these latter two grounds for non-disclosure are already found in the definitions.

Although the concept of injuring international relations existed in the CEA prior to the changes brought about by the *Anti-terrorism*

“‘International relations,’ for example, is broad enough to include sports events, arts festivals, and commercial transactions.”

(Canadian Civil Liberties Association)

*Act*, the Committee believes that it requires legislative clarification. There are ways in which international relations may be injured without necessarily warranting confidentiality in the same way as when national defence or national security is at stake. An example might be a minor diplomatic slight to another country, a small embarrassment to Canada in its dealings with another government, or a difficulty during international negotiations over trade or some other matter unrelated to defence or security. Neither section 38 of the CEA (which defines sensitive and potentially injurious information) nor section 38.06 (which gives a judge authority to withhold information that is injurious to international relations, national defence or national security) specifies

the type or degree of injury to international relations that is necessary to warrant confidentiality. Accordingly, the Committee believes that there may be instances where information is withheld without appropriate justification. A more precise indication of what constitutes information injurious to international relations would give a judge better guidance in determining whether or not the information may properly be withheld.

## **RECOMMENDATION 12**

That the definitions of “potentially injurious information” and “sensitive information” in section 38 of the *Canada Evidence Act*, and the basis on which a judge may decide not to authorize the disclosure of such information under section 38.06, be amended to specify the way in which information must injure or relate to international relations, for example by restricting the authority to withhold information to situations where the information could breach specified confidences of another country.

### **Review of a Certificate of the Attorney General Prohibiting Disclosure**

“If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity..., or to national defence or national security, the judge shall make an order varying the certificate accordingly.” [CEA, subsection 38.131(8)]

With respect to a certificate of the Attorney General prohibiting the disclosure of information, many witnesses questioned whether the standard of review by a judge of the Federal Court of Appeal is satisfactory. For a certificate to be cancelled or varied under section 38.131 of the CEA, an applicant must

“The standard of ‘relates to’ is a very low threshold and risks decisions that do not properly accord with international human rights standards.”

(Amnesty International)

“We think the task that should be given to the judge is this: Would it be injurious to national security to have it released? That is a different test.”

(Alan Leadbeater, Office of the Information Commissioner of Canada)

satisfy the court that the information does not “relate to” information obtained in confidence from a foreign entity, or does not “relate to” national defence or national security. Some witnesses argued that simply requiring that the information relate to foreign information, national defence or national security provides too broad a basis for

non-disclosure. Others felt that only information the disclosure of which would actually injure national defence or national security should ever be the subject of a certificate of the Attorney General.

As certificates of the Attorney General are intended to allow the government to insist on non-disclosure after disclosure has already been authorized, the Committee recognizes

“Material that is simply ‘in relation to’ a foreign entity appears so broad that it could exclude information on the basis of nothing more than idle gossip about a country other than Canada.”

(Canadian Civil Liberties Association)

that the basis for a certificate must be somewhat broader than the reasons for non-disclosure in the first place. A requirement that the information be injurious to national defence or national security would sometimes (though not always) repeat a test that has already been used by a court under section 38.06. Still, in the Committee’s opinion, a certificate of the Attorney General should relate to information that more than minimally affects government interests. We further note that a certificate may be issued and upheld on the basis of protecting information that is “in relation to” a foreign entity. A very wide range of innocuous information can be in relation to a foreign entity.

The Committee is accordingly of the view that amendments should be made to the CEA to ensure that information is withheld under a certificate of the Attorney General only where it is clearly necessary to protect national defence, national security, or a specified aspect of Canada’s relations with foreign entities. First, section 38.13 of the CEA should be amended to specify what it means for information to be “in relation to” a foreign entity when the Attorney General issues a certificate on the basis. Second, section 38.131 should be amended to specify the way in which information must “relate to” information obtained in confidence from a foreign entity, or to national defence or national security, in order for that aspect of the certificate to be confirmed by a judge of the Federal Court of Appeal. Because the ability of the Attorney General of Canada to issue a certificate prohibiting the disclosure of information is an extraordinary power, a court must be in a position to fully determine whether that power has been properly exercised. Even if no certificate has been issued to date, there should be sufficient

legislative limitations and safeguards to protect the interests of parties engaged in criminal or administrative proceedings.

### **RECOMMENDATION 13**

That sections 38.13 and 38.131 of the *Canada Evidence Act* be amended to ensure that information is withheld, under a certificate of the Attorney General of Canada prohibiting the disclosure of information, only where it is necessary to protect national defence, national security, or a specified aspect of Canada's relations with foreign entities.

### **The Public Interest in Disclosure**

In addition to upholding a certificate of the Attorney General only where information more than minimally relates to certain national interests, it was suggested to the

“A judicial balancing of competing disclosure and security interests as available under s. 38.06 should also be available under s. 38.131.”

(Jennifer Stoddart, Privacy Commissioner of Canada)

Committee that the Federal Court of Appeal judge performing the review under section 38.131 of the CEA should be required to weigh the public interest in disclosure against the public interest in non-disclosure, as is required when a court considers making a disclosure order under section 38.06. The Minister of Justice and Attorney General and Minister of Public Safety responded that the standard of review under section 38.131 is satisfactory because a certificate of the

Attorney General may only be issued after an order or decision has been made under the CEA or any other Act of Parliament authorizing disclosure of the information. The suggestion is that a certificate will often be issued after a judge has already considered the public interest in disclosure.

“There is no requirement that the veto [through a certificate of the Attorney General] be in the public interest. There is virtually no test, except for what the government wishes to keep secret. That is an example that should be particularly alarming.”

(Maureen Webb, Canadian Association for University Teachers)

However, the Committee notes that a certificate may also be issued after disclosure has been administratively authorized, for example under the *Privacy Act* or *Access to Information Act*, in which case no judge has yet weighed the public interest in disclosure against the public interest in non-disclosure. Even if a court has already done so, the review of a certificate of the Attorney General should nonetheless involve consideration of the public interest, so that proceedings affecting individuals, and matters stated to involve national security, are as transparent as possible while still ensuring the safety of Canada. A judicial balancing of the competing interests of the public's right to know and national security confidentiality would provide assurance to Canadians that both are considered important.

#### **RECOMMENDATION 14**

That section 38.131 of the *Canada Evidence Act* be amended so that, in determining whether or not a certificate issued by the Attorney General of Canada prohibiting the disclosure of information should be varied, canceled or confirmed, the judge must consider whether the public interest in disclosure outweighs in importance the public interest in non-disclosure.

#### **The Availability of an Appeal**

Under subsection 38.131(11) of the CEA, there is no review of, or appeal from, a decision of a judge of the Federal Court of Appeal regarding the validity of a certificate of the

“Thought should also be given to allowing appeals from the judicial review of the section 38.13 certificate..., so as to encourage greater checks and balances and the possibility for the expression of dissent.”  
(Jennifer Stoddart, Privacy Commissioner of Canada)

Attorney General prohibiting the disclosure of information. The Committee believes that an appeal should be available in the interest of procedural fairness, particularly where the result of the decision is that an individual will not have access to information that may be used against him or her. The fact that an application before the Federal Court of Appeal may already follow a court proceeding during which disclosure was authorized does not justify the preclusion of an appeal, as it is also possible for a certificate of the Attorney

General to be issued after an administrative decision to disclose information, without any prior court involvement.

**RECOMMENDATION 15**

That subsection 38.131(11) of the *Canada Evidence Act* be repealed, and that an order of a judge of the Federal Court of Appeal varying, canceling or confirming a certificate issued by the Attorney General of Canada prohibiting the disclosure of information be subject to an appeal to three judges of the Federal Court of Appeal.

## **INVESTIGATIVE HEARINGS AND RECOGNIZANCES WITH CONDITIONS/PREVENTIVE ARREST**

Section 4 of the *Anti-terrorism Act* enacted provisions to allow investigative hearings, which was a new form of recourse for police and the courts. Under section 83.28 of the *Criminal Code*, a peace officer may apply to a judge for an order for the gathering of information with the prior consent of the Attorney General. If there are reasonable grounds to believe that a terrorism offence has been or may be committed, a court order may compel a person to attend a hearing, answer questions on examination, and produce anything in their possession or control. A person who evades service of the order, is about to abscond or fails to attend an examination may be subject to arrest with a warrant under section 83.29.

Section 83.3 of the *Criminal Code* was another provision enacted in 2001 as an extraordinary measure in the fight against terrorism. It allows a recognizance with conditions and preventive arrest. With the consent of the Attorney General, a peace officer may lay an information before a provincial court judge if he or she suspects that a terrorist act will be carried out and that a recognizance with conditions or arrest is necessary to prevent it. If the peace officer suspects that immediate detention is necessary, he or she may arrest a person, without a warrant, prior to laying the information or before the person has had a chance to appear.

An arrested person must be brought before a judge within 24 hours, or as soon as possible thereafter. The judge is required to release the person unless the peace officer establishes that continued detention is necessary to ensure the person's later appearance or to protect the public. At the main hearing, a judge must decide whether to impose a recognizance, which means that the person must keep the peace and be of good behaviour for up to twelve months, as well as respect any other conditions such as not being in possession of a weapon. If it is determined that the person should enter into a recognizance but the person fails or refuses to do so, the judge may order imprisonment for up to twelve months.

To date, there have been no investigative hearings held, according to the annual reports that

“CJC recommends that these measures be renewed for another five years.”

(Ed Morgan, Canadian Jewish Congress)

the Attorney General of Canada are required to table under section 83.31 of the *Criminal Code*, and those that have been made available by the provincial Attorneys General. Although the government used section 83.28 to obtain an order requiring a potential witness to attend an investigative hearing in the context of the Air India trial, and the Supreme Court of Canada upheld the constitutionality of the section in June 2004, the investigative hearing was never convened. There has likewise been no reported use of the provisions on recognizance with conditions/preventive arrest. These provisions, along with those on investigative hearings, expire at the end of the fifteenth sitting day of Parliament after December 31, 2006, unless a resolution to extend them is passed in both the House of Commons and the Senate.

Witnesses who appeared before the Committee had very different views regarding investigative hearings and recognizance with conditions/preventive arrest. Some argued that the measures represent a substantial departure from our legal traditions. It was suggested, for example, that the obligation to give testimony violates the right to remain silent, and that the power of preventive arrest is too broad because it may be grounded in mere suspicion. Witnesses feared that the extraordinary nature of these provisions may creep into the general criminal law and that these processes might eventually be made available for purposes other than to prevent terrorism-related offences. Others suggested that the provisions represent nothing new for a democratic country. They argued that a recognizance with conditions is little different than a peace bond, and that investigative hearings have procedural safeguards to ensure that an individual’s rights and liberties are not violated. The RCMP stated that these tools remain useful, as they allow potential threats to be addressed proactively.

Given that neither the investigative hearing nor the recognizance with conditions/preventive arrest process has reportedly been used, it is difficult for the Committee to make a definitive judgment as to the need for them. The fact that they have not been

used led some witnesses to say that they have proved unnecessary. Conversely, when the Minister of Justice and Attorney General of Canada appeared before the Committee, he suggested that just because a mechanism in the fight against terrorism has not been employed does not mean that it will not be required in the future. Witness recommendations were accordingly divided into two possibilities: extend the provisions or eliminate them.

The Committee acknowledges the very difficult task of balancing national security interests against individual rights and freedoms in the context of anti-terrorism.

On one hand, sections 83.28, 83.29 and 83.3 of the *Criminal Code* are intended to protect the safety of the public by preventing what can amount to very horrific acts. On the other

“I believe that investigative hearings and preventive arrests are candidates for repeal. It has not been shown necessary for the government to exercise those powers.”  
(Jamie Cameron, Osgoode Hall Law School)

hand, investigative hearings encroach on civil liberties by compelling individuals to give evidence before any criminal proceeding has been initiated, or any offence has been committed. While the provisions on recognizance with conditions/preventive arrest are comparable to other *Criminal Code* provisions, they give the police more latitude to arrest and a judge more latitude to order the continued detention of the individual or impose restrictions on him or her.

At the same time, the Committee notes that protections were put in the legislation to ensure a certain amount of due process. Although individuals attending an investigative hearing must answer questions and produce all requested material, they are expressly entitled to retain and instruct counsel, may invoke any law relating to privilege or non-disclosure, and are protected from self-incrimination in that no answer given or thing produced may be used against them in future criminal proceedings, except for perjury or giving contradictory evidence. The provisions on recognizance with conditions/preventive arrest call for an appearance before a judge as soon as possible, and place the onus on the government to show that a recognizance or detention is necessary for public safety or the administration of justice. Further, the use of either set of

extraordinary powers enacted in sections 83.28, 83.29 and 83.3 of the *Criminal Code* requires the consent of the Attorney General.

Later in this Report, the Committee recommends that the entire operation of the *Anti-terrorism Act* be reviewed and monitored on an ongoing basis by a standing parliamentary committee, or failing that, be subject to another comprehensive parliamentary review at a future date. We believe that the provisions on investigative hearings and recognizance with conditions/preventive arrest should continue in effect for another three years, and that they should be re-evaluated by the established parliamentary committee or committees, before expiry, to determine whether further extension is warranted.

At the same time, we stress that, in the context of the annual reports tabled under section 83.31 of the *Criminal Code*, the federal government should not only indicate

“It is my view that Parliament should insist on prompt and full annual reporting requirements, to which the government has not always adhered to date.”

(Wesley K. Wark, University of Toronto)

whether these extraordinary powers have been used, but also whether they are still needed and, if so, why. In particular, if any of the provisions are used in the future, the government should explain why ordinary *Criminal Code* measures proved unsatisfactory.

Conversely, if the provisions remain unused, we ask the government to justify their continued existence or acknowledge that they should cease to apply. Certain witnesses who

“[T]he burden is on the government to justify these powers because they come, unquestionably, at the expense of the rights of individuals.”

(Jamie Cameron, Osgoode Hall Law School)

appeared before the Committee criticized the extent and quality of the governmental reports on the use of investigative hearings and recognizance/preventive arrest, and asked for greater background and context on the use of the provisions. Finally, the Committee urges all of Canada’s Attorneys General to provide their annual reports in a timely fashion, as it appears that some provinces are not up to date in their reporting.

**RECOMMENDATION 16**

That the application of sections 83.28, 83.29 and 83.3 of the *Criminal Code*, relating to investigative hearings and recognizance with conditions/preventive arrest, be extended to the end of the fifteenth sitting day of Parliament after December 31, 2009, subject to the possibility of further extension following resolutions passed by both Houses of Parliament.

**RECOMMENDATION 17**

That the Attorney General of Canada include, in each annual report on the use of investigative hearings and recognizance with conditions/preventive arrest, a clear statement and explanation indicating whether or not the provisions remain warranted.

## **ELECTRONIC SURVEILLANCE AND INTERCEPTION OF PRIVATE COMMUNICATIONS**

In addition to introducing provisions to allow investigative hearings and recognizance with conditions/preventive arrests, the *Anti-terrorism Act* also strengthened the ability of police to perform electronic surveillance on a person suspected of a terrorist offence and the capacity of intelligence services to intercept the private communications of Canadians for certain purposes.

