HOUSE OF COMMONS
CANADA

RIGHTS, LIMITS, SECURITY: A COMPREHENSIVE REVIEW OF THE ANTI-TERRORISM ACT AND RELATED ISSUES

Final Report of the Standing Committee on Public Safety and National Security

Garry Breitkreuz, MP
Chair

Subcommittee on the Review of the Anti-terrorism Act

Gord Brown, MP
Chair

March 2007

39th PARLIAMENT, 1st SESSION

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Thirty-Eighth Parliament, 1st Session

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ORDERS OF REFERENCE

Extract from the Journals of the House of Commons of Tuesday April 25, 2006

By unanimous consent, it was moved, — That,

the Standing Committee on Justice and Human Rights be the committee for the purposes of Section 145 of the Anti-terrorism Act (2001) and that, pursuant to Subsection 145(2) of that Act, the committee report no later than June 23, 2006.

The question was put on the motion and it was agreed to on division.

ATTEST

AUDREY O'BRIEN
Clerk of the House of Commons

Extract from the Journals of the House of Commons of Friday May 19, 2006

By unanimous consent, it was moved, — That,

notwithstanding the Order made on Tuesday, April 25, 2006, the Standing Committee on Public Safety and National Security be the committee for the purposes of section 145 of the Anti-terrorism Act (2001).

The question was put on the motion and it was agreed to on division.

ATTEST

AUDREY O'BRIEN
Clerk of the House of Commons

Extract from the Journals of the House of Commons of Friday, February 23, 2007

By unanimous consent, it was ordered, — That,

notwithstanding the Orders made on Tuesday, April 25, 2006, Thursday, June 22, 2006, and Wednesday, December 13, 2006, the Standing Committee on Public Safety and National Security be authorized to continue its deliberations relating to its review of the Anti-terrorism Act (2001) beyond February 28, 2007, and present its final report no later than Tuesday, March 27, 2007.

ATTEST

AUDREY O'BRIEN
Clerk of the House of Commons

THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

has the honour to present its

SEVENTH REPORT

During the Thirty-Eighth Parliament, the review of the *Anti-terrorism Act* and related matters was begun by the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. The Subcommittee did not complete its review before the Thirty-Eighth Parliament was dissolved in November 2005.

In the Thirty-Ninth Parliament, the review of the *Anti-terrorism Act* was then referred to this Committee, pursuant to the Order of Reference made by the House of Commons on May 19, 2006. Then, on May 29, 2006, pursuant to its mandate under Standing Order 108(1), your Committee established a Subcommittee with the mandate, pursuant to the Order of Reference, to review the *Anti-terrorism Act* and, as part of that review, to also undertake a review of Section 4 of the *Security of Information Act* and the use of security certificates, and prepare a report on these matters.

The Subcommittee completed its study on February 20, 2007 and presented its report to the Standing Committee on March 20, 2007. After considering the report of the Subcommittee, the Standing Committee adopted the report on March 20, 2007 and agreed to report the following:

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CHAPTER ONE: INTRODUCTION

Canada has not been immune from terrorist activity or the damage caused by it. Between 1973 and 2003 in Canada, it has been estimated there were 6 hijackings, 2 airplane bombings, 73 disruptive hoaxes, 9 hostage takings or kidnappings, 4 letter bombs, 170 bombs, firebombs and arsons, 59 threats, 35 attacks on individuals, 45 acts of vandalism, 14 plots and foiled attacks, and 32 instances of support for terrorist activity.[1] These acts were carried out by groups and individuals as part of different types of political and social action campaigns and activities in different parts of Canada. Most of these actions, however, were not trans-national in character and none had the impact of the September 2001 attack on the United States.

Prior to 2001, Canada had entered into a number of international agreements related to the prevention, detection, and punishment of terrorist activity within its borders and throughout the world. As well, during the 1990's, much policy development had taken place within government with respect to national security and counterterrorism strategies. Canada had not, however, taken all the legislative steps seen as required to fully respect its international obligations. This changed dramatically with the September 11, 2001 terrorist attacks on the United States.

