

# **National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post-9/11 Environment**

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## **Introduction**

This report examines eight critical issue areas where there is some overlap between national security imperatives and human rights concerns in Canada, post-9/11. These issue areas are wide-ranging and were chosen for their potential for stimulating a wide range of useful observations. The report, rather than consisting in in-depth research, is a systematic survey, thus reflecting the Canadian Human Rights Commission's (CHRC) desire to identify key problems and challenges in the post-9/11 security environment in Canada and to consider the value of engaging in further targeted research consistent with the mandate of the Commission.

The September 11 terrorist attacks on targets in the United States gave rise to a new security environment, dominated by a new sense of threats, principally from transnational terrorism and so-called rogue states, and new challenges to the global order. Canada, like other nations, has been forced to consider afresh the language of domestic and international security and to worry about the extent to which new realities might profoundly alter the established norms of a democratic society. In Canada many of these norms are enshrined in the *Charter of Human Rights* and the *Canadian Human Rights Act*.

In Canada since September 11, one powerful metaphor has emerged from public and political debate concerning the issues of national security and human rights. This metaphor encourages us to view national security imperatives on one side of a set of scales, with measures to protect human rights on the other, recalling the famous "scales of justice" statuary, with its deep roots in Greek and Roman mythology (Themis, the goddess of Justice and Law). In its crudest form the metaphor suggests a zero-sum game: more rights means less security; more security means less rights. It seems incontestable that there might have to be individual trade-offs between particular national security practices and measures to protect human rights. For a society to design its national security policy and its human rights mechanisms as part of a perpetual and sometimes impossible balancing act is much more problematic. In our understandable search for a new language and a new conception of national security and rights in a post-9/11 world, we may have been badly misled by the convenience and reassurance of the "scales of justice" metaphor.

The following study does not conceptualize the problem in terms of finding a “balance” between national security and human rights. Rather, it examines the nature of the national security responses that have occurred in Canada since 2001 and, where necessary, attempts to set them in a historical context. The study explores some of the human rights implications of these national security responses. Implicitly, it assumes that a democratic, pluralist society requires both national security and human rights in equal measures and hesitates to sacrifice either, except in extraordinary circumstances and in the face of demonstrable need.<sup>1</sup> The objective is to try to identify current and potential points of friction between national security practices and human rights protection in Canada. As a fear of the future is the defining characteristic of the national security and human rights environment in Canada, it is particularly important that we understand the historical context and present circumstances in order to ready ourselves to face this future. New security institutions, policies and practices are, in many respects, too new to allow us to fully gauge their impact at this stage. When it comes to human rights concerns, Canadians wrestle with the implications of new laws and new practices, without the benefit of a clear sense of how far they have already shaped, or will shape, our rights environment. In other words, the dilemma does not concern a clearly established pattern of human rights abuses or discriminatory practices that can be documented in the present; the dilemma lies in what the future might hold.

The eight issue areas examined include:

- The evolution of national security policy in Canada since September 11, 2001

- New legislative measures

- The application of pre-September 11 powers

- Key federal government agencies in the national security domain

- Measures of accountability and review of national security agencies

- Federal government responsibility and capacity to protect Canadians abroad

- International liaisons in national security work

- The role of the Canadian Human Rights Commission in fostering knowledge

Each issue is dealt with in a separate section of the report. At the end of each section there are recommendations respecting further study to be carried out by the Canadian Human Rights Commission. These recommendations are also consolidated in Appendix A.

The author of this study strongly believes that, for a democratic society to function, its citizens must have a clear understanding of both national security practices and human rights concerns. So far, Canadians have failed to come up with any adequate synthesis of

these intertwined themes. The Canadian Human Rights Commission sees public education as an important facet of its mandate and the author believes that the CHRC can make an important and unique contribution through a targeted research program, similar to the one advocated by the federal Privacy Commissioner. Such a research program should focus, in particular, on issues that might help the CHRC to prepare a “human rights report card” and to monitor important federal legislation in a proactive fashion.

## Overview

The report calls attention to several key areas of concern that warrant ongoing research. These areas include:

**Border security.** The practice of border security, including the construction of anti-terrorist “watch lists,” is a potential generator of important human rights concerns.

**The *Anti-Terrorism Act*.** This Act (Bill C-36) will have significant long-term implications. Forthcoming court trials, potential Charter challenges and the mandatory Parliamentary review are all important elements of any study of the Act’s implications.

**Security certificates.** Immigration security certificates under the *Immigration and Refugee Protection Act* are a key point of friction between national security and human rights prerogatives, despite the fact that they have not been widely used since 9/11.

**The case of Maher Arar.** The O’Connor Commission of Inquiry into the Actions of Canadian Officials with Regard to the Treatment of Maher Arar (Arar Commission) has provided, and will continue to provide, important insights into national security policy and the protection of human rights in a post-9/11 environment.

The author’s recommendations for future study attempt to align these issues with the CHRC’s mandate. Recommendations (see the individual recommendations following each section of the report and the consolidated list in Appendix A) are in keeping with the CHRC’s desire to keep a watching brief on all important federal legislation that affects human rights and to construct a planned annual “report card” on human rights in Canada.

## **Section 1**      The Evolution of National Security Policy in Canada since September 11, 2001, and Its Potential Impact on Human Rights

The Canadian government was slow to fashion a new national security policy after the 9/11 attacks. In the immediate wake of the attacks, and for some time thereafter, the government response was reactive. There was an existing policy to draw on, the National Counter-Terrorism Plan. It was not a public document and was virtually unknown to the public at large. The National Counter-Terrorism Plan was not a strategic policy; rather, it was a crisis management tool, essentially devoted to clarifying the lines of authority and mandates of individual federal government departments and agencies. The only public version—an overview summary—suggests that no particular attention was paid to human rights issues in the plan, other than a brief, concluding statement that read: “The *Canadian Constitution*, including the *Charter of Rights and Freedoms*, legislation and the common law continue to apply during any terrorist incident.”<sup>2</sup>

The first wave of Canadian policy-making in the aftermath of the 9/11 attacks occurred during the immediate crisis months from September to December 2001. It was in this initial period that the shock of the attacks was greatest and the sense of urgency most acute. A widespread concern existed about the possibility of further terrorist attacks against North America. Canadian government policy focussed on three priority issues: counter-terrorism resources; legal powers; and the Canada-US border.

Canadian resources to meet the existing crisis or to respond to new threats were quickly deemed inadequate in the light of the 9/11 attacks. The federal government, operating at the Cabinet level through a newly established ad hoc Cabinet Committee on Public Security and Anti-Terrorism, chaired by Deputy Prime Minister John Manley, quickly ensured new monies would be available to ramp up capabilities. An initial allocation of \$280 million, mostly for improved policing and intelligence activities, was followed by the announcement in December 2001 of a “national security” budget of (initially) \$7.7 billion dollars, to be spent over a five-year period on a wide range of measures.<sup>3</sup> The budget plan had no particular strategic direction and no strategic statement accompanied it.<sup>4</sup>

As well as focussing on new resources, the government forged ahead in the fall of 2001 with major new legislation, principally the *Anti-Terrorism Act* (Bill C-36), described in Section 2 of this report. In addition, the government attempted to implement a new *Public Safety Act* (Bill C-17). This historically unpopular bill continued to draw significant criticism and was ultimately passed in amended form in May 2004. It is also discussed in Section 2 of my report.

Both bills were responses to emergencies, real and perceived. Driven by human rights concerns, critics of the draft *Anti-Terrorism Act* (ATA) succeeded in having the Bill significantly revised, especially as regards the definition of terrorism and the “sunsetting” of some of the Bill’s more dramatic powers. The *Public Safety Act* was forced back to the drafting table as a result of public concerns about the nature of the powers it would unilaterally give Cabinet ministers. In the case of both bills, it could be argued that even in the midst of a perceived crisis and in the aftermath of great political shock, legislative

initiatives to expand governmental powers had to give full consideration to the need to sustain democratic rights and norms.

Border security and Canada-US relations were at the forefront of Canadian decision-making from the moment that 9/11 occurred. The enormous, albeit temporary, disruption to cross-border trade and travel that occurred after September 11 was a stark reminder of the importance for Canada of maintaining an open border. On top of concerns that some part of the 9/11 plot might have been hatched in or facilitated from Canada was a fear that underground Al-Qaeda cells might be present in Canada and be intent on launching future strikes. It was a time of fear that drew attention to the need to improve security at the border, increase cooperation with the United States, and reassure both the Canadian public and our American ally that Canada could be relied on as a counter-terrorist partner.<sup>5</sup>

Canadian border security policy had two objectives: sustain an open border for trade and travel and secure the border against threats. The possible contradictions between the two objectives meant that implementing the policy might not be as simple as it first seemed. The Canadian response was to introduce heightened measures to achieve security while working towards closer integration with the US. The policy's first public triumph was the signing of the "Smart Border Declaration" between Canada and the United States on December 12, 2001. The Declaration talked about the interrelationship between public security and economic security, a theme that would persist in all subsequent discussions of Canada-US border security. It used the phrase "zone of confidence against terrorist activities" to describe the plan for the strengthened border. The Declaration came with a more detailed action plan for implementation, which originally included 30 points and now has 32.<sup>6</sup> With the action plan, the two governments made it clear that future border security measures would be driven by a need for harmonization of policies and integrated efforts. The action plan was based on "four pillars": the secure flow of people; the secure flow of goods; secure infrastructure; and coordination and information sharing. All of these initiatives built on previous efforts, even the one least in the public eye—intelligence sharing.

The impact of a new, post-9/11 border security policy on human rights may be seen in three broad areas: increased sharing of intelligence; increased security enforcement cooperation and integration; and Canada-US harmonization initiatives. In all three areas of concern, because of secrecy and the fact that these are new developments, we are primarily talking about potential abuses of human rights rather than real or documented cases.

Increased cross-border intelligence sharing is, of course, designed to enhance security and ultimately provide greater public safety. While it is meant to have a beneficial impact on rights, it also has the potential to erode rights. Increased intelligence sharing may mean less Canadian control of intelligence data on Canadian persons. It may flood Canadian agencies with intelligence from outside Canada that, while difficult to assess, may affect the rights of Canadians. Increased intelligence sharing may have an impact on Canadian norms and practices with regard to the handling of sensitive intelligence

information. These are all generalized fears, but they point in one direction. Greater intelligence sharing may mean giving information to other nations. At the same time, it may mean that more and better information is made available to the Canadian state. Close monitoring of the drawing up of cross-border watch lists, along with their attendant safeguards, should provide information on developments in this area.

When one considers increased security enforcement cooperation and integration between Canada and the United States, the fears are virtually identical. One instrument of this cooperation has been the Integrated Border Enforcement Teams (IBETs). The IBET program, which brings together law enforcement, customs and immigration representatives from both countries, has expanded rapidly since 9/11. As of the end of 2004, there were 23 IBETs operating in 15 “strategic” border areas. According to an official release, in 2003-2004, a total of 45 national security cases were unearthed as a result of IBET operations.<sup>7</sup> Some IBET teams now have intelligence units with members from both countries working at a single location. An International Joint Management team has been created to oversee the program.

According to one author, the Smart Border policy should be viewed as a deliberately incremental strategy. Reg Whitaker sees the policy as “the concrete model for the wisest Canadian approach to post-9/11 security cooperation.”<sup>8</sup> In Whitaker’s assessment, the Smart Border policy is working (and evolving), offers concrete results to both sides, and serves “to limit the damage to Canadian sovereignty to manageable levels.”<sup>9</sup> Whitaker may be right. His argument makes it clear that the threats to human rights arising from Canadian border security policy are best understood as by-products of the erosion of Canadian sovereignty.

The most contentious matter to arise out of harmonization efforts on bilateral security has been the Safe Third Country Agreement. The Safe Third Country Agreement was built into the Smart Border Action Plan and changes the system for handling refugee claims at the Canada-US land border. The Agreement amends the *Immigration and Refugee Protection Act* (IRPA) and came into force on December 29, 2004.<sup>10</sup> It stipulates new procedures for handling asylum seekers at the Canada-US border. With certain exceptions, asylum seekers arriving at the Canadian land border from the US lose eligibility to have their refugee claim determined in Canada. The agreement similarly allows the US to return to Canada asylum seekers attempting to enter the US from Canada. In popular parlance, the Safe Third Country Agreement was meant to stop “asylum shopping.”

Critics have charged that the Safe Third Country Agreement, although not in conflict with Canadian human rights law, breaches international norms providing protection for migrants. According to one recent study sponsored by the Institute for Research on Public Policy, “as a result of the recent multiplication of restrictive migration policies, the vulnerability of migrants has increased and their rights have unquestionably been reduced at all stages of the migration process.”<sup>11</sup> An Ecumenical Canadian Church group has reflected the concerns of some observers of the Agreement by arguing that the United States, for various reasons to do with law and policy, cannot be considered a “safe”

country for asylum seekers.<sup>12</sup> The Canadian Council for Refugees has called the Safe Third Country Agreement a “bad deal” and offered 10 reasons why, some related to the argument that the US cannot be considered a safe country for refugees and others related to the loss of Canadian sovereignty.<sup>13</sup>

While controversy over aspects of Canadian national security policy-making did not subside, the first wave of such policy initiatives ended abruptly in December 2001. It would be two years before national security policy re-emerged as a political priority in Canada. When it did, the political environment for national security policy had changed substantially.

In December 2003, the new Liberal Prime Minister, Paul Martin, began a process of significantly overhauling the government machinery for managing national security. These developments, which are surveyed in Section 4, had the effect of creating new leadership nodes in the Canadian government, in the newly formed Department of Public Safety and Emergency Preparedness Canada, and in the office of the National Security Advisor to the Prime Minister.