### **Electronic Surveillance under the *Criminal Code***

Sections 6, 7 and 8 of the *Anti-terrorism Act* made changes to the electronic surveillance provisions of the *Criminal Code*. Specifically, investigative powers that were introduced in 1997 to make it easier to use electronic surveillance against criminal organizations were extended to the investigation of the terrorist offences introduced by the *Anti-terrorism Act*. These changes included:

- eliminating the need to demonstrate that electronic surveillance is a last resort in the investigation of terrorist offences, which is an exception to the general rule applicable in other circumstances;
- extending the period of validity of a wiretap authorization from sixty days to up to one year when police are investigating a terrorist offence; and
- permitting a delay of up to three years in notifying a target after surveillance has taken place, as opposed to the 90 day period that is applicable for other criminal offences.

A superior court judge must approve the use of electronic surveillance.

Some witnesses who appeared before the Committee felt that by making it easier for police to use electronic surveillance when investigating terrorist offences, the government effectively weakened constraints on what is an invasive state

“For terrorist offences, the duration of bugging periods will be one year instead of – as it is for many other matters – 60 days. ... Again, this is difficult to justify. It would be impossible to fill a thimble with the number of times that judges have refused such wiretap permission to the police ... [T]his provision ... reduces judicial supervision of one of the post privacy-intrusive instruments in the police arsenal.”

(Canadian Civil Liberties Association)

power. They suggested that law enforcement agencies should be forced to demonstrate that they have tried other investigative methods, or that these methods would be unlikely to succeed, before they obtain prior judicial authorization for a wiretap. They also suggested that ordinary time limits respecting the length of validity of a wiretap and for notifying a target of a wiretap after the fact should be reinstated.

The Committee is of the opinion that, due to the fact that multiple individuals are often involved in carrying out terrorist activities, with each having his or her own discrete role to play in furthering the terrorist activity in question, investigating terrorist offences has much in common with investigating criminal organization offences. Law enforcement officials should accordingly have the benefit of the changes regarding electronic surveillance introduced by the *Anti-terrorism Act* to assist them in investigating terrorist offences. However, the Committee believes that the use of these provisions should be clearly monitored to ensure that they are, in fact, used to investigate suspected terrorist offences, and that they do not begin to be used for more general law enforcement purposes.

### **Interceptions of Private Communications by the Communications Security Establishment**

The *Anti-terrorism Act* also clarified the mandate of the Communications Security Establishment (CSE), Canada's signals intelligence agency, to intercept the communications of foreign targets abroad. It introduced subsections 273.65(1) to (4) of the *National Defence Act*, which created a new mechanism allowing the CSE to intercept "private communications" where one part of the communication either begins or ends in Canada. The CSE can intercept private communications with prior written authorization of the Minister of National Defence, instead of prior judicial authorization, which is required for electronic surveillance under the *Criminal Code*. However, interceptions can only be for the purpose of obtaining foreign intelligence or for the purpose of protecting Government of Canada computer systems and networks from mischief, unauthorized use or interference. In addition, the legislation contains safeguards designed to ensure that the CSE's power to intercept private communications is not misused.

Prior to issuing an authorization to intercept private communications for foreign intelligence purposes, the Minister of National Defence must be satisfied that the interception will be directed at foreign entities located outside of Canada, that the information cannot be reasonably obtained by other means, that the expected foreign intelligence value of the information justifies the interception, and that satisfactory measures are in place to protect the privacy of Canadians and to ensure that the private communications are only used or retained if essential to international affairs, defence or security.

Prior to issuing an authorization to intercept private communications for the purpose of protecting Government of Canada computer systems or networks, the Minister of National Defence must be satisfied that the interception is necessary to identify, isolate or prevent harm to the systems or networks, that the information cannot reasonably be obtained by other means, that the consent of those whose private communications are to be intercepted cannot reasonably be obtained, that satisfactory measures are in place to ensure that only essential information will be used or retained, and that satisfactory measures are in place to protect the privacy of Canadians in the use or retention of the information.

Some witnesses who appeared before the Committee believed that the CSE should be prohibited from intercepting private communications, or that prior judicial authorization

“The Government of Canada should amend the Anti-Terrorism Act to provide that the CSE must request judicial warrants in every case involving the surveillance of persons in Canada.”

(Rights and Democracy)

should be required, instead of prior ministerial authorization, before the CSE conducts such interceptions. However, the Chief of the CSE stated that it was necessary for Parliament to give the CSE power to intercept private communications for foreign intelligence purposes because of changes in communications technologies that make it extremely difficult for the CSE to prove or know, prior to interception, whether both ends of a communication have occurred outside of Canada. He further stated that it was necessary for Parliament to give the CSE power to intercept private communications for

the purpose of protecting Government of Canada computer systems or networks because CSE needs to monitor activity on Government of Canada networks and sample messages that have characteristics associated with viruses or other malicious computer codes.

With respect to the suggestion that the CSE should be required to obtain prior judicial authorization rather than prior ministerial authorization before intercepting private communications, the former CSE Commissioner advised us that executive rather than judicial authorization is necessary because warrants from Canadian courts have no jurisdiction outside of Canada.

“Ministerial authorization is necessary in those instances where the foreign intelligence collection activity poses a risk of intercepting private communications, always targeting – I emphasize always targeting – a foreign entity outside Canada where a warrant issued by a Canadian court has no jurisdiction.”

(Antonio Lamer, former Communications Security Establishment Commissioner)

The Committee accepts the explanations provided by the Chief of the CSE as to why the CSE needs the ability to intercept private communications for foreign intelligence and to protect data and computer systems. We also accept the explanation of the former CSE Commissioner as to why prior ministerial authorization, rather than prior judicial authorization, is used for these interceptions. In addition, we derive comfort from the fact that the Office of the CSE Commissioner is both empowered and required, under sections 273.63 and 273.65(8) of the *National Defence Act*, to review and report on an annual basis regarding the lawfulness of the CSE’s activities, including any interceptions of private communications under authorization by the Minister.

To date, the Office of the CSE Commissioner has been satisfied that all interceptions of private communications have been lawful. However, the Committee remains concerned, as was the former CSE Commissioner, that the standard required to satisfy the Minister that all necessary

“The legislation does not state the threshold to be met. Why not spell it out? If it is reasonable and probable grounds to suspect, well, so be it and let it be said. If it is reasonable and probable grounds to believe, let us say so.”

(Antonio Lamer, former Communications Security Establishment Commissioner)

preconditions to intercepting private communications have been met is unclear. The Committee is of the view that amendments should be made to clarify the standard. Such clarification would not only assist the Minister in deciding whether or not the necessary preconditions have been met in intercepting private communications, but also assist the CSE Commissioner in his review of the Minister's decisions. Accordingly, opinions on such matters as the nature and purpose of the interception, the utility of alternative means of investigation and the measures in place to protect the privacy of Canadians should be expressly based on either reasonable belief or reasonable suspicion.

#### **RECOMMENDATION 18**

That subsections 273.65(2) and (4) of the *National Defence Act* be amended to clarify whether the facts and opinions, which are necessary to satisfy the Minister of National Defence that all of the preconditions for issuing a written authorization to intercept private communications have been met, should be based on reasonable belief or reasonable suspicion.

Interceptions of private communications pursuant to ministerial authorization, rather than pursuant to judicial authorization, are not the norm in Canada. Such interceptions intrude, albeit perhaps necessarily in some instances, on the privacy of Canadians. While the Committee recognizes that the Minister of National Defence may authorize the CSE to intercept private communications only if satisfied that adequate measures are in place to protect the privacy of Canadians and that intercepted information will be used or retained only if essential to international affairs, defence or security, or alternatively, essential to identify, isolate or prevent harm to Government of Canada computer systems or networks, we wish to ensure that intercepted information is disposed of if it has been determined to be non-essential or when it is no longer essential in this regard. Accordingly, to protect the privacy of Canadians, we are of the view that the CSE should develop information retention and disposal policies containing specific time frames for the disposal of information with respect to the private communications it intercepts pursuant to ministerial authorization, if it has not already done so. We also believe, in the interests of transparency and accountability, that the CSE should make these policies publicly available.

**RECOMMENDATION 19**

That, in order to safeguard the privacy of Canadians and those in Canada, the Communications Security Establishment develop, if it has not already done so, information retention and disposal policies, containing specific time frames for the disposal of information, with respect to the private communications it intercepts pursuant to 273.65(1) to (4) of the *National Defence Act*, and that it make these policies publicly available, in the interests of transparency and accountability.

The Committee is also of the view that, in the interests of accountability and transparency, the CSE should be required to report to Parliament regarding the number of ministerial authorizations to intercept private communications issued each year, and whether or not they were issued for foreign intelligence purposes or for the purposes of protecting Government of Canada computer systems or networks. Currently, the CSE is under no obligation to report this number, although CSE officials did advise the Committee that, as of April 2005, no more than 20 ministerial authorizations had been issued and only five were still operational.

**RECOMMENDATION 20**

That the Minister of National Defence or the Communications Security Establishment be required to report annually to Parliament on the number of ministerial authorizations to intercept private communications issued during the year, the number still in force by the end of the year, and the general purpose for which each authorization was issued (i.e., to obtain foreign intelligence or to protect computer systems or networks).

## **ISSUES RELATING TO THE PRIVACY OF CANADIANS AND INFORMATION SHARING**

The *Anti-terrorism Act* introduced provisions that specifically affect the ability of Canadians and those in Canada to access information about themselves or their government, as well as provisions that allow the government to collect personal information about Canadians and those in Canada and share it with others. Other pieces of national security legislation, such as the *Public Safety Act, 2002*, likewise introduced provisions that affect matters relating to information and privacy. Further, information and privacy issues arise as a result of government contracting policies and information sharing agreements within Canada and with agencies and businesses in other countries, whether formal or informal.

### **Citizen Complaints under the *Access to Information Act*, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act***

Section 87 of the *Anti-terrorism Act* added section 69.1 to the *Access to Information Act*, section 103 added section 4.1 to the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and section 104 added section 70.1 to the *Privacy Act*. These provisions are designed to work in conjunction with section 38.13 of the *Canada Evidence Act* (CEA) which, as described previously, allows the Attorney General of Canada to issue certificates prohibiting the disclosure of certain types of information in connection with a proceeding. “Proceeding” under section 38 of the CEA is defined broadly enough to include a complaint made under the *Access to Information Act*, the PIPEDA or the *Privacy Act*.

Sections 87, 103 and 104 of the *Anti-terrorism Act* state that if the Attorney General issues a certificate prohibiting disclosure under the CEA before a complaint is filed under the *Access to Information Act*, the PIPEDA or the *Privacy Act* respecting a request for access to information, these Acts do not apply in relation to the documents or personal information sought. In addition, they provide that where a certificate prohibiting disclosure has been issued after a complaint has been filed, all proceedings with respect to the complaint to the Information Commissioner are discontinued, and all proceedings

with respect to the personal information to which the complaint to the Privacy Commissioner relates are discontinued.

Certain witnesses appearing before the Committee expressed concern about the way the *Anti-terrorism Act* has altered the *Access to Information Act*, the PIPEDA and the *Privacy Act*. Witnesses argued that the changes operate to reduce the ability of members of the public to access information in the hands of the government, and that accordingly, these provisions run counter to the principles of transparency and openness so important in Canada. In addition, claims were made that these amendments have interfered with the ability of the Privacy Commissioner and the Information Commissioner to perform the review and oversight functions they are statutorily mandated to perform, and thus have adversely affected the government's accountability to the public. The Information and Privacy Commissioners both expressed particular concern in this regard.

“Accountability is diminished significantly when it is possible for the government to issue a certificate that eliminates the role of the Information Commissioner to review secret information that has been requested by individual Canadians and when it removes from the judge the ability to make substantive decisions on whether that information should go out.”

(John Reid, former Information Commissioner of Canada)

“The Anti-terrorism Act, as well as other recent government initiatives aimed at combating terrorism, reflect a fundamental shift in the balance between national security, law enforcement and informational privacy, with an associated loss of privacy and due process protections for individuals.”

(Jennifer Stoddart, Privacy Commissioner of Canada)

In addition, the Office of the Information Commissioner pointed out the effect that the issuance of a certificate by the Attorney General prohibiting disclosure would have on the Information Commissioner's investigations. It indicated that while

“[I]n section 87 the entire investigation of the entire complaint must stop [if the government issues a certificate], which is even inconsistent internally in the [Anti-terrorism Act], with use of different words, when you compare it with sections 103 and 104. Both of those attempt to try to restrict it to the information, but in a complaint under the Access to Information Act they do not.”

(Alan Leadbeater, Office of the Information Commissioner of Canada)

the issuance of a certificate would only halt proceedings of the Privacy Commissioner in

relation to the personal information to which a complaint under the *Privacy Act* or PIPEDA relates, it would have the effect of halting *all proceedings* in relation to a complaint made to the Information Commissioner under the *Access to Information Act*, even if the certificate were issued in relation to only one or two pieces of information forming the subject of the complaint.

The Committee believes that the special advocate process it recommended earlier in relation to sections 38.04 and 38.131 of CEA would address many of the issues regarding openness, transparency and accountability raised by witnesses in relation to sections 87, 103 and 104 of the *Anti-terrorism Act*. However, we are troubled by the sweeping effect that section 69.1 of the *Access to Information Act* has on the ability of the Information Commissioner to investigate complaints once the Attorney General has issued a certificate prohibiting disclosure. We believe that the wording of section 69.1 of the *Access to Information Act* should be narrowed to make that provision akin to section 4.1 of the PIPEDA and section 70.1 of the *Privacy Act*.

#### **RECOMMENDATION 21**

That the government amend section 69.1 of the *Access to Information Act* so that, in the event that a certificate of the Attorney General under section 38.13 of the *Canada Evidence Act* is issued after a complaint has been made to the Information Commissioner, the Information Commissioner's investigation of the complaint as a whole is not halted, but only his or her investigation in respect of the information subject to the certificate.

#### **Changes Introduced by the *Public Safety Act, 2002***

Other national security legislation, such as the *Public Safety Act, 2002*, introduced provisions that have the potential to affect the privacy of Canadians. Changes made by that Act to the *Aeronautics Act* and the PIPEDA are particularly significant in this regard. For example, the *Public Safety Act, 2002* added section 4.81 to the *Aeronautics Act*, which empowers the Minister of Transport or other designated person to require air carriers and airline reservation systems to provide passenger information to him or her for the purpose of transportation security. The Minister of Transport may disclose the information to other officials within the Department of Transport and to certain officials

outside the department, such as the Minister of Citizenship and Immigration, Minister of National Revenue, and the Chief Executive Officer of the Canadian Air Transport Security Authority, for the purposes of transportation security. “Transportation security” is broadly defined.