These attacks, which took advantage of the easy travel and openness that is characteristic of twenty-first century democratic societies in order to launch terrorist acts against them, were devastating. They showed that the strengths of these societies were also their most obvious weaknesses. Their openness, technology, and ease of mobility provided the weapons used to attack them. The consequences of these attacks were immediate — economies were undermined, travel was curtailed, borders were closely controlled, the adequacy of law enforcement and intelligence institutions was seriously questioned, suspicions of particular ethno-cultural groups were aroused, and the ability of democratic institutions to adequately respond to the terrorist threat was put into doubt.

[1] Leman-Langlois, Stephane and Jean-Paul Brodeur, "Terrorism Old and New: Counter-Terrorism in Canada", *Police Practice and Research*, Vol. 6 No. 2, May 2005, pp. 121-140, at p. 123.

It was within this context that the international community took action. Numerous international agreements intended to prevent and counter terrorist activity had already been negotiated, ratified and put into place. The September 11 events brought a sense of urgency to taking further effective actions of many kinds against the emerging threat of terrorist activity. Canada was no exception to this worldwide trend.

Partly in response to a United Nations Security Council obligation placed on member states of the UN, Parliament adopted the *Anti-terrorism Act.* Rather than enacting temporary, emergency legislation, Parliament amended existing Acts and adopted a number of new legislative measures. Among the Acts amended were the *Criminal Code*, the *Canada Evidence Act*, the *National Defence Act*, the *Canadian Security Intelligence Service Act* and the *Official Secrets Act*. This was complex legislation, dealing with difficult issues in a highly charged atmosphere characterized by much fear and uncertainty about the unknown.

The *Anti-terrorism Act* attempted to balance divergent interests and requirements throughout all of its provisions, starting with the Preamble and ending with a clause requiring a parliamentary review of its provisions and operation. The legislation was intended to strengthen Canada's capacity to prevent terrorist activity before it occurs, and to disrupt, disable, and dismantle terrorist groups before they can act. The Act was adopted to comply with Canada's international obligations. The goal was to achieve these objectives in a manner consistent with constitutionally guaranteed rights and freedoms.

Parliament recognized in adopting this legislation that it has a role in this area beyond that of law-making alone. One of the functions traditionally performed by legislatures and legislators is to ensure that legislation is applied in a manner consistent with constitutionally guaranteed rights and freedoms. This is done by conducting reviews and oversight of laws and programs authorized by Parliament itself. This is especially important in relation to activities intended to combat terrorist activity where pre-emptive, preventive, and punitive steps have to be taken in a manner respectful of rights and freedoms, due process, and natural justice. What appear to be irreconcilable imperatives and principles may not in reality be that far apart from one another. This is where Parliament can have an impact in making such assessments of actions authorized under the legislation it has adopted.

Recognizing this as an essential function for it to carry out in relation to measures intended to counter terrorist activity, Parliament included section 145 in the *Anti-terrorism Act*. This clause required a comprehensive parliamentary review of the provisions and operation of the Act to be carried out three years after it received royal assent. This review was to have been completed within a year after it had been undertaken, subject to any extensions authorized by Parliament.

The statutorily required review of the *Anti-terrorism Act* was started in December 2004 by the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. However, Parliament was dissolved in November, 2005 before the review could be completed. This task was then taken up by this Subcommittee.

In continuing the review started by its predecessor, the Subcommittee, established on May 29, 2006 by the Standing Committee on Public Safety and National Security, has considered the evidence and submissions already received, as well as reviewed more recent information that has come to its attention. The predecessor to this Subcommittee held 22 meetings over more than 47 hours, during which it heard from 82 witnesses. It also received 44 briefs. The Subcommittee itself held 22 meetings over 36 hours during which it heard from 5 witnesses, and developed its interim and final reports. It also received 6 briefs. A list of the witnesses heard by the predecessor Subcommittee and by this Subcommittee can be found at Appendix A. A list of briefs received by the predecessor Subcommittee, as well as additional ones received by this Subcommittee, can be found at Appendix B.