These major institutional changes preceded, and made imperative, the preparation of a major strategic policy statement. In April 2004, the government issued what it described as Canada’s “first-ever comprehensive statement of our National Security Policy.”<sup>14</sup> The policy arrived two-and-a-half years after the 9/11 attacks (and 147 years after Confederation). In a written preface to the document, Prime Minister Martin stated:

Securing an Open Society articulates core national security interests and proposes a framework for addressing threats to Canadians. It does so in a way that fully reflects and supports key Canadian values of democracy, human rights, respect for the rule of law, and pluralism.<sup>15</sup>

In many ways the National Security Policy was an audacious document. It clearly laid out the objectives of Canadian national security policy: keeping Canadians safe; preventing Canada from being used as a launch pad for attacks on neighbours and allies; and making a valuable contribution to international security. It identified a host of possible current threats and established an innovative “all hazards” approach to national security policy. This “all hazards” approach recognized the danger posed by transnational terrorism to Canada but did not consider it more important than other concerns. Terrorism was but one element in a broader model of a “complex” threat environment featuring dire challenges posed by:

the proliferation of weapons of mass destruction

failed and failing states

foreign espionage

natural disasters

critical infrastructure vulnerability

organized crime

pandemics

Despite the rhetoric of Paul Martin's foreword to the document, the National Security Policy contains little in the way of reference to human rights protection or advocacy. The emphasis in the document is on "securing"; the "open society" is more or less taken for granted.<sup>16</sup> Paradoxically, unlike a strategy statement fixated on terrorist threats and responses, an "all hazards" approach, so much in tune with Canadian experience and outlook, may have reduced the visibility of human rights concerns.

What is missing in the National Security Policy is a sustained analysis of how the open society that Canadians cherish can be advanced by aligning security objectives and human rights protection and advocacy. Failure to see the need for this may have resulted from a lack of continuity between first- and second-wave national security decision-making, or from post-*Anti-Terrorism Act* policy fatigue.

Key recommendations:

*The CHRC should commission a study of the human rights implications of the Smart Border Agreement and Action Plan.*

*The CHRC should engage in a study of Canadian federal agency "watch lists," to monitor their compliance with human rights legislation and to make recommendations with regard to safeguards and appeals mechanisms.*

**Section 2:** New Legislative Measures relevant to National Security and Human Rights, Especially the *Anti-Terrorism Act*, Bill C-36

The most significant legislation introduced by Canada to meet the new security environment created by the September 11 attacks has been Bill C-36, the *Anti-Terrorism Act*.<sup>17</sup> The Act was originally tabled in Parliament on October 15, 2001, and was passed into law, after significant Parliamentary debate and some major revisions, on December 24, 2001.

There have been two major initiatives to evaluate Canada's anti-terrorism legislation. The first was a conference, organized by the University of Toronto's Faculty of Law, which convened on November 9 and 10, 2001. The resulting conference volume, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, contains wide-ranging commentary on the Bill. Most of this is from legal scholars and is often critical of the Bill's intent and content.<sup>18</sup>



Following adoption of the *Anti-Terrorism Act*, the Department of Justice commissioned a study, organized by Professor Thomas Gabor of the Department of Criminology of the University of Ottawa, which sought to ascertain the views of leading Canadian scholars on the impact of the Act. This study drew on individual papers prepared by Canadian scholars, some of whom were contributors to the University of Toronto conference of 2001. The impact study differed from the University of Toronto conference in that it focussed more on the policy implications of the *Anti-Terrorism Act*, while remaining concerned with its legal and human rights elements. The study did unearth significant differences of opinion on the Bill's impact on civil liberties. According to the study's editor, "Participants were deeply divided on the impact of the Act on civil liberties, ranging from those who felt that there was a minimal erosion of rights to those who regarded the Act as 'un-Canadian' and a betrayal of Canadian values."<sup>19</sup>

At the heart of the original debate over C-36 was a set of concerns that included: (1) the necessity for the Act; (2) the definition of terrorist activities which were to be subject to criminal law and legal sanctions; (3) its framing of security in a human rights context; (4) certain conditions perceived as "draconian;" and (5) the question of its status as legacy or temporary legislation. All of these issues remain pertinent and have been the subject of ongoing debate, stimulated by the mandatory Parliamentary review of the *Anti-Terrorism Act* that commenced in 2005.

- (1) The "necessity" of the *Anti-Terrorism Act*. This issue has met with a variety of explicit responses, three of which will be highlighted here.

One argument supporting the necessity of C-36 is that Canada needs to fully support UN international law covenants on anti-terrorism. After the September 11 attacks, it was discovered that Canada had been slow to implement some key UN conventions on the domestic front. Canada had signed the International Convention for the Suppression of Terrorist Bombings (1997) and the International Convention for the Suppression of the Financing of Terrorism (1999), but both conventions required legislation in Canada to implement them. The Canadian government could have followed its established practice of implementing such UN conventions in a piecemeal fashion, but instead chose to introduce legislation as part of the omnibus *Anti-Terrorism Act*. By emphasizing the need to meet international law obligations the Canadian government was able to stress the threat posed by terrorism not just to domestic but also to international security and to argue that C-36 was an appropriate contribution to a broader international effort against terrorism. Patrick Maclem argued further that Bill C-36 was to be commended for "asserting universal jurisdiction to declare terrorism to be an international crime."<sup>20</sup>

The necessity of C-36 has also been argued on the grounds that existing criminal law, which does not specifically mention terrorism or take into account the nature of terrorist operations, would be inadequate to deal with the new security environment. This case is summarized in a Department of Justice report entitled *The Anti-Terrorism Act in Perspective*. The report stresses the fact that the Act was meant to give the government new preventive tools and to enable it to use criminal sanctions against terrorist plotting, whose dimensions, due to operational secrecy and the cell structure of terrorist groups,

may be quite different from normal criminal conspiracies.<sup>21</sup> The report also indicated that there were deficiencies in the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and the draft legislation to introduce a *Charities Registration (Security Information) Act*. It also called attention to the absence of enabling legislation for one of the key intelligence collection agencies in the Canadian government, the Communications Security Establishment.<sup>22</sup> Of course, no definition of terrorism as a criminal offence existed in the *Criminal Code* prior to September 11.

This strand of the argument for necessity has generated criticism, most cogently from Professor Kent Roach. During the debate over C-36 in the fall of 2001, Roach argued:

The most charitable reading of Bill C-36 suggests that the new offences add little to the existing law and are more about making a strong symbolic statement against terrorism than providing police and prosecutors with genuinely new tools to combat terrorism.<sup>23</sup>

While C-36 was meant to be symbolic, what is unclear is whether or not the new powers it gave to government agencies and prosecutors were useful, Roach also seems unpersuaded by the argument that C-36 was meant to add new preventive powers.

The third argument for the necessity of the *Anti-Terrorism Act* invokes the political and comparative roots of the Bill. Its premise is that the Canadian public demanded strong legal measures after September 11. Then ministers McLellan and Cotler expressed this view in their statement to the Parliamentary review committees when they said, based on selective polling data: “The Canadian public supports specific measures that preserve our security. As the Government we have a responsibility to respond and the ATA is part of that response.”<sup>24</sup> The comparative argument consisted in looking at Canadian legislation alongside that of other allies, especially the United Kingdom and Australia, thus putting Canadian legal responses in an international context, dispelling any hint of a unique or unnatural Canadian response, and leaving room for suggestions that Canadian legislation is, comparatively, relatively mild.<sup>25</sup>

The problem with the argument based on public demand and international comparison rests in the context of the times. C-36 was drafted, debated and tabled in an emergency. It was an unavoidable product of a “rush” to legislate, a rush shared by other allied states. The collective rush to legislate, backed by public demand, does not necessarily lead to wise laws, and comparisons between political and legal systems caught up in the same emergency may not be as reassuring as they might seem. While public acceptance of national security legislation is especially vital, this is not the same as saying that good laws are laws drafted in accord with public demand. International comparisons can be extremely helpful not only in providing reassurance but also as a check against both the softer and the harder elements of Canadian legislation.

The most important lesson to be drawn from the third strand of the argument for the necessity of the *Anti-Terrorism Act* is that the public will and international legal developments among counterpart allies need to be closely monitored. In the human rights

context we need the capacity to monitor evolving public attitudes towards the treatment of human rights in national security legislation.<sup>26</sup> We would also benefit from the close monitoring of legislative efforts elsewhere to see how other countries continue to treat human rights concerns. Above all, we may have the chance to learn lessons from other countries' misfortunes, especially in the aftermath of terrorist attacks or apprehended operations, and thus avoid the pitfalls of over-exaggeration or neglect.

(2) The definition of terrorism.

In a focus group study of public attitudes towards the *Anti-Terrorism Act*, the participants surveyed were asked about the definition of terrorist activity contained in the legislation. According to the study report,

The definition of terrorist activity was well received, with participants appreciating the fact that it was broad and, therefore, would not exclude any potential terrorist group. However, some expressed concern that the broadness of the definition might lead to non-terrorist groups (such as environmentalists, labour union activists and anti-globalization protestors) being unjustly defined as terrorists.<sup>27</sup>

In many respects this summary captures the debates that have surrounded the issue of the definition of terrorism since the *Anti-Terrorism Act* was first introduced in Parliament. Concerns about the definition of terrorism have focussed on the breadth of the definition, the inclusion of motive, and some *issues relating to criminal intent* associated with the concept of facilitation as defined by the Act.

The *Anti-Terrorism Act*, in its final version, defines terrorism in a multi-layered way. The definition includes reference to an act committed for a political, religious or ideological purpose that is intended to intimidate or compel and that involves violence against individuals, or the public. Substantial property damage and serious interference with public services can be considered a component of terrorist acts if they meet the criteria of violence outlined by the Act. In the process of revision that led to the final version of the definition, efforts were made to clarify the intent of the Act by throwing a protective cordon around expressions of religious belief and political opinion and by distinguishing between protests or strikes and terrorist activity.

In their joint appearance before the Parliamentary review committees in November 2005, the Public Safety and Justice ministers mounted a spirited defence of the definition of terrorism provided in C-36. They argued that the motive requirement fits the unique nature of terrorist activities and that the definition, despite the worries of critics, was designed to limit the scope of the law rather than to encourage broad sanctions. The limitation means prosecutors have to prove political, religious or ideological purpose. It is further designed to avoid stigmatizing belief systems. The Act also strived to distinguish between forms of protest and terrorist activities.

As scholars of terrorism will readily admit, no definition of terrorism is perfect or universally accepted.<sup>28</sup> The definition of terrorism in the Canadian Act will remain abstract until it is tested in the courts. In some respect the Act's definition has already met one preliminary test. The rarity of criminal charges laid under the terrorist provisions of the Act provides some reassurance that the definition has not lent itself to an egregious extension of state power or an egregious offensive against various forms of dissent. Critics of the definition, in that sense, are left with its abusive potential, rather than reality.

We must be concerned about the potential abuses of power allowed by Canadian laws. But the overwhelming preoccupation with the definition of terrorism has served to obscure some other, secondary, definitional issues in the *Anti-Terrorism Act* that are of concern. An example is provided by the sections of the Act that criminalize "participating, facilitating, instructing and harbouring" terrorist offences.<sup>29</sup> Criminal sanctions for all these offences are severe and thus bring forward a requirement of criminal intent. Where *criminal intent* becomes a significant issue is in the definition of facilitation (83.19). According to the Act, "a terrorist activity is facilitated whether or not a) the facilitator knows that a particular terrorist activity is facilitated; b) any particular terrorist activity was foreseen or planned at the time it was facilitated; and c) any terrorist activity was actually carried out." Whether or not this phrasing clarifies the issue of criminal intent remains at issue.

Only when a case of terrorism comes before the Canadian courts will we have a full opportunity to judge the validity of the law.

**(3)** With regard to framing security in a human rights context, the government of the day insisted strenuously that C-36 would be "Charter-proof"—in other words, that it would meet the challenge of being tested against the provisions of the *Canadian Charter of Human Rights*. The Prologue to C-36 makes the point about protection of human rights explicitly. It states:

The Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canada against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms*.<sup>30</sup>

The then Minister of Justice, the Honourable Anne McLellan, was explicit, when presenting the bill to Parliament:

Canadians can rest assured that we kept in mind the rights and freedoms guaranteed in the Charter when drafting our proposals.<sup>31</sup>

Some critics, especially from the community of legal scholars, expressed doubts when the Bill was first presented.<sup>32</sup> The most prominent sceptic was Professor Kent Roach of the

University of Toronto's Faculty of Law. Roach argued that charter-proofing of legislation was routine, that courts tend to be deferential when faced with matters of national security, that Charter rights were not, in any case, absolute, and that charter-proofing may override more traditional approaches to restraint in the criminal law.<sup>33</sup>

The issue remains open, as C-36 powers have been used sparingly. Only one "investigative hearing" order has been issued since C-36 became law in December 2001. This power was used in the unexpected context of the Air India investigation.<sup>34</sup> It was challenged and the Supreme Court determined that the process was constitutional.

There may be further challenges on the horizon, stemming from the arrest of Mohammad Momin Khawaja on March 29, 2004. Mr. Khawaja was charged under sections 83.18 and 83.19 of the *Criminal Code*, provisions introduced with the *Anti-Terrorism Act*. His case represents the first time that charges have been laid under the Act.<sup>35</sup>

When looking at the charter-proofing claims, legal scholars such as Roach consider the extent of the protections they might offer to established Canadian rights. What this approach misses is the more political intent that underlay the government's insistence on the charter-proof nature of the *Anti-Terrorism Act*. This more political intent involved reassuring Canadian citizens that Bill C-36 did not fundamentally alter the fabric of Canadian democracy. Such reassurance could be construed as a reflection of anxiety about public attitudes to the Bill; it could equally be construed as a reflection of the extent to which Charter rights, two decades after the passing of the Charter, have become embedded in Canadian democratic practice.

(4) "Draconian" provisions of C-36. During the original debate over C-36, in the fall of 2001, controversy surrounded two particular sections of the Bill: investigative hearings and recognizance with conditions.

The intent behind both provisions was to give the government preventive powers. Investigative hearings (under 83.28 and 83.29) were designed to provide a legal forum in which a person suspected of either committing or being about to commit a terrorist offence could be compelled to testify or provide evidence about such activities. Protections were built into the law to prevent self-incrimination.