For the purposes of section 4.81 and section 4.82 of the *Aeronautics Act*, “transportation security” means “the protection of any means of transportation or of any transportation infrastructure, including related equipment, from any actual or attempted action that could cause, or result in,

- (a) loss of life or personal injury;
- (b) substantial damage to or destruction of a means of transportation or any transportation infrastructure; or
- (c) interference with any means of transportation or with any transportation infrastructure that is likely to result in loss of life or personal injury, or substantial damage to or destruction of any means of transportation or any transportation infrastructure.” [*Aeronautics Act*, subsection 4.81(0.1)]

Another provision introduced by the *Public Safety Act, 2002* that affects or has the potential to affect the privacy of Canadians is section 4.83 of the *Aeronautics Act*, which relieves aircraft operators from certain restrictions under the PIPEDA that generally prohibit organizations from disclosing personal information in their possession without the consent of the individual to whom the information relates. Under section 4.83, aircraft operators can share advance information respecting passengers on board or expected to be on board aircraft scheduled to land in a foreign state. Currently, the only foreign state to which Canada is required to provide this information is the United States. This is because section 4.83 was specifically enacted to enable aircraft operators to comply with United States laws compelling such disclosure, accompanied by monetary penalties for non-compliance.

Section 4.82 of the *Aeronautics Act*, which is not yet in force, would allow the RCMP Commissioner, the Director of CSIS, or officials designated by them to obtain this same airline passenger information, without warrant, for transportation security purposes, or for a variety of other purposes, some of which are not directly related to terrorism, transportation security or national security. For example, they would be able to obtain

passenger information to enforce arrest warrants in relation to offences punishable by imprisonment of five years or more and arrest warrants under the *Immigration and Refugee Protection Act* and the *Extradition Act*.

In addition, the *Public Safety Act, 2002* amended section 7 of the PIPEDA to allow private sector institutions to collect personal information about their clients, without their consent, and to disclose it to government, law enforcement and national security agencies in certain specified circumstances – for example, if the institution in question suspects that information relates to national security, the defence of Canada or the conduct of international affairs – as long as they have identified their lawful authority to obtain that information.

During the course of the Committee's proceedings, while general unease was expressed about the amount of information sharing allowed under the *Aeronautics Act* and about modifications to the PIPEDA, the provision that received the most attention was section 4.82 of the *Aeronautics Act*. Witnesses were worried that it would allow police and security intelligence agencies to obtain airline passenger information for purposes other than national security.

“Under the Public Safety Act ... airlines can be compelled, without warrant, to disclose information about passengers to police for anti-terrorism purposes. It may well be that few people would question such a goal ... [b]ut the use of this information is not confined to the purposes of anti-terrorism and transportation safety. The Public Safety Act also allows the information to be used to identify passengers for whom there are outstanding arrest warrants for a wide range of ordinary criminal offences ... [T]he machinery of anti-terrorism is used to nourish the needs of ordinary law enforcement, lowering the standard ordinarily demanded of law enforcement authorities.”

(Jennifer Stoddart, Privacy Commissioner of Canada)

In their view, the extraordinary provisions introduced into the *Aeronautics Act* by the *Public Safety Act, 2002* were designed to address threats to transportation safety and national security. Persons who are wanted on outstanding criminal charges or for immigration or extradition purposes are not necessarily threats in this regard. Some witnesses were also of the view that allowing police and security agencies to obtain information from airlines and aircraft operators to enforce regular warrants when

individuals are traveling by air, while failing to allow this with respect to any other means of transportation, was inequitable.

Some Committee members were comfortable with allowing police or immigration officers to use information from airlines and aircraft operators for the purpose of enforcing regular criminal or immigration warrants, as law enforcement officials should be able to use information available under the law to enforce the law, particularly when a warrant relates to a general offence that is very serious. Other Committee members were troubled by this prospect, echoing comments made by witnesses regarding the erosion of privacy rights that this provision, if proclaimed, would bring about. Still others were troubled by the fact that general warrant information would be made available to police and immigration officials only with respect to those who travel by air, and not with respect to those who travel by other means. The Committee accordingly believes that the government should give careful consideration to the scope of section 4.82 of the *Aeronautics Act* before it is brought into force.

### **Canada's Proposed No-Fly List**

Witnesses appearing before the Committee also expressed anxiety over the prospect that Canada might decide to develop its own version of a no-fly list, which would be used by aircraft operators and airlines to prevent people from boarding aircraft. Witnesses were particularly concerned that the government might follow the United States' example when and if it chose to create its own list.

Originally, the Transportation Security Administration in the United States produced two separate types of watch lists: a "no-fly" list and a "selectee" list. Now, these two lists are subsets of a general consolidated watch list known as the Terrorist Screening Database, which is maintained by the Terrorist Screening Centre, an agency responsible for integrating all existing watch lists in the United States.<sup>34</sup>

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<sup>34</sup> The Terrorist Screening Centre is administered by the Federal Bureau of Investigation (FBI) and the U.S. Justice Department, in cooperation with the U.S. Department of Homeland Security.

If an individual's name is on the no-fly list, then he or she will be denied permission to board an aircraft in the United States. If an individual's name is on the selectee list, then he or she will automatically be selected for enhanced security screening every time he or she flies, although boarding may be permitted following enhanced screening. It is unknown how many people are on these lists, although estimates provided by the American Civil Liberties Union indicate that listed persons may number in the tens of thousands. While the Transportation Security Administration advises that individuals are placed on this list if they are or may be threats to civil aviation or national security, it is unknown what criteria is used to decide whether a person represents such a threat. While the United States Congress has called for a mechanism whereby individuals would be able to appeal or seek redress respecting decisions to place them on the no-fly and selectee lists, appeal and redress mechanisms and policies have not, to date, been finalized. The Transportation Security Administration has, however, developed a mechanism whereby one can apply to correct cases of mistaken identity.

When the former Minister of Transport appeared before our Committee in November 2005, he indicated that the government was, in fact, considering the creation of a no-fly list, and was in the process of consulting stakeholders about the parameters of the list. Then in October 2006, the current government revealed that it was, in fact, creating

“Some key features of our approach include a well-defined and targeted list focused only on persons who pose a threat to aviation security, [a] case-by-case consideration of each individual proposed for inclusion on the [‘no-fly’] list, sufficient information on individuals to minimize false matches to people with similar or the same names, [and] easy and quick access to a reconsideration mechanism to allow individuals to seek a quick review of their inclusion on the list if there were to be a mistake.”

(Jean Lapierre, former Minister of Transport)

this list, known as the Passenger Protect Program (PPP). It expects to have the PPP in place for domestic flights by early 2007 and for international flights later in the year. It appears, however, that the government does not plan to follow the United States example when creating the PPP list. First, the government has published details describing, in general, how people will be selected for listing. According to Transport Canada information, an Advisory Group, led by Transport Canada officials, will be created to

assess individuals on a case-by-case basis for listing, using information provided by CSIS and the RCMP. It will make recommendations to the Minister of Transport, Infrastructure and Communities as to whether to add or remove someone from the list. The list will reportedly be updated every 30 days. Guidelines for determining whether or not people should be added to the PPP include whether they:

- are or have been involved in a terrorist group and are individuals who, it can reasonably be suspected, will endanger the security of any aircraft or aerodrome or the safety of the public, passengers or crew members;
- have been convicted of one or more serious and life-threatening crimes against aviation security; or
- have been convicted of one or more serious and life-threatening offences and who are individuals who may attack or harm an air carrier, passengers or crew members.<sup>35</sup>

While recognizing that the PPP does not yet appear to be in place, the Committee is concerned about the lack of specific listing criteria, particularly in the third guideline. It is unclear, for example, how the Advisory Group led by Transport Canada will determine whether or not a person may attack or harm an air carrier, passengers or crew members or what types of offences will be considered serious or life-threatening for the purposes of the PPP list. Individuals need to understand how and when the law applies to them, particularly in situations when the law may be used to deny them rights or benefits. The government should therefore take additional measures to ensure that individuals know and understand the criteria that will be used by officials to decide whether or not they will be allowed to board an aircraft.

#### **RECOMMENDATION 22**

That the government produce and publish clear guidelines or criteria specifying when, and in what circumstances, individuals will be added to the Passenger Protect Program list.

<sup>35</sup> For further information, see Transport Canada, [Canada's New Government Announces Details of Passenger Protect Program](#), News release, Ottawa, 27 October 2006.

It appears that in addition to providing a mechanism for individuals to correct cases of mistaken identity, the government intends to provide a mechanism for individuals to challenge the decision to include them on the PPP list. According to Transport Canada information, an individual would be able to appeal the listing decision to Transport Canada's Office of Reconsideration, which may arrange for an independent assessment of the case and make recommendations. Individuals would also have the option of appealing to the Security Intelligence Review Committee, the Commission for Public Complaints Against the RCMP, or the Canadian Human Rights Commission. They could also apply to the Federal Court for judicial review.

The Committee is encouraged to see that the government plans to provide listed individuals not only with a mechanism to correct cases of mistaken identity, but also with several avenues to challenge decisions to place or keep them on the PPP list. We wish to ensure, however, that individuals are able to appeal decisions to place them on the list and that they know their rights and responsibilities with respect to their applications to challenge. The Committee is therefore of the view that the government should create an appeal process as well as publish clear guidelines and information with respect to it.

### **RECOMMENDATION 23**

That the government provide individuals listed under the Passenger Protect Program with a process to appeal decisions to list them and produce and publish clear guidelines on how individuals may challenge decisions to place or keep them on the list.

### **Federal Government Outsourcing Contracts**

Another concern raised by certain witnesses appearing before the Committee related to the fear that personal information of Canadians and those in Canada might be made available to United States foreign intelligence officials under the USA PATRIOT Act, which was the United States' primary legislative response to terrorism, enacted in October 2001.

The USA PATRIOT Act contains a provision allowing foreign intelligence officials in the United States, such as the FBI, to obtain access to “tangible items” under the Foreign Intelligence Surveillance Act, a U.S. federal statute. Tangible items may include a wide array of records or documents regardless of who is in possession of them. Before issuing such an order, the Foreign Intelligence Surveillance Act court must be satisfied that there are reasonable grounds to believe that the tangible items sought are relevant to an authorized investigation to obtain foreign intelligence information about a non-U.S. person or to protect against terrorism or espionage. Individuals who receive tangible items production orders are generally prohibited from revealing to anyone but their lawyer that they have received such an order, although they can challenge the non-disclosure aspect of the order as well as the order itself in court.

The USA PATRIOT Act also allows FBI officials to issue National Security Letters (NSLs), a type of administrative subpoena, to communications firms, financial institutions and other third parties, in order to compel them to provide certain customer and financial records, whenever the FBI certifies the records are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. As is the case with tangible items production orders, persons who receive an NSL are generally prohibited from revealing to anyone but their lawyers that they have received one, although they are able to challenge the non-disclosure aspect of the order as well as the NSL itself in court.

Certain witnesses who appeared before the Committee were concerned that foreign intelligence agencies in the United States could use provisions in the USA PATRIOT Act to access the personal information of Canadians and those in Canada, either by obtaining it from Canadian subsidiaries of U.S companies located in Canada or from U.S. companies with which Canada’s federal or provincial governments, or private companies in Canada, have signed outsourcing contracts.

<p>The term “outsourcing contract” is used to describe a contract in which the parties agree that some of the goods and services that would normally be provided by a particular organization will instead be provided by an external entity or organization.</p>
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The Minister of Public Safety stated that U.S. law would not operate to allow subsidiaries of U.S. companies located in Canada to provide the FBI with tangible items pursuant to a U.S. order, since the laws of Canada would apply to these subsidiaries. However, the Committee remains worried about this possibility, particularly in light of a recent decision of the Supreme Court of British Columbia,<sup>36</sup> which indicates that expert opinions differ as to the effect that a USA PATRIOT Act production order would have on records in the control of a Canadian subsidiary.

“We remain concerned about this issue because our current Privacy Act is a weak instrument; it dates now from a generation. It does not speak to the issue of outsourcing, nor does it speak to the contracting out of the treatment of Canadians’ personal information confided to the government.”

(Jennifer Stoddart, Privacy Commissioner of Canada)

The Committee notes that the Treasury Board Secretariat has recently conducted a risk assessment respecting the contracting practices of all federal government departments and institutions, to see whether, under their current contracting practices, they provide personal information of Canadians to external organizations that could potentially be accessed by the U.S. foreign intelligence agencies under the USA PATRIOT Act. We are reassured by the results of this March 2006 assessment, which revealed that only seven out of 160 federal government departments or institutions were in the medium or high risk category with respect to outsourcing contracts.<sup>37</sup> We also note that the Treasury Board Secretariat has developed guidelines to assist federal government departments and institutions when negotiating outsourcing contracts, to ensure that these contracts contain contractual clauses that limit, as much as possible, both the information and access to information provided under contract to external organizations.<sup>38</sup> However, the Committee believes it is necessary to ensure that the federal government remains ultimately responsible for any information it shares under contract, in the event that the personal information of Canadians becomes available to external agencies like the FBI or

<sup>36</sup> *British Columbia Government and Services Employees Union v. British Columbia (Minister of Health Services)*, 2005 BCSC 446.

<sup>37</sup> For further information, see Treasury Board of Canada Secretariat, [Privacy Matters: The Federal Strategy to Address Concerns About the USA PATRIOT Act and Transborder Data Flows](#), Ottawa, 2006.

<sup>38</sup> For further information see Treasury Board of Canada Secretariat, [Guidance Document: Taking Privacy Into Account Before Making Contracting Decision](#), Ottawa, 2006.

other U.S. agencies. Federal departments and institutions must be held accountable for the use or misuse of personal information of Canadians and those in Canada provided under outsourcing contracts to external entities.

#### **RECOMMENDATION 24**

That federal departments and institutions be required to protect personal information provided under outsourcing contracts to external entities by securing against the unauthorized access, collection, use, disclosure or disposal of personal information; placing restrictions on storage, access, and disclosure of personal information outside of Canada; reporting any demand for disclosure of personal information received to the Privacy Commissioner; and protecting whistle-blowers who report a foreign demand for information.

#### **Information Sharing by Means of Agreement or Informal Exchange**

During the course of the Committee's hearings, witnesses also discussed information sharing not mandated by legislation, but which occurs anyway, either by means of agreements, as in the case of the agreements that Canada and the United States have entered into under the Smart Border Declaration, which

“Acknowledging that we have to share information, we must insist that the authorities at least consider the risks that sharing information will impose on Canadian citizens. We must insist that they put whatever reasonable controls they can on the information and that they evaluate at what point it would be appropriate or not to share information.”

(Lorne A. Waldman, Canadian Bar Association)

allow for information exchange between Canada and U.S. officials on a variety of border issues, or through more informal information sharing arrangements. The Maher Arar case provides a distressing illustration of what can happen when this type of information sharing occurs in the absence of clear guidelines or adequate review and oversight.

The Committee recognizes that information sharing has been one of the topics studied in depth by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. We encourage the government to implement the recommendations of Justice O'Connor in relation to information sharing in his September

2006 report.<sup>39</sup> In particular, we would like the government to implement Recommendations 2, 9, 12 and 13, not only with respect to information sharing by the RCMP, but with respect to information sharing by any Canadian agency involved in protecting national security.