The Subcommittee has already tabled an Interim Report (in October 2006) dealing with investigative hearings and recognizances with conditions (preventive arrests), both of which were subject to a sunset clause, meaning that they would expire unless extended by resolutions of both Houses of Parliament. The Subcommittee recommended that the relevant provisions be extended for a further five years and subjected to another parliamentary review at that time. The government subsequently introduced a resolution to extend the measures for three years. However, the House of Commons on February 27, 2007 voted not to extend the measures, so they have now expired.

This document, the Subcommittee's final report, contains the remaining results of its comprehensive review of the provisions and operation of the *Anti-terrorism Act*. Based in large part on the work of the predecessor Subcommittee, of which most members of this Subcommittee were also members, the report sets out findings and recommendations intended to suggest the changes deemed necessary to improve the *Anti-terrorism Act* and related legislation. Evidence, representations and briefs were received from both governmental and non-governmental witnesses. All proposals were seriously considered. The report, however, sets out the suggestions the Subcommittee has accepted and the implementation of which is being recommended.

The report is organized as follows: Each chapter has a background section in which the current law is explained. The next part of each chapter deals with issues of concern to those making submissions to the Subcommittee, or otherwise sets out the rationale for the decided recommendations. The final part of certain chapters contains other recommended legislative amendments which, based on its own analysis of the *Anti-terrorism Act*, the Subcommittee believes are required to clarify and simplify some parts of this complex legislation.

CHAPTER TWO: TERRORIST ACTIVITY OFFENCES

BACKGROUND

This chapter of the report deals with the new terrorism offences added to the *Criminal Code* by Parliament in 2001 when it adopted the *Anti-terrorism Act*. More particularly, it considers some of the specific offences themselves, as well as the sentences available to the courts in dealing with them.

Section 4 of the *Anti-terrorism Act* added a new Part II.I to the Code under the heading "Terrorism", including sections 83.01 to 83.33. The terrorism offences themselves can be found at sections 83.02 to 83.04 and 83.18 to 83.23. To get a sense of these new offences, it is important to have an understanding of two definitions — "terrorist activity" and "terrorist group". The more controversial of the two is the definition of "terrorist activity".

The two-part definition of "terrorist activity" can be found in section 83.01(1) of the Code. The first part is defined in paragraph 83.01(1)(*a*) of the definition as any act or omission committed or threatened inside or outside of Canada with respect to terrorism offences referred to in ten anti-terrorist international conventions entered into by Canada.

The second, more general definition of "terrorist activity" can be found in paragraph 83.01(1)(b) of the definition. A terrorist activity consists of an act or omission committed inside or outside of Canada. Such act or omission must be committed in whole or in part for a political, religious, or ideological purpose, cause or objective. Such act or omission must be committed in whole or in part to intimidate the public, with regard to its security, or to compel a person, a government, or a domestic or international organization to do or refrain from doing something. Further, such act or omission must intentionally cause the death of, or serious bodily harm to, a person (by the use of violence), endanger a person's life, cause a serious risk to health or safety, cause substantial property damage, or cause serious interference with or disruption of an essential service, facility, or system. For greater certainty, saving provisions (which exclude certain conduct from the scope of the definition) are found in the definition itself and in section 83.01(1.1) of the Code. These refer to activities related to lawful armed conflict under international law, advocacy, protest, dissent or work stoppage, and the expression of religious, political, or ideological belief.

A "terrorist group" is defined for Part II.1 of the *Criminal Code* in section 83.01(1) as an entity that has as one of its purposes or activities the facilitation or carrying out of terrorist activity, or a "listed entity" as determined under section 83.05.

The terrorist activity offences added to the Code by the *Anti-terrorism Act* are here only described in general terms. They will be discussed in greater detail as the Subcommittee sets out its findings and recommendations later in this chapter.

Section 83.02 of the Code makes the collection or provision of property for terrorist or certain other activities an indictable offence punishable by up to ten years imprisonment. Section 83.03 makes the provision or making available of property or financial or other related services for terrorist activity, or to be used by or benefit a terrorist group, an indictable offence punishable by imprisonment for up to ten years. Section 83.04 makes the direct or indirect use or possession of property for terrorist activity an indictable offence punishable by imprisonment for up to ten years.