"Recognizance with conditions" (83.3) is more commonly referred to as preventive arrest. It may be imposed if a law enforcement official believes "on reasonable grounds" that a terrorist offence will be committed and that preventive arrest is necessary to prevent the occurrence of such an offence. A terrorist suspect in these circumstances can be held under arrest for a brief period of time, not exceeding 60 hours. A judge can order a further period of "recognizance"—in essence, a form of control order—of up to 12 months.

Bill C-36 provided for an annual reporting mechanism to Parliament on the use of either investigative hearings or preventive arrests. In the most recent available annual report (for 2003-2004), the Department of Justice noted:

The fact that these provisions were not used by the RCMP or federal prosecutors in the first three years of their existence illustrates that officials are proceeding cautiously in using these powers.<sup>36</sup>

The Department also noted:

The Government of Canada continues to support the investigative hearing and recognizance provisions as necessary preventive measures.<sup>37</sup>

After considerable debate in Parliament, these two measures were subject to a five-year “sunset” provision, which means that they will expire at the end of December 2006 unless renewed by Parliament.

The “draconian” nature of these powers was recognized in that the government understood the need to provide safeguards governing their application, as well as the need to proceed cautiously with their possible use. They represent the most emergency-oriented provisions of the Bill. The extent to which these powers can be tolerated in a human rights context depends on two different scenarios. They can, arguably, be tolerated when not used. They will, arguably, be tolerated if properly used in the circumstances imagined by the law—to prevent a terrorist attack.

The challenge with regard to such powers may come in the aftermath of real or threatened terrorist attacks, when governments reach for stronger preventive tools. This is borne out by the circumstances surrounding the enactment of revised Australian legislation in November 2005 and by the current debate in the UK over revisions to anti-terrorism law in the wake of the July 2005 London transport bombings. The tendency to over-reaction may be held in check by existing “emergency” provisions, if such provisions are deemed adequate and lawful and meet public demands.

**(5) The status of C-36 as legacy or temporary legislation.**

One of the revisions introduced to the Act, allied with the application of a five-year sunset clause to investigative hearings and recognizance with conditions, was a mandatory review by Parliament after three years. This review was launched in the spring of 2005 and interrupted by the prorogation of Parliament in December 2005. The new Conservative government promised, in its Throne Speech on April 4, 2006, to resume the review of the *Anti-Terrorism Act*. The details of this resumption have not been announced at the time of writing.

The Parliamentary review in 2005 was conducted by both houses of Parliament through the House of Commons Subcommittee on Public Safety and National Security and the Senate Special Committee on the Anti-Terrorism Act.<sup>38</sup> In a joint statement by ministers McClellan and Cotler to the Parliamentary review committees on November 14, 2005, the previous Liberal government made it clear that, while it supported the review process, it was adamant about the need for the legislation. The ministers said that: “The

Government of Canada does not intend to repeal the ATA.”<sup>39</sup> Their concluding remarks stressed the need to prevent Canada from becoming a “haven for terrorists.”<sup>40</sup>

While still a backbench MP, Irwin Cotler expressed the case in a different way:

Bill C-36 is legacy legislation. It is likely to be with us for a long time. We should try to get it right—or as right as possible.<sup>41</sup>

Bill C-36’s status as good legacy legislation—legislation that gets it right—will meet its first test in the change of government in Canada from Liberal to Conservative and the responses a new government makes to the eventual report of Parliamentary review committees.

A second major piece of national security legislation introduced in the fall of 2001 had an entirely different history from that of C-36. This supposedly complementary Bill, the *Public Safety Act* (originally designated C-17, subsequently C-42), was first introduced in November 2001. It immediately attracted criticism, largely on account of the powers given to the Minister of Defence to designate military security zones. The potential for abuse of such powers was deemed great, especially with regard to their use to block protest. In addition, the Bloc Québécois argued that the Minister might use such powers in a unilateral fashion to send the army into Quebec.<sup>42</sup>

Ultimately the government withdrew these provisions from the Bill during the course of its revisions and reintroduction in 2002. The Bill was finally passed in May 2004.<sup>43</sup> As it evolved it became a form of house-cleaning legislation, designed to amend a large number of existing statutes. Many of these amendments have potential implications for the protection of human rights, but because of the *Pubic Safety Act*’s checkered history and fall from public attention, its provisions are relatively little known or studied.<sup>44</sup>

Additional legislation with a bearing on national security was contemplated by the previous Liberal government of Paul Martin and tabled but not passed prior to the election of 2005-2006. These legislative measures include a bill to establish a Committee of Parliamentarians on National Security and the *Modernization of Investigative Techniques Act* (MITA), which is designed to update the legal environment in which law enforcement and intelligence services can intercept electronic communications in Canada. It remains to be seen whether these pieces of legislation will be reintroduced in Parliament in the original or in modified form.

Key recommendation:

*The CHRC should keep a watching brief on the Parliamentary Review of the Anti-Terrorism Act and should be ready to provide an assessment of the Parliamentary committees' reports as soon as these are issued (by December 2006, unless an extension is granted by Parliament)*

### **Section 3**      The Application of Pre-September 11 Powers to the New Security Environment, Including the Use of Security Certificates

Canada has responded to the new security environment created by the 9/11 terrorist attacks by augmenting the capacity of existing intelligence and law enforcement agencies, by creating new laws, and by engaging in a significant structural reorganization of the Canadian government. Canada had experienced significant terrorist attacks in the past (above all, the Air India bombing). Terrorism was considered an ongoing potential threat to the security of Canada prior to 9/11. But the extent of the threat revealed by the 9/11 attacks came as a shock to the political system. Canadian responses to security threats post-9/11 were a reflection of the trauma occasioned by that event.

Canadian responses to the new threat environment were built on a bedrock of domestic Canadian values and principles, some enshrined in practice and some in legislation. That bedrock included the *Canadian Charter of Rights and Freedoms* (1982) and the long-established practices of multiculturalism and democracy. Canada is also an international actor with a reputation to uphold and internal law conventions to abide by. Canada operates on the international stage within a complex web of alliances and multilateral and bilateral treaty arrangements. We exist in a North American geopolitical space and have, of necessity, to adjust when our foremost trading partner and principal ally, the United States, embarks on a dramatically new security course, as it did after September 11.

Pre-September 11 powers could, in this context, be seen to stem from the many historically conditioned circumstances that define Canadian action domestically and internationally. Economic and social policy, military policy and foreign policy are all elements of such a narrative.

But one particular pre-September 11 “power” has come to symbolize some of the challenges of adapting Canadian practice to the new security environment and has emerged from obscurity as one of the most contentious issues in Canada’s conduct of national security. This “power” is the use of “immigration security certificates” under the *Immigration and Refugee Protection Act* (IRPA).

Security certificates have been in place since 1977 and have been a component of Canada’s immigration laws since 1991.<sup>45</sup> They are a protective tool, used sparingly. Only 27 security certificates have been issued since 1991. The government’s batting average before the Federal Court, which adjudicates the security certificate process, has been



high. Of the 27 cases, 20 have been found reasonable by the Court. Three have not been upheld. Four remain under review.

Despite the public perception of security certificates as an anti-terrorism instrument, only five have been issued since September 11.<sup>46</sup>

Why, then, the controversy? The answer is to be found in four aspects of the security certificate system: the reliance on secret intelligence; the nature of the legal process; the conditions of detention; and the question of removal to countries that practice torture. All these aspects seem to raise troubling questions about whether national security prerogatives have been given more importance than human rights protections. These questions are currently under consideration as part of the Parliamentary review of the anti-terrorism legislation. The constitutionality of the security certificate process is also being reviewed by the Supreme Court of Canada.<sup>47</sup>

The discussion in this section of my report is devoted to understanding the process involved in the issuing of security certificates, not to judging whether this is an appropriate security practice and one that guarantees basic human rights.

Security certificates do depend on secret intelligence. That intelligence can come from a multiplicity of sources, some Canadian, some foreign. There are some checks built into the use of intelligence in building a case against someone in the immigration stream. One is that the Canadian agencies, primarily CSIS, will want to have a strong case, so as to convince the Minister. Reputation is at stake. When a file also contains significant foreign-generated intelligence, CSIS would have another reason for wanting to build a winning hand. Its reputation with foreign agencies, so vital to old or new intelligence partnerships, might, to some degree, be on the line.

Immigration security certificates must be authorized by two Cabinet ministers, the Minister of Public Safety and the Minister of Citizenship and Immigration. That in itself serves to limit the use of the tool and adds further requirements for a strong and convincing intelligence case. The grounds for issuing a security certificate by ministers are threats to Canadian security, violations of human or international rights, serious criminality, or organized criminality as defined by the Act.

The use of secret intelligence in legal proceedings is always a troublesome issue. At the front end of the Canadian security certificate process there is, at least, a double burden of having to protect an intelligence service's reputation and of ministers' needing to be confident in the case.

Immigration security certificate cases are decided by a Federal Court judge. While the legal process de-politicizes the matter, it does not allow for ordinary due process. Defendants and legal counsel are placed in the difficult position of not knowing all the evidence against them. Nor does the process allow for any cross-examination of material or witnesses. But the judge in the case is required not just to adjudicate the reasonableness of the evidence but also to place, by way of a summary, as much of the

evidence in the case as possible before the individual in question. In other national jurisdictions, such as the UK, the legal procedure allows for a security-cleared impartial adviser (*amicus curiae*) to review the evidence in full and assist the individual. There may be alternative ways of trying to resolve the dilemma of secrecy versus rights in such cases.

Conditions of detention have been a troubling part of the security certificate process. Some security certificate cases have dragged on for years, leaving individuals in a detention limbo. Some questions have been raised about the facilities provided individuals targeted by security certificates. Questions of release provisions have also generated controversy. The Canadian government has moved to begin transferring individuals involved in security certificate cases from inadequate provincial detention facilities to federal ones. There has been some official musing on controlled release using various means of continuous monitoring. All this suggests that the government believes that detention issues are to some degree fixable and that it is also sensitive to public criticisms on this score.<sup>48</sup>

In the current five terrorism-related security certificate cases, Mahmoud Jaballah has been detained since 1999, Mohammad Zeki Mahjoub since June 2000, Hassan Almrei since October 2001, Mohamed Harkat since December 2002, and Adil Charkoui since May 2003. Charkoui was released under bail conditions, including electronic monitoring, in February 2005.

All five of these security cases involve allegations that the individuals face torture if returned to their country of origin. This is where the dilemmas of security certificate cases seem less amenable to improvement or less susceptible to some inner process of checks and balances. Canada is bound by international law conventions and norms that forbid the transfer of persons to regimes practicing torture.<sup>49</sup> It must also respect international and Canadian Charter rights to a fair trial.

Built into the security certificate process is the “pre-removal risk assessment,” conducted by an official from Citizenship and Immigration Canada. The risk assessment is also reviewed by a Federal Court judge. The touchstone case is that of Manickavasagam Suresh, who claimed refugee status in Canada and was granted status in 1991. He was subsequently arrested and detained, pending deportation, for alleged links to the LTTE (Liberation Tigers of Tamil Eelam), or Tamil Tigers. Suresh was released under conditions pending an appeal in March 1998. In January 2002, the Suresh case took another turn when the Supreme Court of Canada issued a ruling in his case which confirmed the principle of non-refoulement, which prohibits the return or expulsion of a refugee to the territory of a State where his or her life, freedom or personal security would be in jeopardy, but qualified it by saying that “barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice.” The Government of Canada has taken “extraordinary circumstances” to mean grave threats to national security. The Supreme Court granted Suresh the right to a new deportation hearing, having found the procedural safeguards in his case insufficient.<sup>50</sup>

The Suresh case takes the security certificate process to its limits in terms of length of detention, the added requirements for the state to share its case with the individual before removal, the concerns about torture should removal be effected, and Canada's international law obligations. It requires an impossible effort to decide between the extent of a threat posed by an individual to national security and the possibility of subjecting a person to torture.

The Suresh case also pointed to the likelihood that, when the security certificate process was used against suspected terrorists, the process would encounter obstacles on account of all of its potential dilemmas. This indication seems to be borne out by the cases of the five Muslim men currently subject to security certificates and facing removal from Canada.

Key recommendation:

*The CHRC should study the immigration security certificate process under three main headings: a) detention and bail conditions; b) the accused individual's access to evidence against him; and c) safeguards in the conduct of removal orders. This study should seek to determine the extent to which human rights concerns have been properly recognized in the use of security certificates.*

#### **Section 4** Key Federal Government Agencies in the National Security Domain and Their Respective Mandates and Functions

Canadian federal government agencies with major responsibilities for national security are described collectively as the “security and intelligence community” (S&I community).

The Canadian S&I community is a longstanding one. Its origins date from the Second World War. Its history remains little known to Canadians.

The end of the Cold War brought significant changes to the Canadian S&I community. The Department of External Affairs relinquished its leadership role over the intelligence community, a role that fell increasingly to the Privy Council Office. The key collection agencies—the Canadian Security and Intelligence Service (CSIS), which replaced the RCMP Security Service in 1984, and the Communications Security Establishment, or CSE (previously the CBNRC [Communications Branch of the National Research Council] in 1970)—had to focus on new and substantially different targets. It would not be unfair to say that the Canadian intelligence community was a community in search of a mission in the decade-long post-Cold War period. It added new core missions such as international organized crime, illegal immigration, environmental issues and economic espionage to its portfolio. CSE came to focus on its military mission, under the term “support to military operations” (SMO). CSIS came slowly to focus on Sunni Muslim terrorism, an evolution highlighted by the case of Ahmed Ressam, an Algerian refugee claimant arrested at the Canada-US border in December 1999 while engaged in a mission

to attack Los Angeles airport. The RCMP became a peripheral member of the intelligence community, with a function restricted essentially to law enforcement response.

The S&I community that existed prior to the 9/11 attacks was described in a 24-page booklet produced by the Privy Council Office and entitled *The Canadian Security and Intelligence Community*. This booklet described the functions of the S&I community and included an organization chart indicating that eight departments and central agencies collectively made up the Canadian intelligence system.<sup>51</sup>

While drawing on its historical foundations, the security and intelligence community underwent some significant organizational changes to confront the new, post-9/11 security environment.