Recommendation 2 of Justice O'Connor's September 2006 report suggests that co-operative or integrated arrangements in relation to national security investigations be reduced to writing. Recommendation 9 states that the RCMP should never share information in a national security investigation without attaching written caveats respecting who can have access to the information and how the information is to be used. Recommendation 12 states that where Canadian agencies become aware that foreign agencies have made improper use of information provided by Canadian agencies, they should file a formal objection. Finally, Recommendation 13 states that the Department of Foreign Affairs and International Trade should provide annual reports to the RCMP and CSIS assessing the human rights records of various countries, to assist these organizations in evaluating whether, and on what basis, they should continue to share information with agencies of these countries.

#### **RECOMMENDATION 25**

That the government put information sharing arrangements in relation to national security investigations in writing; ensure that Canadian law enforcement and security agencies attach written caveats regarding the use of shared information; require Canadian agencies to make formal complaints to foreign agencies regarding the misuse of shared information; and produce annual reports assessing the human rights records of various countries.

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<sup>39</sup> [\*Report of the Events Relating to Maher Arar: Analysis and Recommendations\*](#), *supra*, pp. 364-369.

## **SECURITY AND DISCLOSURE UNDER THE *SECURITY OF INFORMATION ACT***

The *Anti-terrorism Act* introduced several changes to the Act formerly known as the *Official Secrets Act*, including renaming it the *Security of Information Act* (SOIA) and creating new offences relating to economic espionage, communication of safeguarded information to foreign entities or terrorist groups, and committing violence or threats at the direction of a foreign entity or terrorist group for the purpose of harming Canadian interests. Additionally, the SOIA now permits the deputy head of a government institution to designate a person who has, has had or will have access to special operational information as a person permanently bound to secrecy, if it is in the interest of national security to so designate that person. The new concept of “special operational information” is broadly defined as information that the Government of Canada is taking measures to safeguard and that may reveal, or from which may be inferred, any of a long list of types of information. Only the Governor General, the lieutenant governors of provinces and judges are exempt from being designated as persons permanently bound to secrecy.

### **Disclosure under Section 15 of the SOIA**

Sections 13 and 14 of the SOIA created offences prohibiting persons bound to secrecy from intentionally and without authority

“No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest.” [SOIA, subsection 15(1)]

communicating or confirming special operational information, or information that, if it were true, would be special operational information. There is a limited defence under section 15, which allows disclosure of secret information in the public interest in order to prevent the commission of an offence. Before disclosing the information, however, an individual is required to bring the concern to the attention of his or her deputy head, the Deputy Attorney General of Canada, the Security Intelligence Review Committee (SIRC) or the Communications Security Establishment Commissioner.

When appearing before us, a representative of SIRC indicated that it was unclear what role SIRC is expected to play in respect of the

“Although this provision allows for SIRC to receive special operational information, SIRC’s role upon receipt of said information is left undefined.”

(Susan Pollak, SIRC)

public interest disclosure defence under section 15. While the provision states that, in certain circumstances, individuals wishing to avail themselves of the defence must first bring their concern to SIRC, it does not state what SIRC is supposed to do once a person does so. For example, it is not known whether SIRC would conduct an investigation relating to the special operational information, have certain statutory powers, or make findings or recommendations through a report to a particular person. Considering the potentially serious repercussions for government employees were they to disclose secret information, SIRC believed that there should be more clarity in this matter. The Committee agrees that clarification is required – not only with respect to the responsibilities of SIRC, but also the other individuals who might receive notice, under section 15 of the SOIA, of a concern regarding the possible commission of an offence.

#### **RECOMMENDATION 26**

That the government specify the procedure to be followed by a deputy head, the Deputy Attorney General of Canada, the Security Intelligence Review Committee and the Communications Security Establishment Commissioner, as the case may be, when they receive notice of a concern from a person wishing to disclose special operational information under section 15 of the *Security of Information Act*.

#### **Disclosure under Section 4 of the SOIA**

Section 4 of the SOIA contains the more general offences of unauthorized use or possession of secret information by any individual, not just government officials bound to secrecy. This section pre-dates the

“Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, password, sketch, plan, model, article, note, document or information, [communicates it to an unauthorized person].” [SOIA, paragraph 4(1)(a)]

*Anti-terrorism Act* and went essentially unchanged in 2001. The public interest defence

set out in section 15 of the SOIA is not available to individuals who contravene section 4. Some witnesses suggested that section 4 should likewise contain a public interest defence so that individuals may disclose information, for example, to prevent an offence or report wrongdoing on the part of the government. Others believed that section 4 of the SOIA requires amendment so that the further dissemination of leaked material is not prohibited unless its disclosure could reasonably be expected to injure national defence or national security, or the material contains markings to indicate its classified nature.

Section 4 of the SOIA was the subject of commentary by many witnesses, in particular, because it was used by the RCMP as a basis for executing search warrants at the home

“In the result, the press can be unwarrantedly muzzled in what it can write and the public can be unjustifiably deprived of what it can learn.”

(Canadian Civil Liberties Association)

and office of *Ottawa Citizen* journalist, Juliet O’Neill, on the grounds that she might have information in her possession classified as secret in relation to the Maher Arar investigation. Some expressed the view that section 4 creates a chill with respect to public debates on national security issues. The Committee notes that the validity of the search warrants used against Ms. O’Neill were quashed by the Ontario Superior Court of Justice in a decision rendered on 19 October 2006.<sup>40</sup> The Court also struck down as unconstitutional subsections 4(1)(a), 4(3) and 4(4)(b) of the SOIA, dealing with wrongful communication and receipt of secret information, and allowing another person to have possession of it. The Court found that these subsections provide no guidance to the public as to what constitutes prohibited conduct, and give the government the unfettered ability to arbitrarily protect whatever it chooses to classify as “secret official” – or even just “official” – information. The Committee is encouraged to learn that the federal government will not be appealing the decision of the Ontario Superior Court but will instead consider legislative options to resolve the concerns raised by the judge.

### **The Type of Secret Information Protected**

In our view, two defects of section 4 of the SOIA require correction by the government in particular. First, section 4 fails to clearly and appropriately circumscribe

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<sup>40</sup> *O’Neill v. Canada (Attorney General)*, [2006] O.J. No. 4189 (QL).

the type of information that an individual may not communicate, use, retain or allow another to possess. “Secret official” is too broad a concept, as it encompasses more than information that might be injurious to the interests of Canada, such as information that would merely embarrass. The term “official document” is even more problematic in its imprecision. In order to more clearly indicate the nature of protected information, we note that the United Kingdom’s *Official Secrets Act* qualifies information that may not be disclosed on the basis that disclosure would be “damaging,” for example to the work of the security and intelligence services, the capability of the armed forces, or the interests of the country abroad. Our SOIA should be amended in such a way that section 4 covers only information that must remain secret in order to protect the safety, security or other specified interests of Canada.

“I think that there would have to be a different legal definition of ‘state secrets’ that might have to be gradated according to security classification of the information.”

(Wesley Wark, University of Toronto)

#### **RECOMMENDATION 27**

That the *Security of Information Act* be amended to narrow the information that is applicable for the purpose of the offences under section 4, such as by restricting it to secret official information the disclosure of which would harm Canada’s national defence, national security or other legitimate specified interests.

#### **The Need for a Public Interest Defence**

The second problem regarding section 4 of the SOIA is that it fails to provide for a public interest defence. Just as there may be times when a person sworn to secrecy must disclose

“[There should be a defence for] one who is in possession of information that could fall under the category of security intelligence and who thinks that the public needs to know it in order to prevent some form of abuse.”

(Wesley Wark, University of Toronto)

information in the public interest under section 15 of the SOIA, we believe there are times when an individual – whether a government employee, journalist or ordinary member of the public – must disclose information in order to prevent an illegal act, or protect the life, health or safety of an individual. The Committee points out that, in addition to the principles that operate to ensure secrecy and loyalty to the government, there is an additional democratic principle by which matters of legitimate concern should

be brought to the attention of the public for debate or resolution. We further note that, in the case involving Ms. O'Neill, the Ontario Superior Court rejected the government's argument that a general public interest defence already exists under section 4.<sup>41</sup> The judge concluded that the express availability of the defence under section 15, in conjunction with its absence under section 4, indicated Parliament's intention in 2001 not to provide for a public interest defence for the section 4 leakage offences.

We therefore call on the government to amend section 4 of the SOIA so that it contains a defence based on disclosure in the public interest. This defence should be broader than the one currently set out in section 15, given that section 15 only permits disclosure to prevent the commission of an offence and requires the individual sworn to secrecy to first raise his or her concern within the government. With respect to section 4, there may be times where disclosure is necessary for a broader reason than to prevent an offence, and where first alerting the government may defeat the purpose of bringing a matter to the attention of the public. Accordingly, a judge asked to determine whether an offence has been committed under section 4 should more generally weigh the public interest in disclosure against the public interest in non-disclosure. Such a test under an amended section 4 would be comparable to the test under section 38.06 of the *Canada Evidence Act*, where a judge considers the public interest in disclosure when deciding whether to authorize, in the context of criminal or administrative proceedings, the disclosure of information that has been withheld by the government.

#### **RECOMMENDATION 28**

That the *Security of Information Act* be amended so that no person is guilty of an offence under section 4 if a judge determines that the person acted in the public interest and the public interest in disclosure outweighed in importance the public interest in non-disclosure.

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<sup>41</sup> *Ibid.* at paras. 54-57.

## A Purpose Prejudicial to the Interests of the State

An individual commits various offences under sections 4, 5 and 6 of the SOIA if he or she communicates information, or attempts to gain admission to a

“[M]uch could be gained both in terms of civil liberties and focusing limited resources by defining the state’s national security interests in a narrower and more tightly focused fashion.”

(Kent Roach, University of Toronto)

prohibited place, for any purpose that is “prejudicial to the safety or interests of the State.” When the *Anti-terrorism Act* was enacted in 2001, this concept was specifically defined in section 3 of the SOIA. However, witnesses appearing before us suggested that section 3 is too broad in defining what constitutes a purpose that is prejudicial to the safety or interests of Canada. In particular, it includes commission of an offence punishable by a maximum term of imprisonment of two years or more “in order to advance a political, religious or ideological purpose, objective or cause.” Some also argued that a prejudicial purpose should not include the various economic or financial harms listed in section 3.

The Committee agrees that the SOIA’s current statement of what constitutes a purpose prejudicial to the interests of the State is too broad. At a minimum, the reference to a political, religious or ideological motive should be removed for the same reasons that we cited earlier in the context of removing this phrase from the definition of “terrorist activity” in section 83.01 of the *Criminal Code*. We also believe that the government should evaluate the extent to which activities that affect the economic or financial well-being of Canada should be included within the concept of prejudicing the safety or interests of Canada. While such harms resulting from the use of secret information or entry into a prohibited place should be prevented, we question whether they should be criminalized in the SOIA to the same extent as injuries to health, safety or security.

**RECOMMENDATION 29**

That paragraph 3(1)(a) of the *Security of Information Act* be amended by removing the reference to the advancement of a political, religious or ideological purpose, objective or cause from what constitutes a purpose that is prejudicial to the safety or interests of Canada.

## DETENTION AND DEPORTATION UNDER SECURITY CERTIFICATES

The process by which non-citizens may be detained and deported based on confidential evidence that they pose a risk to the security of Canada is not contained in the *Anti-terrorism Act*. Rather, it has existed in Canada's immigration law for many years, although amendments have substantially altered the process. Security certificates have been employed infrequently but have garnered much criticism. As a tool being used by the government in response to individuals who pose a significant threat, the Committee determined that it was important to address this contentious topic in the context of Canada's anti-terrorism framework.

A "permanent resident" is a person who has acquired permanent resident status and has not subsequently lost that status. [IRPA, section 2]

A "foreign national" is a person who is not a Canadian citizen or a permanent resident, and includes a stateless person. [IRPA, section 2]

Under section 77 of the *Immigration and Refugee Protection Act* (IRPA), a permanent resident or foreign national may be inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality. If so, they are subject to a security certificate, which is then referred to the Federal Court for a determination of its reasonableness. If the certificate is found to be reasonable, it becomes a removal order, and there is no appeal or further judicial review. Since 1991, 28 security certificates have been issued, only 6 since 11 September 2001. Of the 28 issued, 19 have resulted in deportations, the two most recent being the deportation of Ernst Zundel to Germany in March 2005 and the removal of an individual using the alias Paul William Hampel to Russia in December 2006. Three security certificates have been quashed by the courts as unreasonable, one of which was subsequently re-issued. Six people in Canada are currently the subject of a security

"This is one of those series of tools to disrupt and prevent activities of organizations here. ... It is not done just in the case of terrorists. It is done for organized crime, crimes against humanity and war crimes. ... You are really running risks when you have to wait for the criminal process."

(Paul Kennedy, Public Safety and  
Emergency Preparedness)

certificate: Mohamed Harkat, Hassan Almrei, Adil Charkaoui, Mohamed Mahjoub, Mahmoud Jaballah and Manickavasagam Suresh. Three of these individuals have been released from detention on strict conditions: Mr. Suresh, Mr. Charkaoui and Mr. Harkat.<sup>42</sup>

We have already recommended earlier in this Report that, in the course of judicial consideration of the reasonableness of a security certificate, a special advocate should be appointed to protect the interests of the foreign national or permanent resident by having access to the confidential information on which the certificate is based and challenging non-disclosure and the reliability of the evidence. In this section of our Report, we address some remaining concerns regarding the security certificate process raised by witnesses who appeared before us.

### **Detention and Detention Review**

Because it relates to immigration, the security certificate process applies only to permanent residents and foreign nationals, not Canadian citizens.<sup>43</sup> Even as between

“[One] should consider what the other options are, short of this extreme mandatory detention scheme that applies now. ... [In other contexts] regardless of what kind of criminal they are, people get regular detention reviews.”

(Barbara Jackman, as an Individual)

permanent residents and foreign nationals, different procedures are applicable. Once a security certificate has been signed, a warrant may be issued for the arrest and detention of a permanent resident under section 82 of the IRPA, on the basis of reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person, or is unlikely to appear at the proceeding or for removal. Foreign nationals, on the other hand, are automatically subject to detention without the issue of a warrant. Under section 83, the detention of a permanent resident must be reviewed by a judge

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<sup>42</sup> On 15 February 2007, Mr. Mahjoub was ordered to be released on strict conditions, but had not been released when this Report was finalized: *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 171.