Sections 83.18 to 83.23 deal with participating in, facilitating and instructing terrorist activities, as well as harbouring terrorists. Some of these offences deal with terrorist groups, while others deal with terrorist activity.

Section 83.18 makes participation in the activity of a terrorist group an indictable offence punishable by up to ten years imprisonment. Section 83.19 makes the facilitation of terrorist activity an indictable offence punishable by imprisonment for up to fourteen years.

Section 83.2 of the Code makes the commission of an indictable offence at the direction of, or in association with, a terrorist group an indictable offence punishable by up to life imprisonment. Section 83.21 makes instruction of the direct or indirect carrying out of an activity for the benefit of a terrorist group an indictable offence punishable by up to life imprisonment. Section 83.22 makes the direct or indirect instruction of a person to carry out terrorist activity an indictable offence punishable by up to life imprisonment. Harbouring a person who has engaged in terrorist activity is punishable under section 83.23 by indictment by up to ten years imprisonment.

Finally, section 83.26 provides that sentences for terrorism offences, other than life imprisonment, are to be served consecutively to any other sentence of imprisonment.

The consent of the Attorney General of Canada, or the attorney general or solicitor general of the province where the terrorism offence is alleged to have been committed, is required for any prosecution under the part of the Code dealing with terrorism.

Section 9 of the *Anti-terrorism Act* amended section 231 of the *Criminal Code*. It created the new offence of first degree murder for a homicide resulting from the commission or attempted commission of a terrorism offence. First degree murder is punishable by a minimum sentence of life imprisonment, and a twenty-five year parole ineligibility period. Bill C-24, adopted in 2001 by Parliament to deal with criminal organizations, contained a similar provision relating to homicide resulting from the intimidation of justice system participants.

Sections 20 and 21 of the *Anti-terrorism Act* deal with the sentencing of those convicted of terrorism offences. Section 20 amended section 718.2 of the *Criminal Code* so that sentencing judges are required to take into account participation in a terrorism offence as an aggravating circumstance in determining what penalty to impose on the convicted person.

Section 21 of the Act amended section 743.6 of the *Criminal Code*. Where a person has been sentenced for a terrorism offence to a term in excess of two years imprisonment, the sentencing judge is required to establish a parole ineligibility period of one-half the sentence or ten years, whichever is less. The normal parole ineligibility period is one-third of the sentence or seven years, whichever is less. The Code already provided discretion to sentencing judges to increase parole ineligibility to one-half of sentence or ten years, whichever is less, in relation to designated personal harm offences or criminal organization offences. Bill C-24, referred to above, contained a provision requiring sentencing judges to increase parole ineligibility periods in relation to three new organized crime offences.

There have so far been only two known cases in Canada involving prosecutions under the terrorism offences enacted by the *Anti-terrorism Act*. Ottawa resident Mohammad Momin Khawaja was charged in March, 2004. The case, on which there is a publication ban, is still before the courts (there has been a judgment by the trial judge on elements of the charges — there will be some discussion of this decision in the next part of this chapter). In June and August 2006, 18 men in the Toronto area were charged with terrorism offences under the *Criminal Code*. These cases, on which there is also a publication ban, are still before the courts.

ISSUES OF CONCERN

Definition of "Terrorist Activity"

The briefs and submissions considered by the Subcommittee in this area related largely to the definition of terrorist activity contained in the Code. It is obvious from a reading of the definition itself, even as summarized in general terms earlier in this chapter, that it is complex and not easily fully understood on even a close reading. There is little doubt that the definition is wide-ranging. It is not surprising, however, that Parliament adopted a definition with this degree of complexity and flexibility. The phenomenon it attempts to define for criminal law purposes, terrorist activity in the early twenty-first century, is constantly changing in the forms and actions it takes. As well, to fully counter terrorism these days, it is often necessary to allow for preventive or pre-emptive action so as to effectively disrupt any emerging or nascent terrorist activity before it develops the capacity to manifest itself in concrete ways, with the damage that it may cause. It is within this context that Parliament adopted the definition of terrorist activity now contained in section 83.01(1) of the *Criminal Code*.