Some of these changes occurred quickly after 9/11 and were signalled in the passage of Canada's first anti-terrorism legislation, Bill C-36, in December 2001. The *Anti-Terrorism Act* incorporated enabling legislation for the Communications Security Establishment, which found itself with a new, and top-priority, anti-terrorism mission. A unit called the Financial Transactions Reports Analysis Centre of Canada (FINTRAC) was given anti-terrorist financial tracking responsibilities under C-36. The new criminal definitions of terrorist activity in C-36 effectively meant a renewed role for the RCMP as a national security agency.

The focus on air transport security after 9/11 resulted in the creation of a new Crown corporation, the Canadian Air Transport Security Agency (CATSA), to ensure operational security at Canadian airports.<sup>52</sup> CATSA was established on April 1, 2002. Its enabling legislation, Bill C-49, also required a five-year review, which is now under way. The teams of pre-board screeners deployed at all major Canadian airports are its most public and familiar face.

Deeper structural changes occurred in December 2003. The new Liberal leader, Paul Martin announced some sweeping changes to national security organizations in Canada, including the creation of a new federal government department, Public Safety and Emergency Preparedness (PSEPC), the establishment of the position of National Security Advisor to the Prime Minister in the Privy Council Office, and the inauguration of the Canada Border Services Agency (CBSA), which took on board legacy functions from Citizenship and Immigration Canada, the Canada Customs and Revenue Agency, and the Canadian Food Inspection Agency. At the same time the Office of Critical Infrastructure Protection and Emergency Preparedness (OCIPEP), originally created to tackle concerns about computer system failures at the turn of the millennium, was moved from the Department of National Defence to the new department, PSEPC. These changes collectively signalled a new and unprecedented priority for national security in the Canadian federal government.

The most significant of these changes was the creation of the Department of Public Safety and Emergency Preparedness Canada (PSEPC). This senior federal department was meant to be more than the sum of its parts. Its legacy agencies from the old

Department of the Solicitor General, including CSIS and the RCMP, gave Public Safety a lead role in intelligence and law enforcement. The creation of the CBSA within Public Safety gave the new department a lead role in border security issues. Above all, PSEPC was meant to be about power. As a large department headed by a senior Cabinet Minister, the creation of PSEPC signalled a desire to place leadership and coordination of national security issues in one set of ministerial hands.<sup>53</sup>

More overt changes to structure and authority were matched, post-September 11, by more invisible changes to government practice. At the Cabinet level, a new committee was established in the wake of 9/11. At first of an ad hoc nature (known as the Cabinet Committee on Public Safety and Terrorism), it came to be a standing Cabinet committee with a revised name, “Cabinet Committee on Security, Public Health and Emergencies,” chaired by the Deputy Prime Minister.<sup>54</sup> Since the election of a new Conservative government, this committee has gone through a further evolution and is now the Cabinet Committee on Foreign Affairs and National Security, the new name indicating its broader mandate.

The power and effectiveness of the Canadian S&I community, which are crucial to the achievement of Canadian national security, arguably lie in its ability to function as a community. The extent to which the S&I community is a community is also of crucial importance for understanding the capacity of the Canadian intelligence system to protect and promote human rights. An integrated community is less likely to suffer abuses of human rights, for several reasons. It has a greater degree of leadership, is more subject to policy direction and coordinated priority setting, makes accountability and review easier, and is more open to moderating checks and balances, including whistle-blowing, within a system of security and human rights protections.

Key recommendation:

*Knowledge of the functioning of the security and intelligence community is critical to understanding the landscape of both security policy and human rights protections. To this end, the CHRC should consider monitoring legislative changes in the mandate of national security agencies.*

## **Section 5** Measures of Accountability and Review of National Security Agencies and their Practices, Especially Pertaining to Fidelity to Legal Mandates and Human Rights

An effective system of accountability is vital to the practice of intelligence in democratic states. Yet such systems have, historically, been slow to develop. The lead was taken by the United States during the 1970s, when investigations by House and Senate committees into the practices of the US intelligence community led to the creation of formal committees for intelligence oversight in Congress. Since the late 1970s, the US lead has been followed, after some time, by many Western parliamentary democracies, including the United Kingdom, Australia and New Zealand.

Canada has not yet developed a formalized system of parliamentary scrutiny of its security and intelligence community, though one may be forthcoming. In December 2003, the new Liberal leader, Paul Martin, proposed the creation of a National Security Committee of Parliamentarians. The idea was studied and reported on by an interim committee of parliamentarians between May and October 2004. The government tabled draft legislation, Bill C-81, *An Act to Establish the National Security Committee of Parliamentarians*, on November 24, 2005, but it was not passed before Parliament was prorogued in December 2005 for a general election. The new Conservative government of Stephen Harper has not, at the time of writing, announced its intentions with regard to a Parliamentary body.

But in the absence of dedicated Parliamentary scrutiny, there are ways of ensuring the accountability of the security and intelligence community.<sup>55</sup> These include ministerial accountability and federal review bodies as well as, the media and the academic community, both of which are beyond the scope of this study.

The key elements in the Canadian system are ministerial accountability and federal review bodies. Ministerial accountability is a keystone of Westminster-style parliamentary democracies. The basic philosophy of ministerial accountability appears simple. Ministers are responsible for the departments they lead and are accountable to the public, through Parliament, for the performance and administration of their departments. But according to a research paper produced for the Gomery Inquiry, the doctrine of ministerial responsibility is “a layered concept with different meanings.”<sup>56</sup> David E. Smith calls for significant efforts in the Canadian Parliament to define the concept and to provide for individual ministerial accountability through committee monitoring.

If the rules governing ministerial accountability in Canada are unclear and there is no established Parliamentary procedure in committees to underpin them, then the problem becomes even greater when it comes to ministerial accountability for departments that are responsible for security and intelligence. The difficulty resides in the fact that maintaining secrecy about operational sources and methods of intelligence services deters ministers from becoming completely familiar with the work of agencies that report to them. When it comes to ministerial accountability for law enforcement agencies with a national security mandate, such as the RCMP, the problem is further compounded by the principle of non-involvement by ministers in criminal investigations.

In practice, ministerial accountability in the security and intelligence realm mainly lies with deputy ministers, some of whom have internal accountability mechanisms at their disposal. The most relevant example of such an internal mechanism is the Inspector General of CSIS. The idea of an inspector general (IG) was promoted by the McDonald Commission and incorporated into the *CSIS Act* when it was passed in 1984. The official description of the function of the IG reads as follows: “The Inspector General serves as the Minister’s internal auditor for CSIS and supplements the Deputy Minister’s advice with an independent means of assurance that CSIS complies with the law, ministerial direction and operational policy.”<sup>57</sup>

The CSIS IG must produce an annual certificate for the Minister commenting on the annual report of the Director of CSIS.<sup>58</sup> This process is meant to establish checks and balances. It is supplemented by the independent advisory function of the CSIS IG when it comes to accountability issues and the power of the minister to direct the IG to undertake specific studies.

While the inspector general is responsible for internal accountability of the Canadian Security Intelligence Service, there is also an external review agency, the Security Intelligence Review Committee (SIRC). Like the IG, SIRC was established under the *CSIS Act* in 1984. SIRC produces classified reviews for the Minister and an annual report, the public version of which is tabled in Parliament. The annual reports are posted on the SIRC website. SIRC's mandate requires it to focus on issues of propriety—adherence to the law and ministerial direction. Over the years SIRC has increasingly broadened its interpretation of its mandate, as can be seen by the current title of its annual reports—“Operational Audit.” But SIRC has been reluctant to engage in qualitative studies of the performance of CSIS and has proved to have little capacity to engage in lessons-learned exercises.<sup>59</sup> This has, arguably, limited its value.

A second obstacle to SIRC's capacity to fulfill its accountability function is the perennial problem of secrecy. As regards accountability, SIRC's role is to report to the Minister and through the Minister to Parliament. SIRC does not report directly to the public, nor is it accountable to the public. The tabled version of its annual report, like the public version of the IG's certificates, often appears sanitized because of national security confidentiality.<sup>60</sup>

Two other elements of the Canadian security and intelligence community currently operate in conjunction with external review bodies. The activities of the Communications Security Establishment (CSE), Canada's signals intelligence agency, are subject to review by the Office of the CSE Commissioner. The position of CSE Commissioner was first established in 1996, and the incumbent operated under several Orders in Council. The Commissioner's mandate was to review CSE operations to ensure their compliance with the law and, secondarily, to investigate complaints about the lawfulness of CSE activities.

The Office of the CSE Commissioner received a legislative mandate under Bill C-36, the *Anti-Terrorism Act*, enacted in December 2001. The new legislation confirmed the previous scope of the Commissioner's functions and expanded them. It gave the Office new responsibilities to monitor CSE compliance with ministerial authorizations regarding the interception of communications. It also involved the Commissioner in determining the grounds for the actions of officials who might be engaged in whistle-blowing—what is referred to as public interest defence under the terms of the new *Security of Information Act*.<sup>61</sup>

The CSE Commissioner produces an annual report as part of his mandate. This report is submitted to the Minister of National Defence, who tables it in the House of Commons.

The annual report comments, where applicable, on the four main elements of the Office's duties:

- \* CSE compliance with the law
- \* CSE compliance with ministerial authorization regarding the interception of communications
- \* complaints against CSE
- \* public interest defence cases

The CSE Commissioner's role with regard to ministerial authorizations is an important reflection of new powers given to CSE under the 2001 *Anti-Terrorism Act*. Prior to the Act, CSE was forbidden to intercept the communications of Canadians. CSE retains its function as a foreign intelligence agency under the Act, but it was given the legal capability to intercept Canadian communications in very tightly defined circumstances. Under Bill C-36 (*National Defence Act*, Part V.1, the Minister of National Defence is empowered "to give CSE written ministerial authorization to intercept private communications."<sup>62</sup> The authorization can only be given for the purpose of collecting foreign intelligence under CSE's mandate or for protecting the computer systems or networks of the Government of Canada. It should be noted that CSE interception operates without the usual checks provided by federal court warrants, and thus ministerial authorization, along with external scrutiny of that authorization, is most important.<sup>63</sup>

The CSE Commissioner's main contribution is to support ministerial accountability. The same constraints impact on the Commissioner's annual report as on SIRC and the CSIS IG. Secrecy provisions, along with sanitized reports, limit its capacity to enhance public understanding of the CSE function.

The other agency of the Canadian security and intelligence community that has an external review mechanism is the Royal Canadian Mounted Police. In the case of the Mounties, the review mechanism is different.

The Commission for Public Complaints Against the RCMP (CPC) was created by an Act of Parliament in 1988. Its function is not to carry out systematic reviews, but rather, as the title suggests, to review complaints from the public about RCMP conduct. The Commission Chair does have the power to initiate investigations itself, as it did in October 2003 with regard to the Maher Arar case.<sup>64</sup> Unlike the CSIS IG, SIRC or the CSE Commissioner, the CPC functions in the realm of public, rather than ministerial, accountability.

In the past, the CPC has faced daunting challenges in investigating the RCMP's national security activities. This experience led then Chair of the Commission for Public Complaints, Shirley Heafey, to address the O'Connor Commission, pursuant to its Part II review on the issue of a new review mechanism for RCMP national security activities. Ms. Heafey submitted two reports to the Arar Commission, the second of which makes some forceful points.



Ms. Heafey argued that information is the “lifeblood” of a public complaints process and that the RCMP’s “reluctance” to provide the CPC with all relevant information relating to complaints is “already hindering the CPC’s ability to perform its statutory mandate.”<sup>65</sup> Ms. Heafey argued for the retention of the CPC, but with its enabling legislation altered to give it access to all relevant information as well as audit powers. Given that the RCMP operates within a broader security and intelligence community, Ms. Heafey accepted the need for an overarching review body, a national security review committee that “would co-exist with the CPC and other review agencies and would oversee the conduct of all federal entities engaged in national security.”<sup>66</sup>

The recommendations of the O’Connor Commission with regard to new review mechanisms for RCMP national security activities, now scheduled to be delivered in the fall of 2006, will have to decide between proposals for mechanisms specifically focussed on the RCMP and a system of external review of the entire security and intelligence community. Its recommendations and the government response, along with the question of a future Parliamentary committee, have the capacity to considerably alter the way Canada reviews its national security system.

The last element to be considered here in the current accountability framework involves the work of the Auditor General. The Office of the Auditor General (OAG) has, by far, the longest history of any federal agency currently involved in reviewing the activities of the security and intelligence community. The Office was originally established in 1878. The original purpose—to inform Parliament about the spending of public monies—remains central to the work of the modern Auditor General. Successive pieces of legislation—the *Auditor General Act* of 1977, its amendment in 1994, and a further amendment in December 1995—provide the foundation for the OAG’s current activities.

Despite its long history, the Office of the Auditor General embarked on its first study of the Canadian intelligence community only in 1996. That pioneering study focussed on control and accountability issues.<sup>67</sup> The OAG concluded in a balanced fashion that substantial measures for control and accountability existed, that progress had been made in recent years, but that more could be done. In particular, the OAG urged greater efforts to strengthen leadership and coordination across the intelligence community and to improve the process of priority setting. It also called for improvements in the way that the performance of CSIS and CSE was measured. Anticipating the future, it argued that the CSE needed a legislative framework “in view of the significance, sensitivity and cost of its operations.”<sup>68</sup> This legislative framework would be built into Bill C-36, the *Anti-Terrorism Act*.

The Auditor General returned to the subject of the Canadian security and intelligence community in 2004. Chapter 3 of her March 2004 report was devoted to a study of the implementation of the government’s 2001 anti-terrorism initiative, with particular reference to the ways in which the government had spent the first batch of money allocated for national security in its December 2001 security budget. The OAG 2004 report contained relatively little comment on matters of accountability and focussed more

on operational issues. But the OAG did find areas where it believed disappointingly little progress had been made since its 1996 initiative. The Auditor General continued to be concerned about the lack of coordination of intelligence across government departments and about the ability of intelligence agencies to communicate with each other. The Auditor General pointed to the need to “strengthen the management framework for security and intelligence.” “Improvement,” she argued, “is especially needed in the management of issues that cross agency boundaries, such as information systems, watch lists and personnel screening.”<sup>69</sup>

While the 2004 OAG report was operationally focussed, it is very relevant to a study of accountability in the national security systems and its relation to the protection of rights. A security and intelligence community that lacks sufficient coordination, and in which problems of interdepartmental cooperation on information sharing exist, is a community that invites problems when it comes to ensuring the protection of human rights.