<sup>43</sup> Canadian citizens who pose a risk to national security must be investigated and/or charged in accordance with the provisions of the *Criminal Code*, the *Security of Information Act*, or other anti-terrorism legislation.

within 48 hours, and then at least once every six months, until the security certificate is reviewed and the permanent resident is either removed (deported) or allowed to remain in Canada. There is no such detention review for a foreign national prior to the hearing on the security certificate, which is contrary to the approach used in criminal law, where persons generally have the right to detention review shortly after being detained. As the Committee was troubled to learn, where a security certificate is upheld but deportation is not possible due to the risk faced by the individual in their home country, detention may continue for years. The often long delay between issuing a security certificate and holding the hearing to determine its reasonableness also poses serious problems in terms of due process and the resolution of matters within a reasonable time.

Many witnesses were harsh in their criticism of the security certificate process, calling long-term detention without criminal charges “our own version of Guantanamo

“Security certificates and other measures that limit rights set out in the Charter should never be used in place of prosecutions in accordance with fair trial procedure.”

(David Morris, Canadian Lawyers for International Human Rights)

Bay.” It was argued that the process is discriminatory in that it only applies to non-citizens and that it constitutes a significant departure from our usual court processes where deprivation of liberty requires the state to meet a higher evidentiary burden. Confirmation of the certificate merely on the basis that it is “reasonable” is particularly problematic, given that there is no appeal from such a determination. We were also warned of the possibility of errors in these types of cases.

“Abolish the security certificate regime because it is unfair and unjust.”

(Ziyaad Mia, Canadian Muslim Lawyers Association)

The Committee notes the United Nations Human Rights Committee’s concluding observations in its review of Canada’s security certificate process and its compliance with the *International Covenant on Civil and Political Rights*. In its April 2006 report,<sup>44</sup> the U.N. Committee was concerned that “some people have been detained for several years without criminal charges, without being adequately informed about the reasons for their

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<sup>44</sup> United Nations, Human Rights Committee, [Concluding Observations: Canada](#), *supra*, para. 14.

detention, and with limited judicial review.” It therefore urged Canada to “ensure that administrative detention under security certificates is subject to a judicial review that is in accordance with article 9 of the Covenant, and legally determine a maximum length of such detention.” The U.N. Committee also expressed concern about the mandatory detention of foreign nationals who are not permanent residents. It stated that Canada “should also review its practice with a view to ensuring that persons suspected of terrorism or any other criminal offences are detained pursuant to criminal proceedings in compliance with the Covenant. It should also ensure that detention is never mandatory but decided on a case-by-case basis.”

The Committee recognizes that immigration law distinguishes between the rights of Canadian citizens and those of permanent residents or foreign nationals. Unlike a citizen, a permanent resident or foreign national does not have the unqualified right to enter and leave Canada, or to remain

“A foreigner cannot be deported in an arbitrary manner. A foreigner is entitled to the protection associated with the fundamental principles of justice, the right to life, security and liberty. These rights are universal. A foreigner may not have the right to remain in Canada, but he is entitled to the protection that flows from these fundamental principles of justice.”

(François Crépeau, University of Montreal)

here. We also recognize that there is a justification in treating matters that involve Canada’s national security differently from those that do not. However, this does not mean that the procedure surrounding the detention of a non-citizen on the basis of a security certificate should not be as fair and just as possible. Departures, in the interests of national security or the fight against terrorism, from full adherence to the usual principles of fundamental justice and due process should be as minimal as they can be in the circumstances.

We note that section 84 of the IRPA permits a foreign national who has not yet been deported, within 120 days after a security certificate has been upheld, to apply for release. The judge may allow release, under any appropriate conditions, if satisfied that

“Detention, or the deprivation of liberty through the operation of law, is an extraordinary measure. Detention must be justified in a manner that is transparent and there must be an opportunity to dispute its lawfulness.”

(Greg P. DelBigio, Canadian Bar Association)

the individual will not be removed within a reasonable time and that his or her release will not pose a danger to national security or the safety of any person. If a foreign national may apply for release *after* consideration of the security certificate, we see no reason why he or she should not be entitled to detention review *before* the security certificate has been considered. We are also aware that in a decision rendered 1 February 2006, the Federal Court found that the long continuing detention of a foreign national without review prior to consideration of the security certificate is discriminatory within the meaning of section 15 of the *Canadian Charter of Rights and Freedoms*, when compared to the statutory entitlements of permanent residents.<sup>45</sup>

Because a foreign national who is the subject of a security certificate may be arrested without a warrant, the unavailability of detention review under the current legislation means that no judge has considered the matter *at all* until the main hearing on the certificate, which can often be several months or years later. This is clearly an affront to the normal principles of due process that cannot be justified simply on the basis of national security. Accordingly, the Committee is of the view that foreign nationals should be eligible for detention review at least some point prior to the determination of the reasonableness of a security certificate. A judge should not order continued detention unless satisfied that the foreign national is a danger to national security or the safety of any person, is unlikely to appear at a future proceeding, or is unlikely to appear for the purposes of removal, should it be ordered. We recognize that the factors and information considered by the judge during review of the detention of a foreign national may be different from those considered in the case of a permanent resident. For example, a

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<sup>45</sup> *Re Jaballah*, 2006 FC 115 at paras. 81 and 93.

foreign national may more likely pose a flight risk due to insufficient ties to Canada, or the government's information relating to the alleged national security risk may more likely come from foreign sources rather than from sources within Canada.

**RECOMMENDATION 30**

That subsection 83(1) of the *Immigration and Refugee Protection Act* be amended to require a judge to review, within 48 hours, the detention of a foreign national who is subject to a security certificate.

As indicated earlier, pending consideration of the security certificate, a permanent resident is currently only entitled to detention review every six months. In addition to allowing foreign nationals to have prior detention review, we believe that both permanent residents and foreign nationals should be entitled to detention reviews more frequently than every six months. The Committee notes, for instance, that detention reviews in other contexts of the IRPA occur far more often. With respect to the security certificate process, the Committee points out that it is possible within a relatively short period of time for an individual's circumstances to change or for information to become available, which might justify the release of the individual on conditions. Accordingly, detention reviews should be conducted, not only within 48 hours of arrest, but subsequently within 30 days and then every 90 days after that. Again, it is in the interests of due process and fundamental justice, while still bearing in mind the unique challenges posed in matters of national security, that the Committee makes this recommendation. It is a means of ensuring that there is ongoing and frequent judicial review of a person's case throughout what can be a very lengthy period of detention.

**RECOMMENDATION 31**

That subsection 83(2) of the *Immigration and Refugee Protection Act* be amended to require the detention of a permanent resident or foreign national who is subject to a security certificate to be reviewed by a judge within 30 days after detention and at least once every 90 days thereafter.

## Evidence or Information Obtained by Torture

Some witnesses who appeared before the Committee referred to the danger of relying on evidence obtained by means of torture and the concern that it could be used in security certificate proceedings. Beyond the moral aspects of using such evidence, we agree that its reliability is highly suspect. We also note that, in December 2005, the British House of Lords unanimously held that information obtained by torture could not be used in court proceedings, including where British officials had no prior involvement in the torture and where the torture was perpetrated outside of the territory or control of the United Kingdom.

Witnesses who appeared before us suggested that the rules of evidence and administrative law should be strengthened to forbid acceptance by any court or agency of information that is derived from torture. We note that, in September 2006, Justice

“[Legislation] should state explicitly that any evidence obtained by torture is inadmissible and that where the source of evidence is from a foreign intelligence agency in a country known to practice torture, the evidence is presumptively unreliable.”

(British Columbia Civil Liberties Association)

O'Connor, who headed the Commission of Inquiry relating to Maher Arar, stated in his Recommendation 15 that Canadian agencies should identify information that comes from countries with questionable human rights records, consider the human rights implications, and take proper steps to assess the information's reliability.<sup>46</sup> We reiterate these views. Canadian security and intelligence agencies must carefully scrutinize any information that may have been obtained by torture before using the information as a basis for an investigative technique, to lay charges, or to substantiate a prosecution or security certificate. This may also require a more appropriate allocation of resources and a greater number of personnel with the necessary expertise to properly analyze information that may have been obtained by torture. The crucial point is that Canada's national security and law enforcement agencies should commit to the careful assessment of claims of past torture and the reliability of any evidence that may have been obtained from it.

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<sup>46</sup> [Report of the Events Relating to Maher Arar: Analysis and Recommendations](#), *supra*, pp. 348-349.

With respect to the rules of evidence, we were reminded by a witness that it is a general principle of law that evidence that is not reliable, which means credible and trustworthy, is not to be taken into account. Evidence derived by torture is, by its very nature and source, unreliable and should therefore be substantiated or corroborated by other

“Evidence which is not reliable, i.e. not credible or not trustworthy is not evidence capable of forming the basis for a determination of reasonableness.”

(Barbara Jackman, as an Individual)

means. Although the rejection of unreliable evidence should go without saying, we note that paragraph 78(j) of the IRPA states that the judge considering a security certificate may receive into evidence anything that is “appropriate.” For certainty and clarity, the Committee believes that this should be changed to “reliable and appropriate,” particularly given that these are the qualifying words used in the comparable provisions governing judicial review of the listing of a terrorist entity, consideration of a certificate having the effect of denying or revoking charitable status, applications under the *Canada Evidence Act* with respect to the disclosure of information, and applications to vary or cancel a certificate of the Attorney General of Canada prohibiting disclosure.

### **RECOMMENDATION 32**

That paragraph 78(j) of the *Immigration and Refugee Protection Act* be amended to expressly state that the judge considering the reasonableness of a security certificate may receive into evidence anything that is “reliable and appropriate.”

## The Availability of an Appeal

Certain witnesses who appeared before the Committee expressed concern about the fact that subsection 80(3) of the IRPA precludes judicial review of, or an appeal from, the Federal Court's

“In respect of security certificates, we [suggest] an accelerated appeal..., given the few cases, the importance of this matter and the problems that occur with indefinite detentions.”

(Murray Mollard, British Columbia Civil Liberties Association)

decision regarding the reasonableness of the security certificate. They found it very unfair that an individual is immediately subject to removal once a certificate is upheld by a single judge. We likewise seriously question whether the finality of the initial determination complies with the normal principles of justice when a person's rights and interests are at stake. In the security certificate process, where individuals do not have unimpeded access to the information used against them, and where the consequences of the proceedings may be continued detention or deportation, the latter sometimes to a country where the individual may be at risk of harm or ill-treatment, it is unacceptable for them not to have the right of appeal. The principles of justice and due process demand it.

### RECOMMENDATION 33

That subsection 80(3) of the *Immigration and Refugee Protection Act* be repealed, and that the determination of a judge of the Federal Court regarding the reasonableness of a security certificate be subject to an appeal to the Federal Court of Appeal.

## Deportation and the Risk of Torture

During his appearance before the Committee, the Minister of Justice and Attorney General repeatedly pointed out that individuals who are subject to a security certificate may be released from detention if they agree to return to their country of nationality. It is also sometimes possible to negotiate the removal of an individual to a third country. However, where an individual's country of origin is one with a record of human rights abuses, and removal to a safe third country is not available, this raises the serious possibility that the individual may be tortured once he or she is outside Canada. In other

words, it is not always a solution to say that an individual may end his or her detention by voluntarily agreeing to leave Canada, or that detention will end if the security certificate is upheld and the individual is ordered to be removed from Canada.

With respect to the deportation of individuals subject to a security certificate, the Committee believes that Canada's commitments under the

“The security certificate process should be reformed so as to bring it into line with Canada’s international human rights obligations.”

(Amnesty International)

United Nations *Convention against Torture* must be upheld. Article 3(1) explicitly prohibits state parties from returning a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Article 2(2) provides that under no circumstances are states permitted to deviate from this absolute prohibition. In May 2005, the United Nations Committee against Torture criticized Canada's failure “to recognise, at the level of domestic law, the absolute nature of the protection of article 3 of the Convention that is subject to no exceptions whatsoever.”<sup>47</sup>

The foregoing comments were echoed by the United Nations Human Rights Committee in its April 2006 report on Canada's compliance with *International Covenant on Civil and Political Rights*:

The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of

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<sup>47</sup> United Nations, Committee against Torture, Thirty-fourth session, [Consideration of Reports Submitted by States Parties Under Article 19 of the Convention against Torture, Conclusions and Recommendations of the Committee against Torture: Canada](#), CAT/C/CO/34/CAN, May 2005, para. 4. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra* at paras. 77-78, the Supreme Court of Canada found that “insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.” However, the Court went on to say: “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by section 7 of the *Charter* or under section 1.” Section 7 of the *Charter* allows a person to be deprived of liberty and security if it is accordance with the principles of justice, and section 1 allows limits on rights and freedoms that can be demonstrably justified in a free and democratic society.

presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.<sup>48</sup>

Certain witnesses who appeared before us repeated the substance of the United Nations' statements, namely that individuals

“Canada should legislate an absolute prohibition on return to torture, as it is obliged to do under international law.”  
(Andrew Brouwer, Canadian Council for Refugees)

should not be deported to a country where there are substantial grounds to believe that they would be in danger of being tortured. The Committee recognizes that this principle poses the dilemma of how to appropriately deal with a person who cannot safely be deported from Canada but, as a result of a risk to national security, faces the prospect of indefinite detention here. Nonetheless, we believe that, in order to confirm that torture is never justifiable, as well as uphold its international obligations, Canada should enact an express prohibition against deportation to torture, specifically in the context of removal on the basis of a security certificate. Accordingly, Canada's national security agencies should carefully assess claims of anticipated torture in order to determine whether or not there are reasonable grounds to believe that the individual will be subject to torture in the country to which he or she may be removed if a security certificate is upheld. It is also important to bear in mind that torture does not only include state-sponsored torture, but may also be the result of the failure of the receiving country to protect the individual from torture by a third party.

#### **RECOMMENDATION 34**

That the *Immigration and Refugee Protection Act* be amended to provide that, unless an individual chooses to voluntarily leave Canada, there shall be no removal of a permanent resident or foreign national on the basis of a security certificate if there are reasonable grounds to believe that the individual will be subject to torture in the country to which he or she will be removed.

<sup>48</sup> United Nations, Human Rights Committee, [Concluding Observations: Canada](#), *supra*, para. 15.

## Diplomatic Assurances Against Torture

One of the ways by which Canadian officials might conclude that torture is not likely to occur, and that an individual may therefore be removed following confirmation of a security certificate, is through the acceptance of a “diplomatic assurance.” In other words, governments will occasionally remove an individual to a country known to engage in torture, on the basis of a commitment that the individual will, in fact, not be tortured. A diplomatic assurance from another country may consist of an undertaking to observe the human rights of an individual, as well as a mechanism to confirm that this commitment is being met, such as through monitoring or reporting.

Commentators argue that diplomatic assurances are ineffective, as they are generally given by countries with a persistent pattern of human rights abuses that will not change. Given the clandestine nature of torture, there is difficulty monitoring a state after the return of an individual to ensure that ill-treatment does not take place. Moreover, the acceptance of diplomatic assurances erodes the international prohibition against torture, as all states should abide by the prohibition regardless. Diplomatic assurances were the subject of a May 2006 report of the United Kingdom Parliament’s Joint Committee on Human Rights, which concluded that a number of cases point to their unreliability in protecting against torture.<sup>49</sup>

To the extent that the Canadian government may consider a diplomatic assurance to be reliable evidence that an individual does not face a risk of torture if removed to another country under a security certificate, we wish to ensure that appropriate mechanisms are in place for monitoring the return. This includes the ability to obtain information regarding the status and condition of the returned individual from a reliable source. If the government does not fully believe that it will have the capacity to determine whether or not an individual is being properly treated, and that the diplomatic assurance is being complied with, the government should not deport the individual.