The Subcommittee did, however, consider during its deliberations other definitions of terrorist activity proposed in briefs and submissions. In particular, it reviewed the definition of terrorist activity contained in the UN *International Convention for the Suppression of the Financing of Terrorism*. It found that definition to be too narrow, focusing on activities involving only serious violence, for example. The Subcommittee prefers the definition adopted by Parliament in 2001.

The other issue to which the Subcommittee turned its attention was the political, religious, or ideological motive for a terrorist activity. Anti-terrorist legislation in both Britain and Australia also contain a similar motive requirement. Concerns were expressed in briefs and submissions about the impact this element of the definition has had on particular ethno-cultural groups in Canada, especially the Muslim and Arab communities. Some believe this element of motive to be an invitation to racial and religious profiling by law enforcement and intelligence agencies, due at least in part to the requirement to investigate the political, religious, or ideological motive for suspected terrorist activity. The effect has been to cause members of these minority communities to feel unjustly targeted and consequently marginalized within Canadian society.

When questioned about the practice of racial and religious profiling, law enforcement and intelligence agencies denied they engage in such activity, saying it is not useful for effective investigations and intelligence assessments. Then-Commissioner of the Royal Canadian Mounted Police (RCMP), Giuliano Zaccardelli, told the predecessor to this Subcommittee on June 1, 2005 that the force does not engage in racial profiling, but carries out criminal profiling.

Because of the impact of the motive element of the definition of terrorist activity, it has been proposed in some of the submissions the Subcommittee has reviewed that it be removed. This was recommended by Amnesty International, B'nai Brith Canada, and in the joint submission by the Canadian Arab Federation, Canadian Council on Islamic-American Relations, and the Canadian Muslim Lawyers Association.

Former RCMP Commissioner Zaccardelli told the predecessor to this Subcommittee that the motive requirement limits the ability of enforcement agencies to go after certain people, and is actually a safeguard built into the legislation. When he appeared before the Subcommittee in June 2006, then-Justice Minister Vic Toews also discussed this position, saying that removal of the motive element of the definition would likely make the jobs of investigators and prosecutors easier in relation to the nature of some of the evidence they would have to adduce to obtain convictions.

In the October 24, 2006 decision by Justice Rutherford of the Ontario Superior Court in *R.* v. *Khawaja*[2], the motive element was severed from the definition of terrorist activity because it was in violation of the *Charter*-guaranteed freedoms of religion, expression, and association. In a challenge to the constitutionality of the criminal charges

[2] [2006] O.J. No. 4245 (QL).

against the accused and an attempt to have them quashed, this was the only argument that was successful. The irony of this challenge by the accused and the outcome is that the Crown now has one less element of the criminal offence which it has to prove beyond a reasonable doubt. Undoubtedly surprised by the outcome of the constitutional challenge, the accused has applied to the Supreme Court of Canada for leave to appeal the decision by the trial judge, thus causing the beginning of the trial on the merits to be further delayed.

The ruling by Justice Rutherford in the *Khawaja* case demonstrates in stark terms the result of removing the motive requirement as a constituent element of the definition of terrorist activity. Although the inclusion of motive as a part of a criminal offence to be proven beyond a reasonable doubt is unusual, if not unprecedented in Canada, it constitutes a safeguard in this context. For these reasons, the Subcommittee has concluded that the political, religious, or ideological motive element of the definition of terrorist activity should be retained. At the same time, it is acknowledged that the scope of what constitutes a terrorist activity is still before the courts and that future judgments may have a bearing on the issue.

RECOMMENDATION 1

The Subcommittee recommends that the definition of "terrorist activity" contained in section 83.01(1) of the *Criminal Code* not be amended.

Concerns of Minority Communities

Although the Subcommittee has recommended no amendment to the definition of "terrorist activity", this does not end the matter. The concerns expressed by minority communities about racial and religious profiling by law enforcement and intelligence agencies must be taken seriously and addressed effectively and directly.