Overall, we have seen that there are a number of key characteristics to the accountability and review measures used in national security agencies in Canada. The first is that primary accountability in the security and intelligence field lies with the minister. But ministerial accountability is lessened by the absence of an effective Parliamentary committee system. A second characteristic is that both internal and external review bodies are highly specialized. They are specialized both as to their mandate, which focuses on single entities in the security and intelligence community, and with regard to their emphasis on ensuring compliance with the law. A third characteristic is that the notion of direct accountability to the Canadian public is largely absent from the system. The public capacity to profit from the accountability and review system is limited because of secrecy constraints and the nature of reporting that is provided to the public through Parliament.

None of the current review agencies has an explicit mandate to review human rights issues; their common task is to monitor compliance with specific legal mandates and ministerial directions. However, these legal mandates and ministerial directions require that human rights be protected and respected. The CHRC should monitor the reporting done by review agencies so as to make its own assessments of the information provided in the public domain. From this information it may be possible to establish long-term trends and identify more immediate issues of concern. This will allow the CHRC to make recommendations about security and intelligence practices and their impact on human rights in Canada.

Key recommendation:

*The CHRC should build a database of human rights concerns from the reports issued to date by review agencies responsible for security and intelligence. The purpose of this study would be to assess the extent to which such review agencies have paid systematic attention to human rights issues and in their reporting have revealed any cumulative trends of concern. The material to be studied would include available public domain*

*reports from the CSIS IG, SIRC, the CSE Commissioner, the RCMP Public Complaints Commission, and the Auditor General. This database could be an important element of the CHRC “human rights report card.”*

## **Section 6** Federal Government Responsibility and Capacity to Protect Canadians and Their Rights Overseas, Including Respect for International Law Provisions

The responsibility of a state to protect its citizens both at home and abroad is a fundamental, uncontested and long-established part of the doctrine of state sovereignty. The capacity of a state to protect its citizens abroad presents challenges wholly different from domestic security provisions. The symbolic nature of the extension of a governmental duty to protect Canadians abroad is highlighted in the official passage that appears in all Canadian passports:

The Minister of Foreign Affairs of Canada requests, in the name of her Majesty the Queen, all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford the bearer such assistance and protection as may be necessary.<sup>70</sup>

In Canada the responsibility to protect Canadians abroad, as the passage indicates, lies with the federal Department of Foreign Affairs. Protection of Canadians depends on the capacity of that lead department to help Canadians on foreign soil. Canadian action occurs within a complex web of international law provisions, state-to-state relations, and foreign state legal practices and codes. The complexity of the issue increases when Canadians find themselves trapped in war zones, held under duress in lawless areas, incarcerated by states that do not abide by accepted Western norms, or somehow caught up in the extra-legal practices that have emerged, post-9/11, as part of the US-led war on terror.

The recent example of the hostage ordeal of two Canadians, James Loney and Harmeet Sooden, who travelled to Iraq as part of a group known as the Christian Peacemaker Teams, highlights the difficulties of protecting individuals who choose to enter declared war zones. The case of Maher Arar has provided a dramatic illustration of what can befall individuals ensnared in a United States counter-terrorism practice known as “extraordinary rendition.” In both cases significant Canadian resources were deployed to render assistance to Canadians abroad. In both cases, Canada had, on its own, no foolproof sovereign capacity to protect Canadians abroad. Loney and Sooden were rescued by a coalition military team in Iraq, led by British special forces. Media reports suggested the presence in Iraq of a significant Canadian contingent deployed to assist in locating and securing the release of the two Canadian hostages. Arar was deported to Syria by the United States’ authorities without the consent of the Canadian government. While in a Syrian jail, Mr. Arar had access to Canadian consular officials, but Canada had no power to force his release. The protective screen that shields Canadians abroad is, by nature, fragile.

To further explore the issue of the responsibility and capacity to protect Canadians abroad in a rights context, we have to appreciate that what is at stake is the right to “the security of the person,” a Charter right under Canadian law.<sup>71</sup> Security of the person can encompass both physical security and privacy. Canadian Charter rights do not extend beyond the borders of Canada, but Canadians, for better or worse, often travel abroad with the expectation that their rights travel with them.

While the Canadian government has a responsibility to protect Canadians abroad, individual Canadians living or travelling abroad also have a responsibility to ensure they are reasonably informed about potential threats to their security and to take reasonable precautions. A duty of prudence exists. Where individual responsibility and government responsibility overlap is in the area of information.

The federal government should be able to provide Canadians with authoritative information on risks associated with travel and living abroad. It will not be the sole source, but rather part of a diffuse information universe comprising other key providers such as the news media, travel guides, travel agents, local knowledge and travellers’ tales. While government information must be easily accessible to ordinary Canadians, its value resides in its authoritativeness.

The first test of the federal government’s responsibility and capacity to protect Canadians overseas thus comes in the realm of information provision. In this regard, Foreign Affairs Canada, as the lead department, depends heavily on its website ([www.fac-aec.gc.ca](http://www.fac-aec.gc.ca)) to provide information. In its mission statement, posted on the web, the Department indicates that it “works to promote prosperity, ensure Canadians’ security within a global framework, and promote Canadian values and culture on the international stage.” The Consular Affairs Bureau, part of Foreign Affairs Canada, hosts a very useful website. The broad intent is clearly to be both informative and cautionary. Among the most relevant components of the web-delivered information is the section entitled “Current Issues,” whose purpose is to “provide Canadian travellers with event-driven and timely information and advice on such matters as security, natural disasters, demonstrations and health hazards, all of which could seriously impact on travel abroad.”<sup>72</sup> According to Foreign Affairs Canada, “Current issues enable the Government of Canada to communicate information to the general public quickly, clearly and concisely.” As well as the web-delivered information there is an emergency operations centre whose telephone number is listed on the website. The online “Current Issues” series is complemented by such additional publications as “Country Travel Reports” and “Travel Updates.”

The Consular Affairs Bureau’s Current Issues pages typically indicate the nature of the travel alert applicable to the country concerned and provide brief details about the dangers involved. Foreign Affairs Canada uses a graduated travel warning system, the most serious of which advises Canadians against “all travel” to a particular country and urges Canadians in the country to leave. Currently the highest level of warning is applied to four countries: Iraq, Afghanistan, Liberia and Somalia. “Current Issues” reporting is

supported by the “Country Travel Reports” series, which provides additional details. A brief examination of reports posted by the Consular Affairs Bureau suggests that no special attention is paid to the human rights record or criminal justice system of foreign states.

Failure to highlight human rights concerns and provide at least a summary of the justice system of states to which the Canadian government attaches a travel warning is a notable shortcoming.

Apart from this problem, the provision by Foreign Affairs Canada of accessible and authoritative information regarding potential risks involved in travel and residence in foreign countries meets the standards expected. More detailed study would be required to assess whether the array of information posted was sufficiently timely; whether the level of travel alert corresponded to the known facts of the security situation in the country; and to what extent the Foreign Affairs system was publicly known and used, not just by individual travellers themselves but also by other information providers, especially the media and commercial travel services.

Provision of accessible and timely information will not, of course, prevent Canadians from finding themselves in situations abroad where their physical security and rights are threatened. Travel and foreign residence are matters of individual choice. Canadians can face imprisonment abroad, if deemed to have broken the laws of the state they visit, and can otherwise be caught up in a variety of threatening situations, ranging, according to the Foreign Affairs lexicon, from security dangers to avian flu, political demonstrations, natural disasters, disease outbreaks, and obstacles to travel in foreign regions.

The agency responsible for assisting Canadians who find themselves in difficulty abroad is the Consular Service of the Department of Foreign Affairs. It maintains a global network of offices in more than 180 countries. This network operates communications on a 24/7 basis through the Emergency Operations Centre in Ottawa. The work of consular services finds its sanction in the United Nations Vienna Convention on Consular Relations of April 24, 1963, to which Canada is a signatory.<sup>73</sup> The Vienna Convention spells out the general obligations of states with regard to the provision of consular assistance to foreign nationals by the “sending” and “receiving” states.

The capacity of Canadian consular services to protect Canadians and their rights depends on a host of issues, some of which, such as the attitudes, practices and legal norms of foreign states, are beyond Canadian control. Those issues within the realm of Canadian control would include resources, staffing, training, expertise, and the corporate culture of the Consular Service. Foreign Affairs Canada sets standards for the performance of its Consular Service and invites Canadians to comment on them. To my knowledge, broader public audits of the performance of the Consular Service are not routinely done, either by any external agency or by the relevant Parliamentary committees.

The most dramatic insight into the functioning of the Consular Service in a case involving human rights has been provided recently by public testimony to the

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the Arar Commission). Senior officials from the Department of Foreign Affairs and its Consular Affairs Bureau gave sworn testimony before the Commission's legal staff and were cross-examined by attorneys representing Maher Arar. These officials included Konrad Sigurdson, the current Director General of the Consular Affairs Bureau (testimony June 23, 2004), Maureen Girvan, the consular services officer based in New York (testimony May 11-12, May 16, 2005), Gar Pardy, the Director General of the Consular Affairs Bureau during the time of Mr. Arar's captivity in 2002-2003 (testimony May, June 2, 2005, October 24, 2005), Franco Pillarella, Canadian ambassador to Syria at the time (testimony June 14-15, 2005) and Leo Martel, then consul at the Canadian Embassy in Damascus (testimony August 30-31, 2005). Their public testimony is available on the Arar Commission website at [www.ararcommission.ca](http://www.ararcommission.ca). Justice Dennis O'Connor is scheduled to submit his report to the government in April of 2006.

The public testimony of senior officials involved in consular matters has provided us with an extensive body of documentation regarding the practices of the Consular Service in a security-related case. The testimony speaks to such issues as Canadian knowledge of the US practice of extraordinary rendition, knowledge of Syrian human rights practices, interaction with Syrian government officials, operational procedures within the Canadian government, and interdepartmental information sharing and coordination.

It is vital that lessons be learned from the Arar case, particularly as regards the ability of the Canadian government to protect the rights of Canadian citizens swept up in the global war on terror. Justice O'Connor's report will hopefully serve this purpose, though his specific mandate is not a lessons-learned one. Whatever shape Justice O'Connor's report takes, there will remain a need for additional study of the public documentation generated by the Arar Commission.

In a case such as that of Maher Arar, the Consular Service represents the Government of Canada. The success of consular activities may well depend on the extent of the state in question's belief that the actions of the Consular Service represent a matter of high priority and significance for the Government of Canada. In this context, the federal government requires a mechanism to publicly register its interest in protecting the rights of Canadians abroad. There are various possible levels of Canadian political engagement, from the Prime Minister, to the Minister for Foreign Affairs, to Parliamentarians and down to the individual ambassador. In the previous Liberal government, a new initiative was taken to establish a Parliamentary Secretary to the Minister for Foreign Affairs responsible for protecting Canadians abroad. The post was held by Liberal MP, Dan McTeague. Mr. McTeague became the government's de facto spokesperson on issues of Canadians abroad.

Mr. Harper's new government discontinued the previous initiative. The Minister of Foreign Affairs is now served by two Parliamentary secretaries, neither of whom has explicit responsibilities with regard to the protection of Canadians abroad. It is difficult to weigh the pros and cons of the function of a Parliamentary Secretary with an explicit mandate for protecting Canadians overseas. The Liberal experiment was a short one. It

was abandoned, it would seem, in the interest of streamlining the Cabinet and Parliamentary Secretary function and perhaps for that reason alone.

Privacy issues have some bearing on the federal government's responsibility and capacity to protect Canadians and their rights overseas. Canadian privacy laws do not have any extra-territorial reach, of course. But where the matter becomes pertinent is in cases where Canadian information, protected under Canadian laws, finds its way into foreign-held databases, possibly to cause harm to Canadians travelling or residing abroad. There are multiple paths by which such information can travel. The two key pathways are (1) transfers of information sanctioned by state bodies and (2) transfers of information arranged by private sector agencies. The first category will be discussed in the section of this report devoted to security and intelligence liaison. The second category is an issue that has been taken up by the Privacy Commissioner of Canada, particularly under her mandate to uphold the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Just as the Consular Affairs Bureau of Foreign Affairs Canada served as the main portal of federal government information for Canadians travelling or residing abroad, the Federal Privacy Commissioner functions as the main portal on privacy issues. The Privacy Commissioner also acts as an advocate for privacy rights and as a resource for research in the area. In the year 2004, for example, the federal Privacy Commissioner contributed to a study initiated by the Office of the Information and Privacy Commissioner for British Columbia. This study sought to measure the impact on Canadian privacy rights of the new powers acquired by US law enforcement and intelligence agencies under the *Patriot Act*. In her conclusion, Privacy Commissioner Jennifer Stoddart argued for further investigation of both the issues highlighted above. She said:

The circumstances under which personal information held by the private sector in Canada should be transferred to organizations in other countries is an important policy issue that needs further examination.<sup>74</sup>

With regard to state-to-state transfers of information, The Privacy Commissioner argued that, while the Arar Commission should shed light on the transfer of information in national security cases, there was a need to examine the issue more broadly across a wider range of federal government departments. She further argued that there was a need for the government to explain to Canadians the nature of such transfers.<sup>75</sup>

Key recommendation:

*The CHRC should commission an evaluation, for internal use and guidance, of the Arar Commission report upon its release. The evaluation should focus on such key issues as intelligence sharing, Canadian federal agency knowledge of the human rights environment at home and abroad, and the recommendations of the Arar Commission as to a review mechanism for the national security activities of the RCMP.*

## **Section 7** International Liaisons in National Security Work and Their Implications for Human Rights in Canada

Canada has long-standing security and intelligence liaison arrangements with international partners. In a formalized way, these arrangements date back to the Second World War. For most of the Cold War period, Canadian membership in a security and intelligence alliance system was considered beneficial, as it provided access to a large pool of intelligence otherwise unavailable to Canada given the limited resources it devoted to intelligence. The costs involved a possible reduction of sovereignty, should Canada be steered by the information controlled by its foreign partners or by the national self-interest of foreign states.<sup>76</sup> Human rights impacts were not a major issue, at least in the very limited public debate on such matters.