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<sup>49</sup> United Kingdom Parliament, Joint Committee on Human Rights, [The U.N. Convention Against Torture \(UNCAT\)](#), Nineteenth Report, Session 2005-06, London, 26 May 2006, paras. 95-133.

### RECOMMENDATION 35

That, before removing an individual to a country where torture is possible, on the basis of a diplomatic assurance that the individual will not be tortured, the government ensure that there will be an effective means of monitoring the individual's return, including the ability to access the necessary information to ascertain whether or not the individual is being tortured.

### The Need for an International Solution

The principle against deportation to torture can result in a very unfortunate predicament for a person detained under a security certificate who a judge believes should not be released as a result of a risk to national security or the safety of a person. The case of Mahmoud Jaballah illustrates this. On 16 October 2006, the Federal Court upheld the decision to detain him on a security certificate, asserting that Mr. Jaballah should be removed from Canada as soon as could reasonably be done.<sup>50</sup> However, the Court also ruled that Mr. Jaballah could not be deported to Egypt, his country of citizenship, because of the risk of torture he would face there, nor to any other country where he could face a risk of torture. The result is that Mr. Jaballah must either remain in detention, leave Canada voluntarily, or be removed to a safe third country willing to accept him.

When faced with the alternatives of indefinite detention in Canada and deportation to a country where torture is probable, the former will undoubtedly be the choice of most

“The other reality is that all those countries require international cooperation in order to fight what is clearly a global problem of terrorism.”

(Paul Kennedy, Public Safety and  
Emergency Preparedness)

individuals subject to a security certificate, and indeed, it should be the government's choice. That said, even in cases where an individual will not face a risk of torture on removal to a particular country, the Committee does not believe that removal is necessarily the easy solution. An individual may still be a threat to Canada if living elsewhere. Further, in the fight against terrorism, Canada has a responsibility to the

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<sup>50</sup> *Re Jaballah*, 2006 FC 1230.

international community. Simply deporting individuals, so that other countries must deal with them or contend with the threat posed, is in some ways an abrogation of a collective duty to reign in terrorists and make the world a safer place.

The Committee does not know the answer to the very difficult question of how best to deal with individuals who pose a threat to Canada but face a risk of torture in the only country or countries to which they may be removed, or how best to deal with individuals who may or may not face a risk of torture but pose a threat to the international community at large. We do, however, urge Canada to begin a dialogue with other countries, perhaps by encouraging the creation of a United Nations task force or proposing an examination by the existing Security Council Counter-terrorism Committee, so that the international community may reflect on these important questions. Among other things, it must be determined whether there is a maximum limit to continued detention and at what point an individual should be charged with a specific offence, particularly given that the international community can share intelligence in order to bring an alleged terrorist to justice. While preventive measures, such as deportation on the basis of a security certificate, are occasionally necessary in the fight against terrorism, there is a point at which the precautionary principle must give way to the principle by which individuals are entitled to know and respond to the allegations against them, and be tried in a country that respects the principles of fairness and due process.

**RECOMMENDATION 36**

That Canada show leadership in engaging the United Nations on the issue of how to properly deal with alleged or known terrorists who, regardless of what country they are in or to which they may be removed, pose a threat to the international community as a whole.

**RECOMMENDATION 37**

That Canada show leadership in engaging the United Nations on the issue of how to properly deal with alleged or known terrorists who may not be removed to another country due to a risk of torture, and are instead subject to indefinite detention without the prospect of criminal or other proceedings in which to respond to the case against them.

## **OVERSIGHT AND REVIEW OF CANADA'S NATIONAL SECURITY AND ANTI-TERRORISM FRAMEWORK**

The lack of adequate oversight and review of matters relating to national security and anti-terrorism has been a recurring preoccupation since the time the *Anti-terrorism Act* was first tabled in Parliament. When a Special Senate Committee conducted its pre-study of Bill C-36 in the fall of 2001, a recommendation was made that an Officer of Parliament be appointed to monitor, as appropriate, the exercise of powers provided in the *Anti-terrorism Act*. It was further suggested that this officer table a report annually, or more frequently, as appropriate, in both Houses. The Special Senate Committee on the Subject Matter of Bill C-36 also suggested that the entire Act be sunsetted, in other words be subject to expiry on a future date and renewed or re-enacted if it was determined to be justified.

In October 2004, the Interim Committee of Parliamentarians on National Security recommended the creation of a parliamentary intelligence committee to ensure that the security and intelligence community effectively serves Canada's interests, respects the *Charter of Rights and Freedoms* and remains fiscally responsible, properly organized and well managed. In November 2005, a National Security Committee of Parliamentarians was proposed in Bill C-81, which died on the *Order Paper* with the dissolution of the 38<sup>th</sup> Parliament. With access to classified information, the Committee's mandate would have been to review the legislative, regulatory, policy and administrative framework for national security in Canada, the activities of federal departments and agencies in relation to national security, and any other matters relating to national security referred to it by the government. The Committee would have been comprised of Senators and Members of the House of Commons but would have reported to the Prime Minister.

We also note some of the approaches used by other countries to monitor or review their national security and anti-terrorism frameworks. In the United Kingdom, an independent reviewer has been appointed to monitor the operation of that country's anti-terrorism legislation. The U.K. also has an Intelligence and Security Committee, made up of parliamentarians who oversee the operations of relevant agencies and report to the

Prime Minister. The United States has a Senate Select Committee on Intelligence and a House Permanent Select Committee on Intelligence, although their powers to review and to obtain classified information are greater than that normally enjoyed by parliamentary committees in Canada.

We believe that the best way to ensure that Canada’s anti-terrorism initiatives are exercised in a manner consistent with our fundamental principles and values – and the best way for Canadians to feel confident that the powers are being exercised in this way – is to provide for ongoing, independent oversight and review. That said, recommendations from witnesses who appeared before us

differed on how to best achieve this. Some asked us to endorse the National Security Committee of Parliamentarians previously proposed in Bill C-81, while others called for a parliamentary review of the operation of Canada’s anti-terrorism framework every few years. Some wished to appoint an independent reviewer of anti-terrorism legislation, responsible directly to Parliament and with a role similar to that of Lord Carlile in the

United Kingdom. Others suggested that the government strengthen the ability of the Commission for Public Complaints Against the RCMP to oversee that organization. Still others called for the creation of a new overall oversight body that would monitor not only the conduct of CSIS, the CSE and the RCMP, but all other government

agencies and departments, to the extent that they are involved in matters of national

“The government should establish a National Security of Parliamentarians to oversee the security and intelligence apparatus in Canada.”

(Office of the Privacy Commissioner of Canada)

“In 2001, we suggested that an ombudsman ... be appointed and entrusted with independent authority for overseeing the use of the provisions of this bill. We make the suggestion again, more emphatically.”

(William M. Trudell, Canadian Council of Criminal Defence Lawyers)

“The government should commit to the review of the Anti-terrorism Act by Parliament every three years as a minimum.”

(David Morris, Canadian Lawyers for International Human Rights)

“Oversight for all national security agencies and functions should be centralised in one body.”

(Canadian Arab Federation)

security. The new body would provide integrated oversight, as well as monitor the operations of agencies that are not currently subject to external or independent review.

### **Oversight of National Security Activities**

Canada's primary oversight bodies in matters of national security are the Security Intelligence Review Committee (SIRC), whose mission is

“[O]versight should be independent, effective and accessible.”

(Ziyaad Mia, Canadian Muslim Lawyers Association)

to protect Canadians' rights by ensuring that the Canadian Security Intelligence Service (CSIS) acts within the law; the Commissioner of the Communications Security Establishment (CSE), which oversees the activities of Canada's signals intelligence agency; and the Commission for Public Complaints against the Royal Canadian Mounted Police (RCMP). The operations of CSIS are also subject to internal review by the Inspector General, who reports to the government as to whether CSIS is complying with its operational policies and ministerial directives.

While SIRC and the CSE Commissioner are generally perceived to be effective oversight mechanisms, the Commission for Public Complaints Against the RCMP is not, due to its limited powers. For instance, SIRC has almost complete authority to review the activities of CSIS, and has

“CPC has no power to audit RCMP files. CPC can only act on the basis of a complaint. If no member of the public complains, we never find out about it. In the case of members of the Muslim population, since 9/11 there is too much fear of bringing unwanted attention to themselves or of police retaliation for them to come forward and make complaints about police conduct.”

(Shirley Heafey, former Chair of the Commission for Public Complaints Against the RCMP)

access to sensitive and classified information, with the exception of Cabinet confidences. The Commission for Public Complaints Against the RCMP, on the other hand, usually only becomes involved when individuals complain directly to it, or are dissatisfied with how the RCMP has handled their complaints and appeal to it. Moreover, the Public Complaints Commission receives only information that the RCMP believes is relevant to a complaint. The Commission is not involved in any form of continuing review of the

operations of the RCMP or the adequacy of its practices. While the Public Complaints Commission has the mandate to review complaints arising out of the national security functions of the RCMP,<sup>51</sup> its ability to discharge that mandate is hindered, due to its limited access to information.

In the context of the Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, Justice O'Connor recommended, in his December 2006 report, the creation of

“We also suggest the need for independent auditing of police and anyone else exercising surreptitious powers in the national security area. These should be subject to after-the-fact auditing by independents.”

(Alan Borovoy, Canadian Civil Liberties Association)

an enhanced review and complaints body to oversee the national security functions of the RCMP.<sup>52</sup> In our view, it is clear that the RCMP requires more comprehensive oversight of its anti-terrorism-related powers and national security activities. We believe that the preferable way to achieve this is to give an oversight body powers comparable to the powers that SIRC enjoys in its review of CSIS activities, including the fullest possible access to information and an ability to audit the day-to-day operations of the RCMP to ensure that it is always in compliance with the law. We note that Justice O'Connor made similar recommendations, namely that the new oversight body, which he calls the Independent Complaints and National Security Review Agency for the RCMP (ICRA) should have authority to conduct self-initiated reviews, subpoena documents, compel testimony, and investigate and report on complaints.<sup>53</sup>

With respect to improved oversight of the RCMP, we believe that particular emphasis should be placed on proper information and criminal intelligence sharing, respect for individual rights, and the avoidance of racial profiling. At the same time, the Committee wishes to point out that additional oversight and review is not the only or

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<sup>51</sup> Subsection 45.35(1) of the *Royal Canadian Mounted Police Act* allows a member of the public to make a complaint to the Commission regarding the conduct of a member of the RCMP “in the performance of any duty or function under the Act.” Section 18 of the Act refers broadly to police duties “in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada.”

<sup>52</sup> [A New Review Mechanism for the RCMP's National Security Functions](#), *supra*, pp. 603-607 (Summary List of Recommendations).

<sup>53</sup> *Ibid.*, pp. 516-542 (Recommendations 3 and 4).

even best way to ensure that the fight against terrorism is properly carried out. Nothing replaces well-staffed, well-financed police and intelligence services that are able to adequately perform their functions and gain the trust of the community in the first place.

**RECOMMENDATION 38**

That the government implement more effective oversight of the RCMP, akin to the level and nature of oversight that SIRC performs in relation to CSIS, particularly in terms of access to information and the capacity to audit day-to-day national security functions.

**A Standing Parliamentary Committee**

In conjunction with adequate oversight of the RCMP, the Committee believes that there must be ongoing parliamentary monitoring of national security matters, including the *Anti-terrorism Act*, other relevant legislation, and the policies of the government departments and agencies that are involved. Particularly because many aspects of the *Anti-terrorism Act*, as well as the *Public Safety Act, 2002*, are extraordinary, they should be subject to ongoing parliamentary oversight and review to assess their continued relevance, and to keep them in the public eye. It is the cumulative effect of all of Canada's anti-terrorism laws, policies and practices that requires careful assessment on an ongoing basis, to ensure that the rights and interests of individuals are affected no more than is necessary to protect national security. The powers of surveillance, enforcement and investigation given to Canada's security, intelligence and police services, as well as to federal ministers, should not creep into the general law and become entrenched.

Canada's anti-terrorism legislation is disparate and the government departments and agencies implementing and enforcing it are diverse. In addition to CSIS, the CSE and the RCMP, there are the Financial Transactions and Reports Analysis Centre, the Canada Border Services Agency, the Canadian Air Transport Security Authority, and the Canada Revenue Agency. Many government departments are also implicated in matters relating to national security, namely Justice, Public Safety and Emergency Preparedness, National Defence, Foreign Affairs and International Trade, Citizenship and Immigration,

Transport, and Health. Further, there are other watchdog agencies that sometimes play a role in protecting the interests of individuals in the context of anti-terrorism, such as the Office of the Privacy Commissioner, the Office of the Information Commissioner, the Office of the Auditor General, and the Canadian Human Rights Commission.

By receiving information on the activities of these departments and agencies as they relate to anti-terrorism and national security, as well as being referred relevant annual reports by them, a parliamentary committee would be able to review issues that involve more than one

“The legislation and its implementation need to be monitored and decisions vested in the government and its ministers need to be subject to third-party review.”

(Ed Cashman, Public Service Alliance of Canada)

“[A] parliamentary role in this area seems advisable.”

(Alex Neve, Amnesty International)

agency or where no form of integrated review is available. It could also examine whether there should be an oversight mechanism within the government to monitor and coordinate the activities and policies of all agencies involved in national security matters. We are aware that Justice O’Connor recommended, in December 2006, the establishment of an integrated review coordinating committee, made up of the CSE Commissioner, the Chair of SIRC, the Chair of a new RCMP review agency, and a fourth independent person.<sup>54</sup> A parliamentary committee could examine the desirability and feasibility of such an arrangement, or receive information from the integrated review coordinating committee, if it were created.

Even if the committee recommended by Justice O’Connor is established, it is important to have scrutiny by Parliament as a means of balancing executive oversight and keeping the public apprised of anti-terrorism-related matters and activities. The practices of government agencies, particularly those involved in national security, can be very unfamiliar to the average Canadian and it is through Parliament that the public often learns about issues and expresses its views and opinions. Likewise, parliamentary involvement would still be warranted if SIRC and a newly created ICRA were to have

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<sup>54</sup> *Ibid.*, pp. 591-600 (Recommendation 12).

expanded authority to oversee other national security agencies, as also recommended by Justice O'Connor.<sup>55</sup> While duplication of effort should be avoided, it is necessary, given Canada's constitutional framework, to have parliamentary review and scrutiny that complements the policy and operational decisions of the government. The fact that the *Anti-terrorism Act* provides for the courts to authorize certain investigative powers of police is another example of complementary oversight. If the government, the courts and Parliament each fulfil their respective roles in Canada's anti-terrorism framework, there is three-pronged oversight and accountability through the executive, judicial and legislative branches.