A number of steps have been taken by law enforcement and intelligence agencies to respond to these concerns. The Government of Canada has established a Cross-Cultural Roundtable on Security. Meeting regularly, it facilitates a broad-based range of information exchange on the impact of national security issues and actions on ethno-cultural communities across Canada.

As part of its implementation of the Government of Canada's Action Plan against Racism, the RCMP has undertaken a number of initiatives. It has adopted a Bias Free Policing Strategy so as to address allegations of religious and racial profiling and to maintain high quality policing services for all Canadians. Part of this strategy includes outreach to visible minority and other communities. Members of the RCMP receive training throughout their careers to foster their sensitivity to the full cultural diversity of

Canada. All members of the RCMP are expected to engage in such community outreach activities as part of their regular duties. The Commissioner's Advisory Committee on Visible Minorities meets regularly.

CSIS has also adopted a number of policies to address the issues being considered in this part of the report. Its employment practices and policies encourage the hiring of personnel from all parts of Canadian society so as to reflect its cultural diversity. Many of its Intelligence Officers have lived in and traveled to many parts of the world. This experience allows them to better understand and be sensitive to cultural differences. In carrying out their functions, CSIS investigators are aware of the concerns expressed by minority communities and are expected to follow detailed policy guidance on how to conduct interviews in a respectful way. Cross-cultural training is an integral part of the core courses taken by Intelligence Officers. CSIS has a public liaison program, primarily staffed by volunteers, who provide briefings to community groups on request. CSIS regional offices also have outreach programs which include meetings with community leaders.

This is a brief overview of some of the activities undertaken by government agencies. Although these agencies have taken important steps, concerns about racial and religious profiling are still being expressed by many community leaders and others. This must be taken seriously. While the Subcommittee makes no specific recommendations on how best to respond to concerns about racial and religious profiling, much more has to be done in consultation with the affected ethno-cultural communities to address these concerns.

Glorification of Terrorist Activity

Freedom of expression is a core constitutionally guaranteed right which is central to a healthy democracy in Canada. There are occasions, however, when this freedom is abused or misused by those whose commitment to an open, pluralistic society is questionable.

Such was the case in the 1960's when a small number of racist neo-nazi groups and individuals distributed hate propaganda in the form of leaflets, pamphlets and newspapers. This distribution targeted young people in particular. With the memory of World War II and the hatred that was promulgated by a nazi regime still fresh in the minds of Canadians, Parliament adopted amendments to the *Criminal Code* making the communication of hate promotion material a criminal offence. These provisions can still be found in the Code at sections 318 to 320.1. There have only been a small number of prosecutions under this part of the Code. As well, these sections have been found by the Supreme Court of Canada to be consistent with freedom of expression. This is so because they contain a number of safeguards built right into them.

A serious worry about the incitement or glorification of terrorist activity was raised by B'nai Brith Canada in its brief. In particular, it expressed concern about the impact of teachings consisting of glorification of or incitement to terrorist activity on the youth in some communities. It recommended that the *Criminal Code* be amended so as to make the incitement to terrorist activity an offence. This offence would be directed at those who foment, glorify, or condone terrorism. The Subcommittee agrees with this recommendation in principle, but believes it must be further developed as follows.

This type of criminal legislation is not unknown. Britain's *Terrorism Act, 2006* includes such an offence at section 1. As well, any proposed legislation in Canada to address this issue can be modelled, in part, on the hate propaganda provisions found in the *Criminal Code*.

The British legislation makes it an offence at section 1(1) and (3) to make statements likely to be understood by members of the public as indirectly encouraging the commission or preparation of terrorist acts. Such statements are defined as including the glorification of the commission or preparation of terrorist acts, whether current or past, and the glorification of such acts as conduct to be emulated. "Glorification" is defined at section 20(2) as "any form of praise or celebration". This offence is punishable on indictment by imprisonment of up to seven years and/or a fine, or on summary conviction by imprisonment of up to six or twelve months and/or a fine.