The terrorist attacks of September 11, 2001, altered the way of calculating the benefits and costs of intelligence liaison and sharing relationships. It has been widely acknowledged by Western intelligence officials that the onset of a global war on terrorism has had two major impacts. One is that the difficulty of collecting intelligence on individuals or groups that are not acting on behalf of a state and practice asymmetric warfare has forced intelligence services to put even greater emphasis on intelligence alliances than during the Cold War and post-Cold War periods. Intelligence alliances allow for increased collection, global range, and burden sharing. A second major impact has been that states have been forced to look outside the traditional network of intelligence partnerships to construct intelligence-sharing relationships with new states in threatened regions of the world that have their own internal experience of dealing with terrorism.<sup>77</sup>

The increased volume of intelligence sharing, post-9/11, among members of the traditional Western intelligence alliance (often referred to as UKUSA and now known informally as the “Five I...s”) has raised some concerns with regard to impacts on human rights. These concerns have focussed on the construction of watch lists to monitor cross-border travel, new techniques for intelligence gathering, and the extent to which the legal norms in Western states now differ following the introduction of new counter-terrorism legislation. Concerns have also been raised in regard to the US practice of “extraordinary rendition,” whereby persons the US deems to be terrorist suspects are held and transferred to foreign jurisdictions for interrogation and imprisonment.

Concerns about citizens falling into the net of extraordinary rendition intersect with the newer phenomenon of intelligence-sharing relationships with non-traditional security and intelligence partners, especially among Middle-East and South-Asian states. In constructing new intelligence relationships with such states, Western countries confront the problem posed by exchanges with states that do not respect Western norms of human rights and that practice torture on those in detention. The dilemma is real and no obvious solution is at hand. The benefits of pursuing intelligence relationships with non-traditional allies seems clear—access to potentially significant sources of information on



terrorist groups and activities. The drawbacks are equally clear: condoning repulsive legal systems and possibly abetting violations of international law banning the practice of torture.

Two general safeguards have been adopted to try to resolve the problem of intelligence sharing with non-Western states. One is to introduce systems that will ensure that Western intelligence services will attempt to exercise internal care and caution when exchanging intelligence with states whose human rights records is substandard. Such attempts have no legal enforcement mechanism and may not receive full scrutiny by review agencies. They depend on internal cultures and leadership decisions. Amnesty International (Canada) has expressed its concern about reliance on such safeguards and argued for setting clear legal restrictions on the sharing of intelligence with states with unacceptable human rights records.<sup>78</sup>

A second safeguard has been to seek assurances from foreign states that they will treat detainees humanely, as part of the process of transferring them for interrogation and incarceration. Human Rights Watch has been particularly critical of the hollowness of such assurances in its public reports.<sup>79</sup>

One of the substantial difficulties that must be faced in any public discussion of the role of security and intelligence alliances and their impact on human rights is secrecy. Intelligence alliances are shrouded in secrecy. The terms of engagement are not public documents, even with regard to agreements reached in the earliest days of the Cold War, much less more recent practice. For example, while there has been much public discussion of the formation of the UKUSA alliance in the late 1940s, which provided the foundation for all subsequent evolutions of the Western intelligence alliance, the actual documents detailing that formation of this alliance have not been released by any of the partner states (Britain, the United States, Canada, and later Australia and New Zealand).<sup>80</sup>

In the Canadian context the shroud of secrecy has been partly penetrated thanks to the activities of the Security Intelligence Review Committee (SIRC). SIRC was established under the *CSIS Act* in 1984 to review the activities of the Canadian Security Intelligence Service.<sup>81</sup> It consists of a committee of Privy Councillors appointed by the government and supported by a staff of security-cleared officials. It has full access to CSIS documents and officials and presents an annual report to the Minister (currently the Minister for Public Safety). An expurgated version of the report is presented to Parliament by the Minister.

SIRC regularly reviews liaison arrangements with foreign agencies and reports on them annually. The most recent SIRC annual report (for 2004-2005) specified that CSIS' relations with foreign entities are subject to the provisions of Section 17(1) of the *CSIS Act* and that section 38(a)(iii) of the Act directs SIRC to review all such arrangements. In its 2004-2005 annual report SIRC reviewed CSIS's exchanges of information with "close allies"; the operations of a security liaison post abroad; and the expansion of existing liaison arrangements. While SIRC pronounced itself generally satisfied, it was concerned

in some instances with inadequate documentation and unclear operational procedures for specifying responsibility for intelligence exchanges.

SIRC also drew attention to the fact that the existing assurances regarding human rights protection provided by CSIS when it enters into a new arrangement with a foreign agency could not be guaranteed. It noted that, when CSIS initiates the process, it is required to inform Foreign Affairs Canada and the Minister of Public Safety that it will “closely scrutinize the content of the information provided to, or received from, a foreign agency in order to ensure that none of the information sent to, or received from, that agency is used in the commission of, or was obtained as a result of, acts that could be regarded as human rights violations.” SIRC noted dryly that CSIS could not provide any absolute guarantee in this regard. It advised merely that the content of the letters sent to Foreign Affairs Canada and Public Safety be revised to better accord with the limits of CSIS’s knowledge and control of information.<sup>82</sup>

Ministerial direction is a crucial aspect for the establishment of relations by CSIS with foreign agencies. The establishment of new arrangements or the expansion of existing ones can be initiated by CSIS but must secure prior approval of the Minister of Public Safety in consultation with the Minister of Foreign Affairs. There is a “ministerial directive” in place that sets the conditions for such approvals. As reported by SIRC, the ministerial directive requires that four conditions must be met:

1. Foreign liaison arrangements must be required to protect Canada’s security.
2. They must be compatible with Canada’s foreign policy objectives.
3. They must respect the applicable laws of Canada.
4. “The human rights record of the country or agency is to be assessed, and the assessment weighed in any decision to enter into a cooperative relationship.”<sup>83</sup>

The fourth condition is telling. It calls for an “assessment” of the human rights record of a foreign state and for a process of “weighing” of the record against unspecified benefits in the pursuit of an intelligence relationship. Respect for human rights in such a context depends on both the quality and reliability of CSIS’s assessments of foreign countries’ rights records and of the sensitivity of the “weighing” process. Given the tight rules surrounding official secrecy, it is impossible for the public to hold CSIS to account with regard to either factor. The extent to which SIRC can successfully fill the gap is limited by the fact that its annual reports to Parliament are deliberately sanitized.

SIRC annual reports, whatever their merit, tend to gain little sustained public attention in Canada. The principal source of public controversy over Canada’s intelligence relationships with foreign states in the post-9/11 period has been the Arar case and the testimony presented in public by senior government officials to the O’Connor Commission. A key aspect to emerge from testimony has concerned the practices and policies surrounding intelligence sharing.<sup>84</sup> This testimony has shed additional light on

CSIS practices, RCMP procedures, and differences in information handling between the two security agencies. The details of the testimony given at the O'Connor Commission will not be reviewed here, but it should be noted that one of the cornerstones of the long-established practice of intelligence sharing with the United States may have been modified post-9/11 or abused post-9/11. This cornerstone is the application of information controls, known as "caveats," by both the RCMP and CSIS. Caveats were historically meant to severely limit the circulation of sensitive information exchanged between government agencies so as to protect sources and methods.

Respect for caveats is not just a matter of operational necessity. They are also a principal means by which the impact of national security investigations involving human rights and privacy can be responsibly managed. To the extent that the traditional practice of caveats is seen as a hindrance to fast-paced counter-terrorism investigations in a post-9/11 world, the danger increases that human rights and privacy protections will be sacrificed. This represents a potential abuse rather than an abuse that can be fully documented at this stage.

Justice O'Connor's findings, when released to the public, should provide substantial insights into the practice of Canadian intelligence agencies when it comes to sharing with foreign partners, both traditional and new.

Key recommendation (See also Section 6 for a similar finding):

*The CHRC should commission a study of the human rights dimensions of the O'Connor Commission report, which could provide vital foundational material for its annual "human rights report card."*

## **Section 8**      The Role of the Canadian Human Rights Commission in Fostering Knowledge and Understanding of the Interface Between security and human rights

As has been argued throughout this report, an ongoing, critical monitoring of the evolving practice of national security in Canada and its impact on human rights is essential to the maintenance of democratic norms, good governance, public confidence, and the legality and efficacy of the Canadian security and intelligence community. There are many entities in Canada that might be engaged in such sustained monitoring, including Parliament, federal government review bodies and commissioners, NGOs, private sector watchdogs, the media, and the academic community. Despite the potentially abundant sources of monitoring, the actual work done remains uncoordinated, fragmentary, discontinuous and often highly specialized. For all these reasons, the quality of monitoring, as currently performed, is insufficient.

The key challenge of this section of my report is to suggest ways in which the CHRC, while fulfilling its mandate, could also make an identifiable and unique contribution to critical and sustained monitoring of the nexus between security and rights.

The Canadian Human Rights Commission has been active since 1978, having been established to help give effect to the *Canadian Human Rights Act*. It seems fair to say that, prior to 9/11, the CHRC was not particularly active in monitoring the implications for rights of national security policy in Canada. The debate over the passage of Canada's *Anti-Terrorism Act*, Bill C-36, in the fall of 2001, awakened the CHRC's concern. The Chief Commissioner of the CHRC appeared before the House of Commons Standing Committee on Justice and Human Rights to express concerns about the proposed definition of terrorism and provisions dealing with preventive detention.<sup>85</sup>

In the CHRC's annual report for 2001 it was recognized that, while some of the Commission's concerns had been addressed in the final version of Bill C-36, "the Act still places significant restraints on civil liberties that prior to September 11 were unknown in Canada."<sup>86</sup>

The 2001 annual report applauded the fact that C-36 confirmed the role of the CHRC over discriminatory messages transmitted via the Internet, calling this one of the "positive features" of the Bill. More recently, the question of discriminatory and hate messages in a national security context has become controversial. In the aftermath of the July 2005 transit bombings in London, England, the British government attempted to bring forward new national anti-terrorism legislation, one of the most controversial elements of which was the criminalization of "incitement." The extent to which a hate crime offence might be synonymous with an act of incitement to terrorism and whether and how current Canadian law distinguishes between them is a matter that would seem to require further study. As discriminatory messages transmitted over the Internet fall directly within the CHRC's mandate, this would seem to be an important area for research, especially with regard to CHRC liaison engagements with Internet service providers and law enforcement agencies. When such messages cross over into what appears to be criminal activity, such matters are referred to the police for further action.

In its annual report for 2001, the CHRC also called attention to the need to "better educate the general public and law enforcement officials about human rights."<sup>87</sup> This duty, it was suggested, fell primarily to the federal government. The demand also provides an important opening for the CHRC and a potential definition of its future role. While the federal government has identified a need to educate the public on national security matters and has taken some important initiatives, such as the release of the national security strategy document in April 2004, public education cannot be left to the government alone.

In the period since the release of its annual report in 2001, the CHRC has engaged in some forward thinking about broader initiatives in the field of Canadian human rights. A consultation paper, "Looking Ahead," produced in September 2004, included a suggestion for a new emphasis on a research capacity to monitor the human rights landscape in Canada and the production of a "periodic report on the state of human rights in Canada." This might be achieved by "developing human rights indicators to allow assessment of progress."<sup>88</sup>

While it would be a departure from past practice and certainly take the CHRC in new directions, the CHRC should seek to establish itself as an authoritative source for public understanding of national security and human rights issues in a Canadian context.

The key to the success of this initiative would be to ensure that the CHRC uses its research program in such a way that it complements, rather than overlaps or duplicates, the initiatives and reporting undertaken by other agencies in both the public and the private sector. This would require the CHRC to be fully informed about the activities of other stakeholders in the field of national security and rights in Canada. These stakeholders would include

Amnesty International (Canada)<sup>89</sup>

Canadian Civil Liberties Association<sup>90</sup>

Law Reform Commission of Canada<sup>91</sup>

Human Rights Watch<sup>92</sup>

Canadian Association of University Teachers<sup>93</sup>

Canadian Bar Association<sup>94</sup>

Rights and Democracy<sup>95</sup>

Canadian Association for Security and Intelligence Studies<sup>96</sup>

In addition, the CHRC could perform an invaluable service by using its website as a comprehensive portal directing attention not only to its own work but also to the selected work of other governmental and nongovernmental agencies reporting on national security and human rights in Canada. At present, no such portal exists. The principle of “one-stop shopping” for authoritative information on rights and security is an important one, given the current fragmentary nature of expertise in Canada.

Key recommendation:

*The CHRC should consider covering the issue of national security and human rights protection in its planned human rights report card. A possible indicator would be the number of national security cases involving Canadian citizens, residents and immigrants and refugees.*

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*Note: This is a “selected” bibliography representing published works that, in the opinion of the author, are significant contributions to the study of national security and human rights in Canada. It is not a comprehensive bibliography on all aspects of the field but is tailored to reflect the eight issues discussed in my report. The bibliography does not include media reports. For websites consulted in drawing up my report, please see the individual citations in the endnotes section.*

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## APPENDIX A

### CONSOLIDATED RECOMMENDATIONS

This table is drawn from the body of my report and lists the specific recommendations for future research endeavours to be supported by the Canadian Human Rights Commission. Reference is made to the section of the report from which these recommendations are drawn. Items are listed in order of their appearance in the report.