A standing parliamentary committee might also choose to address one specific issue relating to a particular agency in great detail, or ensure the adequacy of required reports, such as those of the Attorney General of Canada on the use of investigative hearings and recognizance with conditions/preventive arrest. The objective would be to hold the government to account and instil public confidence. At the same time, the committee would shape law and policy through its observations and recommendations, as well as directly influence legislation when amendments to Canada's anti-terrorism laws are referred to it for study. A standing committee would have the further advantage of being in a position to follow up on issues identified in previous parliamentary reports. On that point, the committee we are contemplating would report directly to Parliament, as is the normal course, rather than to the Prime Minister, as was envisioned by Bill C-81.

We considered the extent to which a standing parliamentary committee should have access to secret or confidential information. Barring special situations that might warrant it, in which case the committee might conduct its proceedings *in camera* with the appropriate approval, the parliamentary review that we envision would be open and transparent, undertaken in much the same way as our present study. Public hearings and witness testimony from those affected by Canada's anti-terrorism and national security legislation and policies would allow the agenda of a standing committee to be driven by those issues that are of the greatest public concern. We expect the committee's work to

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<sup>55</sup> *Ibid.*, pp. 558-580 (Recommendations 9 and 10).

be more comprehensive – a form of overall monitoring as opposed to review of specific operations and individual cases or complaints. Particularly once oversight of the RCMP’s activities is improved, the standing committee would provide a complementary form of scrutiny.

We believe that it is preferable for the standing committee to be established by the Senate, with a sufficient number of Senators with the relevant expertise and experience, in order to take advantage of the Senate’s

“We need to have ongoing mechanisms beyond the three-year review. ... The Senate would seem to be the logical place to have an ongoing review not only of the Anti-terrorism Act, but also of the package of counterterrorist statutes, policies and practices.”

(Wayne MacKay, Dalhousie University)

institutional memory in relation to the *Anti-terrorism Act* and other past developments in Canada’s national security framework. The committee should also have a dedicated staff, as does the Standing Joint Committee on Scrutiny of Regulations, and a sufficient budget for it to carry out its mandate. We recognize that there are existing parliamentary committees that currently address matters relating to Canada’s national security. However, the committee we envision would have no other responsibilities, and would place a particular emphasis on laws, policies and issues relating to anti-terrorism.

Whether or not a standing parliamentary committee is established to provide ongoing oversight and review of Canada’s anti-terrorism legislation and regime, there should, at a minimum, be another comprehensive

“The important thing is to keep these issues in the public debate and there are many ways of doing that. The regular review is necessary so that after three years, or after five years, we can come back on the issues and debate them again in Parliament.”

(François Crépeau, as an Individual)

parliamentary review of the provisions and operation of the *Anti-terrorism Act* in three years, as well as every five years after that. We point out that we have already recommended earlier in this Report that the provisions on investigative hearings and recognizance with conditions/preventive arrest expire in three years unless extended by Parliament. This means that those provisions would require prior examination either by

the standing parliamentary committee that we recommend or in the context of the next parliamentary review in three years.

As Canada's anti-terrorism legislation and national security framework never cease to affect the rights and freedoms of specific individuals and are always relevant to the general public, the Committee believes that it is strongly preferable to carry out oversight and review on an ongoing basis, rather than wait for a parliamentary review at a future date before addressing these important matters. It is for this reason that we recommend both a standing parliamentary committee to conduct ongoing examination and monitoring of issues and activities relating to national security and anti-terrorism, as well as consistent periodic reviews of the provisions and operation of the *Anti-terrorism Act* specifically.

**RECOMMENDATION 39**

That a standing committee of the Senate, with dedicated staff and resources, be established to monitor, examine and periodically report on matters relating to Canada's anti-terrorism legislation and national security framework on an ongoing basis.

**RECOMMENDATION 40**

That the *Anti-terrorism Act* be amended to require, within eight years of royal assent (i.e., by December 2009) and within every five years thereafter, another comprehensive review of the provisions and operation of the Act to be undertaken by a parliamentary committee or committees established by either or both Houses of Parliament, followed by a report or reports to Parliament, within a year after each review is undertaken or such further time as may be authorized, setting out any recommendations for change.

## **APPENDIX 1 – LIST OF RECOMMENDATIONS**

### **RECOMMENDATION 1**

That clause 83.01(1)(b)(i)(A) of the *Criminal Code*, which requires an act or omission to be “... committed in whole or in part for a political, religious or ideological purpose, objective or cause,” be removed from the definition of “terrorist activity” found in section 83.01(1).

### **RECOMMENDATION 2**

That the government legislate a single definition of terrorism for federal purposes.

### **RECOMMENDATION 3**

That paragraph (c) of the definition of “threats to the security of Canada” in section 2 of the *Canadian Security and Intelligence Service Act* be amended by removing the reference to a political, religious or ideological objective and replacing it with alternate wording to indicate the type of violent activities against person or property that constitute threats to the security of Canada.

### **RECOMMENDATION 4**

That, in addition to implementing clear policies against racial profiling, all government departments and agencies involved in matters of national security and anti-terrorism engage in sufficient monitoring, enforcement and training to ensure that racial profiling does not occur, the cultural practices of Canada’s diverse communities are understood, and relations with communities are improved generally.

### **RECOMMENDATION 5**

That the government launch an information program and produce materials in various languages to increase public awareness of: the proper role and powers of police and national security agencies in the fight against terrorism; the rights of individuals, particularly on questioning or arrest; and the mechanisms that are available to address complaints, particularly those of racial profiling.

### **RECOMMENDATION 6**

That the government strengthen the ability of the Cross-Cultural Roundtable on Security to effect change in matters relating to national security and anti-terrorism by giving it a more focused mandate, ensuring more balanced representation, detaching it from the Department of Public Safety and Emergency Preparedness and increasing its budget, all for the purpose of obtaining input from those communities most affected by anti-terrorism laws, policies and practices.

## **RECOMMENDATION 7**

That in proceedings where information is withheld from a party in the interest of national security and he or she is therefore not in a position to make full answer and defence, a special advocate having access to the confidential information held by the government be appointed to represent the party's interests, as well as the public interest in disclosure, by challenging the facts and allegations against the party and the government's arguments for non-disclosure.

## **RECOMMENDATION 8**

That the special advocate be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending *in camera* hearings, and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security.

## **RECOMMENDATION 9**

That the party affected by the proceedings be entitled to select a special advocate from among an adequately sized roster of security-cleared counsel who have the appropriate expertise and are funded by, but not affiliated with, the government.

## **RECOMMENDATION 10**

That the government provide written justification for listing each terrorist entity under its three listing regimes.

## **RECOMMENDATION 11**

That the Department of Justice be required to review and provide an independent evaluation of the information that security and intelligence agencies provide to the Minister of Public Safety before he or she recommends to Cabinet the listing of a terrorist entity, retaining one on the list, or removing one from the list.

## **RECOMMENDATION 12**

That the definitions of "potentially injurious information" and "sensitive information" in section 38 of the *Canada Evidence Act*, and the basis on which a judge may decide not to authorize the disclosure of such information under section 38.06, be amended to specify the way in which information must injure or relate to international relations, for example by restricting the authority to withhold information to situations where the information could breach specified confidences of another country.

### **RECOMMENDATION 13**

That sections 38.13 and 38.131 of the *Canada Evidence Act* be amended to ensure that information is withheld, under a certificate of the Attorney General of Canada prohibiting the disclosure of information, only where it is necessary to protect national defence, national security, or a specified aspect of Canada's relations with foreign entities.

### **RECOMMENDATION 14**

That section 38.131 of the *Canada Evidence Act* be amended so that, in determining whether or not a certificate issued by the Attorney General of Canada prohibiting the disclosure of information should be varied, canceled or confirmed, the judge must consider whether the public interest in disclosure outweighs in importance the public interest in non-disclosure.

### **RECOMMENDATION 15**

That subsection 38.131(11) of the *Canada Evidence Act* be repealed, and that an order of a judge of the Federal Court of Appeal varying, canceling or confirming a certificate issued by the Attorney General of Canada prohibiting the disclosure of information be subject to an appeal to three judges of the Federal Court of Appeal.

### **RECOMMENDATION 16**

That the application of sections 83.28, 83.29 and 83.3 of the *Criminal Code*, relating to investigative hearings and recognizance with conditions/preventive arrest, be extended to the end of the fifteenth sitting day of Parliament after December 31, 2009, subject to the possibility of further extension following resolutions passed by both Houses of Parliament.

### **RECOMMENDATION 17**

That the Attorney General of Canada include, in each annual report on the use of investigative hearings and recognizance with conditions/preventive arrest, a clear statement and explanation indicating whether or not the provisions remain warranted.

### **RECOMMENDATION 18**

That subsections 273.65(2) and (4) of the *National Defence Act* be amended to clarify whether the facts and opinions, which are necessary to satisfy the Minister of National Defence that all of the preconditions for issuing a written authorization to intercept private communications have been met, should be based on reasonable belief or reasonable suspicion.

## **RECOMMENDATION 19**

That, in order to safeguard the privacy of Canadians and those in Canada, the Communications Security Establishment develop, if it has not already done so, information retention and disposal policies, containing specific time frames for the disposal of information, with respect to the private communications it intercepts pursuant to 273.65(1) to (4) of the *National Defence Act*, and that it make these policies publicly available, in the interests of transparency and accountability.

## **RECOMMENDATION 20**

That the Minister of National Defence or the Communications Security Establishment be required to report annually to Parliament on the number of ministerial authorizations to intercept private communications issued during the year, the number still in force by the end of the year, and the general purpose for which each authorization was issued (i.e., to obtain foreign intelligence or to protect computer systems or networks).

## **RECOMMENDATION 21**

That the government amend section 69.1 of the *Access to Information Act* so that, in the event that a certificate of the Attorney General under section 38.13 of the *Canada Evidence Act* is issued after a complaint has been made to the Information Commissioner, the Information Commissioner's investigation of the complaint as a whole is not halted, but only his or her investigation in respect of the information subject to the certificate.

## **RECOMMENDATION 22**

That the government produce and publish clear guidelines or criteria specifying when, and in what circumstances, individuals will be added to the Passenger Protect Program list.

## **RECOMMENDATION 23**

That the government provide individuals listed under the Passenger Protect Program with a process to appeal decisions to list them and produce and publish clear guidelines on how individuals may challenge decisions to place or keep them on the list.

## **RECOMMENDATION 24**

That federal departments and institutions be required to protect personal information provided under outsourcing contracts to external entities by securing against the unauthorized access, collection, use, disclosure or disposal of personal information; placing restrictions on storage, access, and disclosure of personal information outside of Canada; reporting any demand for disclosure of personal information received to the Privacy Commissioner; and protecting whistle-blowers who report a foreign demand for information.

## **RECOMMENDATION 25**

That the government put information sharing arrangements in relation to national security investigations in writing; ensure that Canadian law enforcement and security agencies attach written caveats regarding the use of shared information; require Canadian agencies to make formal complaints to foreign agencies regarding the misuse of shared information; and produce annual reports assessing the human rights records of various countries.

## **RECOMMENDATION 26**

That the government specify the procedure to be followed by a deputy head, the Deputy Attorney General of Canada, the Security Intelligence Review Committee and the Communications Security Establishment Commissioner, as the case may be, when they receive notice of a concern from a person wishing to disclose special operational information under section 15 of the *Security of Information Act*.

## **RECOMMENDATION 27**

That the *Security of Information Act* be amended to narrow the information that is applicable for the purpose of the offences under section 4, such as by restricting it to secret official information the disclosure of which would harm Canada's national defence, national security or other legitimate specified interests.

## **RECOMMENDATION 28**

That the *Security of Information Act* be amended so that no person is guilty of an offence under section 4 if a judge determines that the person acted in the public interest and the public interest in disclosure outweighed in importance the public interest in non-disclosure.

## **RECOMMENDATION 29**

That paragraph 3(1)(a) of the *Security of Information Act* be amended by removing the reference to the advancement of a political, religious or ideological purpose, objective or cause from what constitutes a purpose that is prejudicial to the safety or interests of Canada.

## **RECOMMENDATION 30**

That subsection 83(1) of the *Immigration and Refugee Protection Act* be amended to require a judge to review, within 48 hours, the detention of a foreign national who is subject to a security certificate.

### **RECOMMENDATION 31**

That subsection 83(2) of the *Immigration and Refugee Protection Act* be amended to require the detention of a permanent resident or foreign national who is subject to a security certificate to be reviewed by a judge within 30 days after detention and at least once every 90 days thereafter.

### **RECOMMENDATION 32**

That paragraph 78(j) of the *Immigration and Refugee Protection Act* be amended to expressly state that the judge considering the reasonableness of a security certificate may receive into evidence anything that is “reliable and appropriate.”

### **RECOMMENDATION 33**

That subsection 80(3) of the *Immigration and Refugee Protection Act* be repealed, and that the determination of a judge of the Federal Court regarding the reasonableness of a security certificate be subject to an appeal to the Federal Court of Appeal.

### **RECOMMENDATION 34**

That the *Immigration and Refugee Protection Act* be amended to provide that, unless an individual chooses to voluntarily leave Canada, there shall be no removal of a permanent resident or foreign national on the basis of a security certificate if there are reasonable grounds to believe that the individual will be subject to torture in the country to which he or she will be removed.

### **RECOMMENDATION 35**

That, before removing an individual to a country where torture is possible, on the basis of a diplomatic assurance that the individual will not be tortured, the government ensure that there will be an effective means of monitoring the individual’s return, including the ability to access the necessary information to ascertain whether or not the individual is being tortured.

### **RECOMMENDATION 36**

That Canada show leadership in engaging the United Nations on the issue of how to properly deal with alleged or known terrorists who, regardless of what country they are in or to which they may be removed, pose a threat to the international community as a whole.

### **RECOMMENDATION 37**

That Canada show leadership in engaging the United Nations on the issue of how to properly deal with alleged or known terrorists who may not be removed to another country due to a risk of torture, and are instead subject to indefinite detention without the prospect of criminal or other proceedings in which to respond to the case against them.

### **RECOMMENDATION 38**

That the government implement more effective oversight of the RCMP, akin to the level and nature of oversight that SIRC performs in relation to CSIS, particularly in terms of access to information and the capacity to audit day-to-day national security functions.

### **RECOMMENDATION 39**

That a standing committee of the Senate, with dedicated staff and resources, be established to monitor, examine and periodically report on matters relating to Canada's anti-terrorism legislation and national security framework on an ongoing basis.

### **RECOMMENDATION 40**

That the *Anti-terrorism Act* be amended to require, within eight years of royal assent (i.e., by December 2009) and within every five years thereafter, another comprehensive review of the provisions and operation of the Act to be undertaken by a parliamentary committee or committees established by either or both Houses of Parliament, followed by a report or reports to Parliament, within a year after each review is undertaken or such further time as may be authorized, setting out any recommendations for change.