As mentioned earlier, the *Criminal Code* contains hate propaganda offences that not only prohibit such activity, in particular at section 319(2), but also include measures intended to protect the constitutionally entrenched freedom of expression. The Code requires that the provincial attorney general consent to any hate propaganda prosecution. As well, judicial interpretation has resulted in the prosecution having to prove specific intent to promote hatred by the acts for which criminal sanction is being sought. Finally, these Code provisions make special defences available to anyone charged with these hate propaganda offences. The special defences, found at section 319(3), allow the accused to argue that the impugned statements are true; they were expressed in good faith on a religious subject or a belief in a religious text; they were expressed on a subject of public interest and there were reasonable grounds to believe they were true; or they were made in good faith and with an intention to point out matters which tend to produce feelings of hatred, for the purpose of the removal of those matters.

The hate propaganda provisions in Canada and the terrorism glorification provisions in Britain share some similarity in terms of the historical contexts within which they were adopted. They were both put into place to address abuses of freedom of expression which had as their goal the subversion, if not the outright negation, of important elements of open, inclusive societies. They are different in that the hate propaganda measures in Canada are intended to assure and protect the dignity of identifiable groups, and the British anti-glorification of terrorism provision is intended to prohibit acts that may lead to large-scale destruction to that society as a whole.

The Subcommittee believes that the hate propaganda offences now contained in the *Criminal Code* are not adequate to address the glorification and encouraged emulation of terrorist activity. As well, the Code terrorist activity offences dealing with the intentional facilitation of, instruction of, or participation in such acts are also inadequate to address the situation within which the glorification or incitement is expressed to the public, and no particular individuals are encouraged to emulate any specific actions. Such expressive behaviour is diffuse and untargeted.

Not only does the Subcommittee believe that there should be a new offence added to the Code to address the glorification of terrorist activity for the purpose of emulation, it also believes that any such amendment should require the consent of the provincial attorney general to any prosecution, require the prosecution to prove that the accused specifically intended to glorify terrorist activity for the purpose of emulation, and make available to the accused special defences similar to those included in the hate propaganda provisions of the Code.

RECOMMENDATION 2

The Subcommittee recommends that the *Criminal Code* be amended to make it an offence to glorify terrorist activity for the purpose of emulation. Any such amendment should require the consent of the provincial attorney general to a prosecution, require the prosecution to prove that the accused intended to encourage emulation by the glorification of terrorist activity, and make available to the accused special defences similar to those included in section 319(3) of the Code.

The Facilitation Offence and Legal Services

Concern has been expressed by the legal profession about whether the provision of legal services to those accused of terrorism offences could lead to criminal charges against those providing such services. More particularly, the Canadian Bar Association in its brief said that the expansive definition of participating in or contributing to an activity of a terrorist group, set out in section 83.18 of the *Criminal Code*, includes providing or offering to provide a skill or expertise for the benefit of an accused terrorist or terrorist group. It said that lawyers representing those accused of terrorism offences could be seen as providing a skill or expertise for the benefit of a terrorist group. As well, the Association pointed out, the court dealing with such a prosecution is required by subsection 83.18(4) of the Code to consider association with a terrorist group as a factor in determining whether a participation or facilitation offence has been proven. They worried that this could also include defence counsel acting on behalf of a person or group charged with a terrorism offence.

Based on these observations, the Canadian Bar Association recommended that the *Criminal Code* be amended so as to specifically exclude counsel providing legal services to those accused of terrorism offences from the ambit of section 83.18. A similar recommendation was also made by the Federation of Law Societies of Canada.

Anyone charged with criminal offences faces serious consequences if convicted. The most serious of these is the deprivation of liberty for a definite or indefinite period. Terrorism offence charges are not only serious, but the limited experience with them so far in Canada shows that they involve complex procedural, disclosure, and other legal issues. Thus, access to legal counsel by those charged with terrorism offences is essential for the process to be fair, and to allow for full answer and defence. The rule of law requires that counsel acting on behalf of accused persons be able to carry out their functions without fear of the consequences of doing so, in conformity with the codes of ethics applicable to the legal profession.

Because the Subcommittee subscribes to the comments set out in the preceding paragraph, it agrees with the purpose underlying the recommendation made by both the Canadian Bar Association and the Federation of Law Societies of Canada.