1. *The CHRC should commission a study of the human rights implications of the Smart Border Agreement and Action Plan [Section 1]*
2. *The CHRC should engage in a study of Canadian federal agency “watch lists,” to monitor their compliance with human rights legislation and to make recommendations with regard to safeguards and appeals mechanisms. [Section 1]*
3. *The CHRC should keep a watching brief on the Parliamentary Review of the Anti-Terrorism Act and should be ready to provide an assessment of the Parliamentary committees’ reports as soon as these are issued (by December 2006, unless an extension is granted by Parliament) [Section 2]*
4. *The CHRC should study the immigration security certificate process under three main headings: a) detention and bail conditions; b) the accused individual’s access to evidence against him; and c) safeguards in the conduct of removal orders. This study should seek to determine the extent to which human rights concerns have been properly recognized in the use of security certificates. [Section 3]*
5. *Knowledge of the functioning of the security and intelligence community is critical to understanding the landscape of both security policy and human rights protections. To this end, the CHRC should consider monitoring legislative changes in the mandate of national security agencies. [Section 4]*
6. *The CHRC should build a database of human rights concerns from the reports issued to date by review agencies responsible for security and intelligence. The purpose of this study would be to assess the extent to which such review agencies have paid systematic attention to human rights issues and in their reporting have revealed any cumulative trends of concern. The material to be studied would include available public domain reports from the CSIS IG, SIRC, the CSE Commissioner, the RCMP Public Complaints Commission, and the Auditor General. This database could be an important element of the CHRC “human rights report card.” [Section 5]*
7. *The CHRC should commission an evaluation, for internal use and guidance, of the Arar Commission (O’Connor) report upon its release. The evaluation should focus on such key issues as intelligence sharing, Canadian federal agency knowledge of the human rights environment at home and abroad, and the recommendations of the Arar*

*Commission as to a review mechanism for the national security activities of the RCMP.  
[Section 6]*

8. *The CHRC should commission a study of the human rights dimensions of the Arar Commission (O'Connor) report, which could provide vital foundational material for its annual "human rights report card." [Section 7]*

9. *The CHRC should consider covering the issue of national security and human rights protection in its planned human rights report card. A possible indicator would be the number of national security cases involving Canadian citizens, residents and immigrants and refugees. [Section 8]*

## APPENDIX B

### PROPOSAL FOR AN EXPERT ADVISORY COUNCIL TO ASSIST THE WORK OF THE CHRC

This report demonstrates the wide range of topics pertinent to national security and human rights in Canada that need further study. The report also suggests that the current conditions for the study of national security and rights issues in Canada are not satisfactory. While valuable attention is paid to such issues by many different public and private sector agencies, the overall effort can be categorized as highly specialized, autonomous, and unsystematic.

On the assumption that future developments in the field of national security policy in Canada will continue to have a major impact on human rights concerns, there is a powerful incentive for the Canadian Human Rights Commission to provide leadership in supporting cutting-edge research by Canadians on Canadian issues. Such research should be informed by the highest standards of scholarship, but it should also be aimed at providing the best possible body of information for the general public.

Given the diverse array of topics needing study and the onus on exceptional-quality work, this report recommends that the CHRC establish an advisory group to assist it in establishing a plan for research.

The advisory group should be kept small to ensure functionality, and its membership should serve for fixed terms, probably two years, with the possibility of renewal. It would be important to continually refresh the membership of the group in order to ensure the best possible advice to the Commission.

Determination of the broad principles of membership in such an advisory group would be crucial. The key considerations regarding the makeup of an advisory group would include the following:

1. Demonstrable expert credentials on the part of all members.
2. Interest in public policy and in the dissemination of public knowledge.
3. Interdisciplinarity. The group should consist of a representative array of experts including social scientists, legal scholars, and public policy experts. To be useful, it might consist of individuals with operational experience, including lawyers, former government officials, retired policy makers, and former politicians.
4. Multicultural makeup. Given the perceived impact of national security on the rights of “victimized” communities in Canada, it would be important to have expert representation from such communities included in the advisory group.

5. Gender. National security policy may impact on rights in ways that are gender-specific. It would be important for the work of any advisory group to have representation from knowledgeable people capable of reflecting on the gender dimensions of security and rights.

There are many different mechanisms possible for selecting the members of an advisory group. For the sake of simplicity, the best approach might be to place selection responsibility in the hands of the Commissioner.

The mandate of an advisory group would be as important to its success as its membership. The mandate should include: maintaining a priority list of topics for research; working with the Commissioner and research staff of the CHRC to establish research proposal designs; providing advice on a database of research expertise in Canada to be maintained by the CHRC; assisting in the selection process for research contracts; providing input where required with regard to ongoing research projects and final reports. Such a mandate would allow the staff of the CHRC to supplement its in-house resources and help ensure quality control in the CHRC's research program.

If the CHRC is going to embrace a research program on national security and human rights in order to inform its work and pursue its mandate, then it will be important for the Commission's staff to be able to identify not only those with appropriate credentials to serve on an advisory group but also the roster of expert researchers in Canada suitable for specified projects. The research staff of the CHRC can be usefully assisted in this task by the advisory group, if established. It would be valuable to maintain list of experts and to supplement it with a bibliography of published works relating to national security and human rights in Canada. This bibliography should be posted and kept updated on the CHRC website.

## APPENDIX C

### LIST OF ACADEMIC EXPERTS

Any list of academic experts in Canada on national security and human rights would need to be shaped by the particular questions under study at any given time. But the Canadian academic community with expertise in the field is relatively small. The following list is based on the author's reading and exposure over a period of years. It is organized alphabetically by name, with university affiliation given, and with a brief indication of known research interests.

David Bercuson, University of Calgary, Centre for Strategic and Military Studies, Canadian military, national security

Jean-Paul Brodeur, Université de Montréal, Canadian security, Quebec policing, terrorism

Jutta Bruneo, University of Toronto, Faculty of Law, international law, conflict

Michael Byers, University of British Columbia, international law, Arctic security, Canadian foreign policy

Gavin Cameron, University of Calgary, nuclear terrorism, transportation security

David Charters, University of New Brunswick, terrorism and counter-terrorism, low intensity conflict

François Crépeau, Université de Montréal, international migration law

David de Witt, York University, international security, Asia-Pacific, Canadian defence

John English, University of Waterloo, Canadian national security policy, Parliament, Canadian foreign policy

Stuart Farson, Simon Fraser University, Canadian intelligence, policing, role of Parliament, security in urban environments

David Haglund, Queen's University, defence policy, Canada-US relations; Canada-EU relations

Thomas Homer-Dixon, Trudeau Centre for Peace and Conflict Studies, University of Toronto, energy security, natural resources scarcity, terrorism

Brian Job, University of British Columbia, Asia-Pacific security, Canadian policy

Edna Keeble, St. Mary's University, Halifax, national security policy, immigration, minority rights

Arne Kislenko, Ryerson University, Toronto, national security and immigration policy, border security

Andy Knight, University of Alberta, United Nations, international organizations

Audrey Macklin, University of Toronto Faculty of Law, border security, immigration and refugees

Louis Pauly, Munk Centre for International Studies, University of Toronto, North American economic policy, Canada-US economic relations

Wesley Pue, University of British Columbia, Faculty of Law, anti-terrorism legislation

Kent Roach, University of Toronto, Faculty of Law, Canadian national security law

Stéphane Roussel, Université du Québec à Montréal, border security, North American security relationships

Martin Rudner, Carleton University, Canadian intelligence, critical infrastructure protection

Joel Sokolsky, Royal Military College, defence policy, North American security

Denis Stairs, Dalhousie University (retired), national security policy, foreign affairs

Janice Stein, Munk Centre for International Studies, University of Toronto, foreign policy, Middle East

Peter Stoett, Concordia University, bio-terrorism

Wesley Wark, Munk Centre for International Studies, University of Toronto, intelligence, national security policy, terrorism and counter-terrorism

Reg Whitaker, University of Victoria, Canadian intelligence, national security, immigration, air transport security



## ENDNOTES

<sup>1</sup> I am attracted by the thinking of Irwin Cotler on this matter, especially his view that the foundational principle in all matters of national security and human rights is to find their meeting ground in a conception of “human security.” See Irwin Cotler, “Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy,” in Ronald J. Daniels et al., eds., The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill (Toronto: University of Toronto Press, 2001), p. 112.

<sup>2</sup> Public Safety and Emergency Preparedness Canada, Archive, “An Overview of Canada’s Counter-Terrorism Arrangements,” n.d., at [http://ww2.psepc-sppcc.gc.ca/publications/national\\_security/terrorism\\_arrangements\\_e.asp](http://ww2.psepc-sppcc.gc.ca/publications/national_security/terrorism_arrangements_e.asp).

<sup>3</sup> Department of Finance, Canada, Budget 2001, “Enhancing Security for Canadians,” at <http://www.fin.gc.ca/budget01/booklets/bksece.htm>.

<sup>4</sup> On this point, see Wesley Wark, “Learning Lessons (and how) in the War on Terror: The Canadian Experience,” International Journal, vol. LX, no. 1 (Winter 2004-2005), pp. 82-83.

<sup>5</sup> See Reg Whitaker, “Securing the ‘Ontario-Vermont border’: Myths and Realities in Post-9/11 Canadian-American Security Relations,” International Journal, LX, no. 1 (Winter 2004-2005), 53-70.

<sup>6</sup> Canada, Department of Foreign Affairs and International Trade, “32-point Action Plan,” January 13, 2005, [www.dfait-maeci.gc.ca/can-am/main/border/32\\_point\\_action-en.asp](http://www.dfait-maeci.gc.ca/can-am/main/border/32_point_action-en.asp).

<sup>7</sup> Department of Foreign Affairs, “Smart Border Action Plan Status Report,” December 17, 2004, at <http://dfait-maeci.gc.ca/world/site/>.

<sup>8</sup> Whitaker, “Securing the ‘Ontario-Vermont border,’” p. 66.

<sup>9</sup> *Ibid.*

<sup>10</sup> Citizenship and Immigration Canada, News Release, “Safe Third Country Agreement Comes into Force Today,” December 29, 2004. [www.cic.gc.ca/english/press/04/0420-pre.html](http://www.cic.gc.ca/english/press/04/0420-pre.html).

<sup>11</sup> François Crépeau and Delphine Nakache, “The Control of Irregular Migration in Canada: Placing Security Concerns within the Framework of Human Rights Protection,” Institute for Research on Public Policy, Choices, vol. 12, no. 1 (Feb. 2006), p. 18, at [www.irpp.org](http://www.irpp.org). See also Audrey Macklin, “The Values of the Canada-US Safe Third Country Agreement,” (Ottawa: Caledon Institute of Social Policy, 2003).

<sup>12</sup> KAIROS, Canadian Ecumenical Justice Initiatives, “Safe Third Country Agreement,” Dec. 17, 2004, at [www.kairoscanada.org/e/refugees/safeCountry/index.asp](http://www.kairoscanada.org/e/refugees/safeCountry/index.asp).

<sup>13</sup> Canadian Council for Refugees, “10 Reasons Why Safe Third Country is a Bad Deal,” Feb. 2005, [www.web.net/%7Eccr/10reasons.html](http://www.web.net/%7Eccr/10reasons.html).

<sup>14</sup> Foreword by Prime Minister Paul Martin, “Securing an Open Society: Canada’s National Security Policy,” [www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat\\_e.pdf](http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf).

<sup>15</sup> *Ibid.*

<sup>16</sup> Edna Keeble, Defining Canadian Security: Continuities and Discontinuities,” American Review of Canadian Studies, 35 (Spring 2005).

<sup>17</sup> Bill C-36, Royal Assent version at [http://www.parl.gc.ca/37/1/parlbus/chambers/house/bills/government/C-36/C-36\\_4/90168b-3E.html#12](http://www.parl.gc.ca/37/1/parlbus/chambers/house/bills/government/C-36/C-36_4/90168b-3E.html#12).

<sup>18</sup> Ronald J. Daniels et al., eds. The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill (Toronto: University of Toronto Press, 2001).

<sup>19</sup> Thomas Gabor, editor, “The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act,” Department of Justice, March 31, 2004. Section 6.1, p. 24. Released in 2005 and available at <http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-1/rr05-1.pdf>.

<sup>20</sup> Patrick Macklem, “Canada’s Obligations at International Criminal Law,” in Daniels, ed., The Security of Freedom, p. 362.

<sup>21</sup> On this general point, see Wesley K. Wark, “Intelligence Requirements and Anti-Terrorism Legislation,” in Daniels, ed., The Security of Freedom, esp. pp. 288-89.

<sup>22</sup> Department of Justice, “The ATA in Perspective,” n.d., at [www.justice.gc.ca/en/anti\\_terr/perspective\\_page2.html](http://www.justice.gc.ca/en/anti_terr/perspective_page2.html).