## **APPENDIX 2 – LIST OF WITNESSES**

### **Monday, February 14, 2005**

The Honourable Anne McLellan, P.C., M.P., Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness.

*Public Safety and Emergency Preparedness Canada:*

Paul Kennedy, Senior Assistant Deputy Minister;  
Christian Roy, Counsel, Legal Services.

*Department of Justice Canada:*

Bill Pentney, Assistant Deputy Attorney General, Citizenship, Immigration and Public Safety.

### **Monday, February 21, 2005**

The Honourable Irwin Cotler, P.C., M.P., Minister of Justice and Attorney General of Canada

*Department of Justice Canada:*

George Dolhai, Director/Senior General Counsel, Strategic Prosecution Policy Section;  
Doug Breithaupt, Senior Counsel, Criminal Law Policy Section;  
Stanley Cohen, Senior General Counsel, Human Rights Law Section;  
Daniel Therrien, Senior General Counsel.

### **Monday, March 7, 2005**

*Canadian Security Intelligence Service:*

Jim Judd, Director;  
Dale Neufeld, Deputy Director of Operations.

### **Monday, March 14, 2005**

*Norwegian Defence Research Establishment: (by videoconference)*

Thomas Hegghammer, Senior Analyst.

*King's College London: (by videoconference)*

Michael Clarke, Director, International Policy Institute.

*Norman Patterson School of International Affairs, Carleton University:*

Martin Rudner, Director, Centre for Intelligence and Security Studies.

*Mackenzie Institute:*

John Thompson, President.

*Institute of Defence and Strategic Studies, Nanyang Technological University  
(Singapore): (by videoconference)*

Rohan Gunaratna, Head, International Centre for Political and Terrorism  
Research.

**Tuesday, March 15, 2005**

*University of Toronto:*

Wesley K. Wark, Professor, International Relations Programme.

*Osgoode Hall Law School:*

Patrick J. Monahan, Dean.

Jamie Cameron, Professor.

*University of Toronto:*

Kent Roach, Professor, Faculty of Law.

*Dalhousie University:*

Wayne MacKay, Professor, Faculty of Law.

**Monday, March 21, 2005**

*Public Safety and Emergency Preparedness Canada:*

Paul Kennedy, Senior Assistant Deputy Minister.

*Department of Justice Canada:*

Daniel Therrien, Senior General Counsel;

Robert Batt, Senior Counsel, Legal Services, Canadian Security Intelligence  
Service (CSIS).

*Canada Border Services Agency:*

Claudette Deschênes, Vice-President, Enforcement Branch.

*Citizenship and Immigration Canada:*

Craig Goodes, Acting Director General, Case Management Branch.

*Foreign Affairs Canada:*

Keith Morrill, Director, Criminal, Security and Treaty Law Division.

Ruth Archibald, Senior Coordinator, International Crime and Terrorism Division;

Keith Morrill, Director, Criminal, Security and Treaty Law Division.

**Monday, April 11, 2005**

*Royal Canadian Mounted Police:*

Giuliano Zaccardelli, Commissioner.

*Ontario Provincial Police:*  
Gwen Boniface, Commissioner.

*Ottawa Police Service:*  
Vince Bevan, Chief.

*Communications Security Establishment:*  
Keith Coulter, Chief;  
Barb Gibbons, Deputy Chief, Corporate Services;  
John Ossowski, Director General, Policy and Communications;  
David Akman, Director, Legal Services, General Counsel.

*Canadian Association of Chiefs of Police:*  
Edgar MacLeod, President;  
Vince Westwick, Co-Chair, Law Amendments Committee;  
Frank Ryder, Co-Chair, Law Amendments Committee.

**Monday, April 18, 2005**

*Financial Transactions and Reports Analysis Centre of Canada:*  
Horst Intscher, Director;  
Sandra Wing, Deputy Director, External Relationships;  
Josée Desjardins, Senior Counsel.

*Commission for Public Complaints Against the RCMP:*  
Shirley Heafey, Chair;  
Steve McDonnell, Senior General Counsel.

*Security Intelligence Review Committee:*  
Susan Pollak, Executive Director;  
Tim Farr, Associate Executive Director;  
Marian McGrath, Senior Counsel;  
Sharon Hamilton, Senior Research Advisor.

*Monash University (Australia): (by videoconference)*  
David Wright-Neville, Professor, School of Political and Social Inquiry, Faculty of Arts.

**Monday, May 2, 2005**

*Canadian Bar Association:*  
Susan T. McGrath, President;  
Greg P. DelBigio, Chair, Legislation and Law Reform Committee, and Vice Chair, National Criminal Justice Section;  
Tamra L. Thomson, Director, Legislation and Law Reform.

*Canadian Council of Criminal Defence Lawyers:*  
William M. Trudell, Chair.

*Canadian Muslim Lawyers Association:*  
Ziyaad Mia, Former Director;  
Faryal Rashid, Member.

*Canadian Lawyers for International Human Rights:*  
David Morris, Former Member of Board of Directors.

**Monday, May 9, 2005**

*Royal Canadian Mounted Police:*  
Giuliano Zaccardelli, Commissioner;  
Wayne Hanniman, Inspector.

*Office of the Privacy Commissioner of Canada:*  
Jennifer Stoddart, Privacy Commissioner;  
Raymond D' Aoust, Assistant Privacy Commissioner;  
Patricia Kosseim, General Counsel, Legal Services.

*Canada Border Services Agency:*  
Alain Jolicoeur, President;  
David Dunbar, Acting Head of Legal Services;  
Claudette Deschênes, Vice-President, Enforcement Branch;  
Candice Breakwell, Director, Legislative Affairs and Access to Information and Privacy.

**Monday, May 16, 2006**

*Canadian Civil Liberties Association:*  
Alan Borovoy, General Counsel;  
Alexi Wood, Policy Analyst.

*Amnesty International:*  
Alex Neve, Secretary General.

*Rights and Democracy:*  
Jean-Louis Roy, President;  
Lloyd Lipsett, Senior Assistant to the President.

*Ligues des droits et libertés:*  
Philippe Robert de Massy, Lawyer;  
Denis Barrette, Lawyer.

**Monday, May 30, 2005**

The Honourable Reg Alcock, P.C., M.P., President of the Treasury Board.

*Office of the Information Commissioner of Canada:*

John Reid, Information Commissioner;  
Alan Leadbeater, Deputy Information Commissioner of Canada;  
Dan Dupuis, Director General, Investigation and Reviews;  
Daniel Brunet, General Counsel.

*Canadian Council for Refugees:*

Andrew Brouwer, Member of the Executive Committee.

*Canadian Bar Association:*

Lorne A. Waldman, Member, National Citizenship and Immigration Law Section.

*As an Individual:*

Barbara Jackman.

*Treasury Board of Canada:*

Helen McDonald, Chief Information Officer;  
Donald Lemieux, Senior Director.

**Monday, June 13, 2005**

*Office of the Communications Security Establishment Commissioner:*

The Right Honourable Antonio Lamer, P.C., Commissioner;  
Joanne Weeks, Executive Director.

*Canadian Council on American-Islamic Relations:*

Riad Saloojee, Executive Director.

*Coalition for Muslim Organizations:*

Adam Esse, President.

*Canadian Arab Federation:*

Omar Alhabra, National President.

*Canadian Islamic Congress:*

Khurram Awan.

**Monday, June 20, 2005**

*United Nations Office on Drugs and Crime (Vienna) (by videoconference)*

Jean-Paul Laborde, Chief, Terrorism Prevention Branch.

*Imagine Canada*

Peter Broder, Corporate Counsel and Director, Regulatory Affairs;  
Robbin Tourangeau, Vice-President, Public Policy and Government Relations.

*As an Individual*

Blake Bromley, Partner, Benefic Lawyers.

**Monday, September 26, 2006**

*Canadian Jewish Congress:*

Ed Morgan, National President;  
Manuel Prutschi, Executive Vice-President.

*B'nai Brith Canada:*

David Matas, Senior Legal Counsel.

*Canadian Association of University Teachers:*

Maureen Webb, Legal Counsel;  
James Turk, Executive Director.

*Public Service Alliance of Canada:*

Ed Cashman, Regional Executive Vice-President;  
Seema Lamba, Human Rights Officer.

**Monday, October 17, 2005**

*As an Individual:*

Joan Russow.

*Canadian Red Cross:*

The Honourable David Pratt, P.C., Advisor and Special Ambassador;  
Sylvain Beauchamp, Senior Policy Advisor, International Humanitarian Law.

*Federation of Law Societies of Canada:*

George D. Hunter, Vice-President;  
Katherine Corrick, Director of Policy, Law Society of Upper Canada.

*International Civil Liberties Monitoring Group:*

The Honourable Warren Allmand, P.C., Steering Committee Member;  
Roch Tassé, National Coordinator.

*As an Individual:*

François Crépeau, Professor, Faculty of Law, University of Montreal.

*British Columbia Civil Liberties Association:*

Murray Mollard, Executive Director.

*African Canadian Legal Clinic:*

Marie Chen, Acting Director of Legal Services;  
Royland Moriah, Policy Research Lawyer.

*National Organization of Immigrant and Visible Minority Women of Canada:*

Anu Bose, Executive Director.

**Monday, October 24, 2005**

*Canadian Labour Congress:*

Hassan Yussuff, Secretary-Treasurer;  
David Onyalo, Executive Assistant to the Secretary-Treasurer.

*Cross-Cultural Roundtable on Security:*

Dr. Zaheer Lakhani, Chair.

*Public Safety and Emergency Preparedness Canada:*

Marc Whittingham, Assistant Deputy Minister, Portfolio Relations and Public Affairs.

**Monday, October 31, 2005**

*Canadian Security Intelligence Service:*

Jim Judd, Director.

*Canadian Islamic Congress:*

Faisal Joseph, National Legal Counsel.

*Muslim Council of Montreal:*

Imam Salam Elmenyawawi, Chairman.

**Monday, November 14, 2005**

The Honourable Joe Volpe, P.C., M.P., Minister of Citizenship and Immigration;  
The Honourable Jean Lapierre, P.C., M.P., Minister of Transport.  
The Honourable Anne McLellan, P.C., M.P., Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness;  
The Honourable Irwin Cotler, P.C., M.P., Minister of Justice and Attorney General of Canada.

*Citizenship and Immigration Canada:*

Anne Arnott, Director General, Case Management;  
Claudette Deschênes, Vice-President, Enforcement Branch, Canada Border Services Agency;  
Daniel Therrien, Acting Assistant Deputy Attorney General, Legal Services.

*Transport Canada:*

Jacques Pigeon, Departmental General Counsel, Legal Services;  
John Forster, Associate Assistant Deputy Minister, Safety and Security.

*Canadian Air Transport Security Authority:*

Jacques Duchesneau, President and Chief Executive Officer;  
Marc Duncan, Vice-President, Chief Operating Officer;  
Michael McLaughlin, Vice-President and Chief Financial Officer.

*Justice Canada:*

Bill Pentney, Senior Assistant Deputy Minister, Policy Sector.

*Department of Public Safety and Emergency Preparedness Canada:*

Margaret Bloodworth, Deputy Minister.

**Monday, November 21, 2005**

*Air India 182 Victims Families Association:*

Bal Gupta, Chair;  
Nicola Kelly, Executive Committee Member.

*As an Individual:*

Maureen Basnicki.

**Monday, June 12, 2006**

The Honourable Stockwell Day, P.C., M.P., Minister of Public Safety.  
The Honourable Vic Toews, P.C., Q.C., M.P., Minister of Justice and Attorney General of Canada.

*Public Safety and Emergency Preparedness Canada:*

William Elliott, Associate Deputy Minister;  
James Deacon, Director General, National Security Policy.

*Department of Justice Canada:*

Bill Pentney, Senior Assistant Deputy Minister, Policy Sector;  
George Dolhai, Director/Senior General Counsel, Strategic Operations Section;  
Stanley Cohen, Senior General Counsel, Human Rights Law Section.

**Monday, June 19, 2006**

*Canadian Bar Association:*

Lorne A. Waldman, Member, National Citizenship and Immigration Law Section;  
Tamra Thomson, Director, Legislation and Law Reform.

## **FACT-FINDING MISSIONS**

**Please note: titles reflect positions held at time of meeting.**

### **Washington, D.C. – September 2005**

Officials at the Canadian Embassy in Washington

The Honourable Frank McKenna, Canadian Ambassador to the United States

Daniel Glaser, Acting Assistant Secretary, Terrorism and Financial Intelligence --  
Terrorism Finance, U.S. Department of the Treasury

Paul Rosenzweig, Senior Legal Research Fellow, The Heritage Foundation, Center for  
Legal and Judicial Studies

Representative F. James Sensenbrenner (R-WI), Chairman of the House of  
Representatives Committee on the Judiciary

Bill Kehoe, General Counsel to the House of Representatives Committee on the Judiciary

Representative John Conyers (D-MI), Ranking Member of the House of Representatives  
Committee on the Judiciary

Representative Jerrold Nadler (D-NY), Member of the House of Representatives  
Committee on the Judiciary

Representative Zoe Lofgren (D-CA), Member of the House of Representatives  
Committee on the Judiciary, and Member of the House Judiciary Committee's  
Subcommittee on Immigration, Border Security, and Claims

Mark Agrast, Senior Fellow, Centre for American Progress

Representative Jeff Flake (R-AZ), Member of the House of Representatives Committee  
on the Judiciary

Bruce Swartz, Deputy Assistant Attorney General, Criminal Division, Department of  
Justice

### **London, England – November 2005**

Mel Cappe, Canadian High Commissioner to the United Kingdom

Members of the Canadian High Commission's Intelligence Liaison Group

Gus Hosein, Privacy International

Lord Holme, Chair of the House of Lords Constitution Committee and former Co-Chair of the Newton Commission

Sir Iqbal Sacranie, Secretary General of the Muslim Council of Great Britain, and other members of the Muslim Council of Great Britain: Assistant Secretary General, Onesa Malik; Miraz Irahasan

The Right Honourable Paul Murphy, Chair of the Intelligence and Security Committee

The Right Honourable Charles Clarke, Home Secretary

Professor Michael Clarke, Director, International Policy Institute, Kings College, London

Professor Anthony Glees, Director, Brunel Centre for Intelligence and Security Studies

Sandra Bell, Director, Royal United Services Institute, Homeland Security/Resilience

David Bentley, Associate, Royal Institute of International Affairs

Kevin O'Brien, Security/Terrorism Consultant and former Senior Analyst, RAND Corporation

The Right Honourable John Denham, Chairman, House of Commons Home Affairs Committee, and other members of the Committee

Gareth Crossman, Policy Director, Liberty

Ben Muir, Higher Executive Officer of the London Resilience Team, and other members of the London Resilience Team

The Right Honourable Alan Beith, M.P.

The Honourable William Hoyt

Sir David Omand, GCB

Bob Whalley

The Baroness Hayman

Right Honourable the Lord Mawhinney Kt.