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- <sup>23</sup> Kent Roach, "The New Terrorism Offences and the Criminal Law," in Daniels, ed., The Security of Freedom, p. 151.
- <sup>24</sup> Joint Statement by McLellan and Cotler, p. 3.
- <sup>25</sup> *Ibid.*, pp. 6-7.
- <sup>26</sup> The Research and Statistics Division of the Department of Justice conducted studies of minority group attitudes to the ATA in March 2003. They followed this up with a study of broad Canadian public views in 2004. The latter study was based on focus group methodology and conducted by the firm of Millward, Brown, Goldfarb. See Department of Justice, "Public Views on the Anti-Terrorism Act," Executive Summary, at [http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-3/rr05\\_3\\_01.html](http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-3/rr05_3_01.html).
- <sup>27</sup> *Ibid.*, Executive Summary, p. 2.
- <sup>28</sup> Bruce Hoffman, Inside Terrorism (NY: Columbia University Press, 1998), Chapter 1, "Defining Terrorism."
- <sup>29</sup> Sections 83.18 to 83.23 of the *Anti-Terrorism Act*.
- <sup>30</sup> Bill C-36, the *Anti-Terrorism Act*, [http://www.parl.gc.ca/37/1/parlbus/chambers/house/bills/government/C-36/C-36\\_4?90168b-#E.html#12](http://www.parl.gc.ca/37/1/parlbus/chambers/house/bills/government/C-36/C-36_4?90168b-#E.html#12).
- <sup>31</sup> The Hon. Anne McLellan, Minister of Justice and Attorney General, addressing the House of Commons on October 16, 2001. At [www.parl.gc.ca/37/1/parlbus/chambus/house/debates/095\\_2001-10-16/han095\\_1010\\_E.html#Int-56581](http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/095_2001-10-16/han095_1010_E.html#Int-56581).
- <sup>32</sup> See, for example, Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism," in Ronald J. Daniels, et al., eds., The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (Toronto: University of Toronto Press, 2001), 131-47.
- <sup>33</sup> *Ibid.*, 133-35.
- <sup>34</sup> The investigative hearing involved Satnam Reyat, the wife of Inderjit Singh Reyat. The Supreme Court upheld the constitutionality of the investigative hearing process on June 23, 2004, but the hearing itself did not proceed. Satnam Reyat was never called to testify at the Air India trial.
- <sup>35</sup> RCMP statement regarding the case of Mohammad Momin Khawaja, April 2, 2004. Quoted at CBC News In-depth: Canadian Security, at [www.cbc.ca/news/background/cdnsecurity/khawaja\\_mohammad.html](http://www.cbc.ca/news/background/cdnsecurity/khawaja_mohammad.html).
- <sup>36</sup> Department of Justice, "Annual Report concerning Investigative Hearings and Recognizance with Conditions, December 24, 2003 – December 23, 2004," at [www.justice.gc.ca/en/anti\\_terr/annualreport\\_2003-2004.html](http://www.justice.gc.ca/en/anti_terr/annualreport_2003-2004.html).
- <sup>37</sup> *Ibid.*
- <sup>38</sup> Minutes of the meetings and evidence presented to the House of Commons Subcommittee on Public Safety and National Security during the 39<sup>th</sup> Parliament, 1<sup>st</sup> session, can be found at [www.parl.gc.ca/committee/CommitteeList.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e21\\_&COM=9242](http://www.parl.gc.ca/committee/CommitteeList.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e21_&COM=9242). The material for the Senate Special Committee can be accessed at [http://www.parl.gc.ca/common/Committee\\_SenHome.asp?Language=E&Parl=38&Ses=1&comm\\_id=597](http://www.parl.gc.ca/common/Committee_SenHome.asp?Language=E&Parl=38&Ses=1&comm_id=597). Both committees ceased their work in late November 2005.
- <sup>39</sup> Joint Statement by the Hon. Anne McLellan, Deputy Prime Minister and the Minister of Public Safety and Emergency Preparedness and the Hon Irwin Cotler, Minister of Justice and Attorney General of Canada, on occasion of appearances before the Senate Special Committee on the Anti-Terrorism Act and the House of Commons Subcommittee on Public Safety and National Security, November 14, 2005, p. 18. At [www.justice.gc.ca/en/news/sp/2005/doc\\_31726.html](http://www.justice.gc.ca/en/news/sp/2005/doc_31726.html)
- <sup>40</sup> *Ibid.*
- <sup>41</sup> Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy, in Daniels, ed. The Security of Freedom, p. 129.
- <sup>42</sup> Kent Roach, September 11: Consequences for Canada (Montreal: McGill-Queen's University Press, 2003), p. 70.
- <sup>43</sup> Department of Justice Canada, *Public Safety Act*, 2002, at <http://laws.justice.gc.ca/en/P-p31.5/255438.html>.
- <sup>44</sup> Department of National Defence, Backgrounder, "Highlights of the Public Safety Act, 2002," May 6, 2004, at [http://www.forces.gc.ca/site/newsroom/view\\_news\\_e.asp?id=1375](http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1375).

- <sup>45</sup> Notes for an Address by The Hon. Joe Volpe, Minister of Citizenship and Immigration, before a meeting of the Special Senate Committee on the Anti-Terrorism Act, Nov. 14, 2005 at [www.cic.gc.ca/english/press/speech%2D2005/anti%2Dterrorism.html](http://www.cic.gc.ca/english/press/speech%2D2005/anti%2Dterrorism.html).
- <sup>46</sup> Joint Statement by the Hon. Anne McClellan, Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness, and the Hon. Irwin Cotler, Minister of Justice and Attorney General of Canada, before the Senate Special Committee on the Anti-Terrorism Act and the House of Commons Subcommittee on Public Safety and National Security, November 14, 2005 at [www.justice.gc.ca/en/news/sp/2005/doc\\_31726.html](http://www.justice.gc.ca/en/news/sp/2005/doc_31726.html).
- <sup>47</sup> It should be noted that previous Supreme Court reviews of aspects of the security certificate process have upheld its constitutionality.
- <sup>48</sup> McClellan and Cotler joint statement, *op. cit.*
- <sup>49</sup> The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Under Article 3, no person may be returned to another state where “there are substantial grounds for believing he would be in danger of being subjected to torture.” This principle is known as “non-refoulement.”
- <sup>50</sup> Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada, 2002, SCC1 File no. 27790, January 11, 2002, at [www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1\\_0003.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html).
- <sup>51</sup> Privy Council Office, “The Canadian Security and Intelligence Community: Helping Keep Canada and Canadians Safe and Secure,” March 2001. This booklet, also posted on the PCO website, [www.pco-bcp.gc.ca](http://www.pco-bcp.gc.ca), has not been updated since March 2001.
- <sup>52</sup> CATSA mandate, [www.catsa-acsta.gc.ca/english/about\\_propos/mandat.htm](http://www.catsa-acsta.gc.ca/english/about_propos/mandat.htm).
- <sup>53</sup> The Public Safety portfolio has a current annual budget of \$5 billion and employs 52,000 people across Canada. See [www.psepc-sppcc.gc.ca/abt/wwa/index-en.asp](http://www.psepc-sppcc.gc.ca/abt/wwa/index-en.asp).
- <sup>54</sup> Auditor General of Canada, March 2004 Report, Chapter 3, “National Security in Canada,” 3.15 and 3.16.
- <sup>55</sup> It should be noted that there are Parliamentary committees which have stepped into the breach, including a subcommittee on national security of the House of Commons Justice Committee and the Senate Committee on National Security and Defence.
- <sup>56</sup> David E. Smith, “Clarifying the Doctrine of Ministerial Responsibility as it Applies to the Government and Parliament of Canada,” *Restoring Accountability - Research Studies*, vol. 1, Commission of Inquiry into the Sponsorship Program and Advertising Activities (Gomery Inquiry), p.133. Accessed at [www.gomery.ca/en/phase2report/volume1/CISPAA\\_vol1\\_4.pdf](http://www.gomery.ca/en/phase2report/volume1/CISPAA_vol1_4.pdf).
- <sup>57</sup> “Duties of the Inspector General,” [www.psepc-sppcc.gc.ca/abt/wwa/igcsis/igcsis-en.asp](http://www.psepc-sppcc.gc.ca/abt/wwa/igcsis/igcsis-en.asp).
- <sup>58</sup> Copies of the CSIS IG certificates for the period 2000 to 2004, released under the *Access to Information Act*, are available on the website of the Department of Public Safety, at [www.psepc-sppcc.gc.ca/abt/wwa/igcsis/igcsis-en.asp](http://www.psepc-sppcc.gc.ca/abt/wwa/igcsis/igcsis-en.asp).
- <sup>59</sup> Wesley Wark, “Learning Lessons (and how) in the War on Terror: The Canadian Experience,” *The International Journal*, LX, no. 1 (Winter 2004-2005), 71-90.
- <sup>60</sup> SIRC annual reports are posted on the Committee’s website at [www.sirc-csars.gc.ca/reports\\_e.html](http://www.sirc-csars.gc.ca/reports_e.html).
- <sup>61</sup> Mandate of the Office of the Communications Security Establishment Commissioner, at [http://csec-csec.gc.ca/mandate/index\\_e.php](http://csec-csec.gc.ca/mandate/index_e.php). The mandate is formally set out in Part V.1 of the *National Defence Act* and in section 15 of the *Security of Information Act*.
- <sup>62</sup> “Review Function,” Office of the CSE Commissioner, *ibid.*
- <sup>63</sup> The CSE Commissioner’s website also notes that other agencies may be involved in examining the activities of the CSE. The agencies listed are the Canadian Human Rights Commission, the Privacy Commissioner, the Information Commissioner, the Commissioner of Official Languages and the Auditor General of Canada, *ibid.*
- <sup>64</sup> CPC News Release, “Commission for Public (EDITOR’s note – footnote incomplete)
- <sup>65</sup> Supplementary Submission of the Commission for Public Complaints against the RCMP Regarding the Policy Review of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, October 18, 2005, “Conclusion,” at [www.cpc-cpp.gc.ca/DefaultSite/Reppub/index\\_e.asp?article=90](http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.asp?article=90).
- <sup>66</sup> *Ibid.*
- <sup>67</sup> OAG, “The Canadian Intelligence Community: Control and Accountability,” [www.oag-bvg.gc.ca/domino/reports.nsf/1996](http://www.oag-bvg.gc.ca/domino/reports.nsf/1996).

- <sup>68</sup> Ibid, “Conclusion.”
- <sup>69</sup> Report of the Auditor General of Canada, Chapter 3, “National Security in Canada—the 2001 Anti-Terrorism Initiative,” conclusion, at 3.161, accessed at [www.oag-bvg.gc.ca](http://www.oag-bvg.gc.ca).
- <sup>70</sup> Government of Canada passport, as it appears on the inside cover.
- <sup>71</sup> *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982 (UK)*, c. 11. “Legal Rights,” paragraph 7. Accessed at <http://laws.justice.gc.ca/en/charter/index.html>.
- <sup>72</sup> <http://www.voyage.gc.ca/main/before/faq/tip-en.asp#ci>.
- <sup>73</sup> Vienna Convention on Consular Relations, accessed at <http://laws.justice.gc.ca/en/F-29.4/60418.html#rid-60420>.
- <sup>74</sup> Jennifer Stoddart, “Transferring Personal Information about Canadians Across Borders—Implications of the USA Patriot Act: Submission of the Office of the Privacy Commissioner of Canada to the Office of the Information and Privacy Commissioner for British Columbia,” August 18, 2004, accessed at [www.privcom.gc.ca/media/nr-c/2004/sub\\_usapa\\_040818\\_e.asp](http://www.privcom.gc.ca/media/nr-c/2004/sub_usapa_040818_e.asp).
- <sup>75</sup> Ibid.
- <sup>76</sup> This concern is at the heart of the book by James Littleton, *Target Nation: Canada and the Western Intelligence network* (Toronto: Lester and Orpen Dennys, 1986). A memoir by a former official of the Communications Security Establishment alleges that Canadian intelligence agencies engaged in sensitive intelligence gathering activities on behalf of their foreign partners. Mike Frost, *Spyworld: Inside the Canadian and American Intelligence Establishments* (Toronto: Doubleday, 1994).
- <sup>77</sup> Sir Richard Dearlove, former Chief, British Secret Intelligence Service (1999-2004), “The Craft of Intelligence in an Age of Terrorism,” University of Toronto, March 29, 2006, notes in possession of the author.
- <sup>78</sup> Amnesty International (Canada), “Agenda for Real Security,” accessed at [www.amnesty.ca/realsecurity/](http://www.amnesty.ca/realsecurity/).
- <sup>79</sup> Human Rights Watch, “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” April 15, 2005, accessed at <http://hrw.org/reports/2005/eca0405/eca0405.pdf>.
- <sup>80</sup> Martin Rudner, “Canada’s Communication Security Establishment: From Cold War to Globalization,” Occasional Paper # 22, 2000. Norman Paterson School of International Affairs, Carleton University. Copy in possession of the author.
- <sup>81</sup> Bill C-9, “An Act to Establish the Canadian Security Intelligence Service, July 1984.
- <sup>82</sup> SIRC Annual Review, 2004-05, pp. 23-26, 31-36. Available online at [www.sirc-csars.gc.ca](http://www.sirc-csars.gc.ca).
- <sup>83</sup> Ibid, at p. 36.
- <sup>84</sup> Note in particular the testimony by senior CSIS officials Ward Elcock and Jack Hooper and senior RCMP officials Gary Loeppky and Mike Cabana. Arar Commission website, testimony at [www.ararcommission.ca/eng/11e.htm](http://www.ararcommission.ca/eng/11e.htm).
- <sup>85</sup> Canadian Human Rights Commission, 2001 Annual Report, accessed at [www.chrc-ccdp.ca/publications/2001\\_ar/default-en.asp](http://www.chrc-ccdp.ca/publications/2001_ar/default-en.asp).
- <sup>86</sup> Ibid.
- <sup>87</sup> Ibid.
- <sup>88</sup> CHRC, “Looking Ahead,” Consultation Paper, September 2004, accessed at [www.chrc-ccdp.ca/pdf/consultation\\_en.pdf](http://www.chrc-ccdp.ca/pdf/consultation_en.pdf). Cited under Principle IV, “A Preventive and Forward-Looking System.” See also the CHRC *Annual Report* for 2003.
- <sup>89</sup> [www.amnesty.ca](http://www.amnesty.ca). See especially the Amnesty “Agenda for Real Security” at [www.amnesty.ca/realsecurity/](http://www.amnesty.ca/realsecurity/).
- <sup>90</sup> [www.ccla.org](http://www.ccla.org). For the CCLA 2005 statement on the *Anti-Terrorism Act*, see [www.ccla.org/pos/briefs/](http://www.ccla.org/pos/briefs/).
- <sup>91</sup> [www.lcc.gc.ca](http://www.lcc.gc.ca). The Law Reform Commission hosted a conference on the *Anti-Terrorism Act* in the spring of 2002.
- <sup>92</sup> [www.hrw.org](http://www.hrw.org). The Human Rights Watch maintains a section on its website entitled “Human Rights Watch work on: Counterterrorism in Canada.”
- <sup>93</sup> The CAUT maintains a “War on Terrorism Watch: CAUT Resource Page” at [www.waronterrorismwatch.ca/default.asp](http://www.waronterrorismwatch.ca/default.asp).
- <sup>94</sup> [www.cba.org](http://www.cba.org). See the CBA’s 2005 brief on the need for revisions of the *Anti-Terrorism Act* at [www.cba.org/cba/news/2005\\_releases/2005-05-02\\_antiterror.aspx](http://www.cba.org/cba/news/2005_releases/2005-05-02_antiterror.aspx).
- <sup>95</sup> [www.dd-rd.ca](http://www.dd-rd.ca).
- <sup>96</sup> [www.casis.ca](http://www.casis.ca).