RECOMMENDATION 3

The Subcommittee recommends that section 83.18 of the *Criminal Code* be amended so as to ensure that counsel providing legal services to those accused of terrorism offences can properly act on their behalf without fear of being charged themselves with terrorism offences.

OTHER RECOMMENDED AMENDMENTS

References to Government

The Subcommittee notes that certain provisions amended or enacted by the *Anti-terrorism Act* refer to governments within Canada in an inconsistent manner. Sometimes, the phrase “the Government of Canada or of a province” is used, as in section 7(3.71), (3.72), (3.73) and (3.75) of the *Criminal Code*, which refer to an act or omission committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act. The same reference to government is used in paragraphs 3(1)(*e*) and 3(1)(*f)* of the *Security of Information Act*, which include, in what constitutes a purpose prejudicial to the interests of the State, endangering a person or damaging property by reason of the fact that the person is doing business with or on behalf of the Government of Canada or of a province. However, in paragraph 3(1)(*d)*, the *Security of Information Act* more broadly refers to particular conduct that has a significant adverse impact on the functioning of “any government in Canada.”

The Subcommittee believes that wherever the narrower phrase "the Government of Canada or of a province" is used in the *Anti-terrorism Act*, it neglects other legitimate forms of government, namely territorial and municipal governments, including regional and urban authorities. Unless there is a reason to exclude certain types of governments, or the context dictates otherwise, the Subcommittee accordingly suggests that wherever the narrower phrase is used to refer to a government within Canada, it should be replaced by the broader phrase "any government in Canada." Amendments would not be required where the *Anti-terrorism Act* already refers, even more broadly, to "a government," as it does in clause (*b*)(i)(B) of the definition of "terrorist activity" in section 83.01 of the *Criminal Code*. These broadest references are already taken to include any government within Canada, and moreover, may include foreign governments.

RECOMMENDATION 4

The Subcommittee recommends that, unless the context dictates otherwise, the words "the Government of Canada or of a province" be replaced by the words "any government in Canada" throughout the provisions enacted or amended by the *Anti-terrorism Act*.

References to a Person

The *Anti-terrorism Act* added a definition for "entity" to section 83.01 of the *Criminal Code*. It means "a person, group, trust, partnership or fund or an unincorporated association or organization." However, the definition of terrorist activity only refers to an intention to compel a person, a government or a domestic or international organization to do or not do something. The Subcommittee believes that the word "person" should be replaced by the broader term "entity," in order for a terrorist activity to clearly include acts that are intended to influence other types of entities.

RECOMMENDATION 5

The Subcommittee recommends that the words "a person" and "the person" be replaced, respectively, by the words "an entity" and "the entity" in clause (*b*)(i)(B) of the definition of "terrorist activity" in section 83.01 of the *Criminal Code*.

Definition of "Terrorism Offence"

In addition to enacting a definition for "terrorist activity" in section 83.01 of the *Criminal Code*, the *Anti-terrorism Act* enacted a definition for "terrorism offence" in section 2. A terrorism offence includes, in paragraph (*c*), "an indictable offence under this or any

other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity." The Subcommittee questions why terrorist activity is not in and of itself a terrorism offence, regardless of whether the act also constitutes another indictable offence.

We find it odd, for instance, that an arrest without a warrant is possible under section 83.3 of the *Criminal Code* to prevent a "terrorist activity" from being carried out, yet carrying out the terrorist activity is not itself an offence unless it includes the commission of another indictable offence. Another oddity is that facilitating a terrorist activity is clearly made an offence under the Code, yet the actual undertaking of the terrorist activity would not necessarily be an offence as the Code presently reads. We believe that Canadians would be very surprised to learn that the commission of a terrorist activity may not automatically be a terrorism offence. As the objective of the *Anti-terrorism Act* is to prevent and punish terrorist conduct generally, we believe that any terrorist activity should automatically be a terrorism offence. This would also allow investigative hearings, which are only possible under section 83.28 in relation to a "terrorism offence," to be available for a broader range of terrorist conduct. In other words, an amendment equating a terrorism offence with a terrorist activity would allow *all* terrorist activity to be subject to certain preventive tools.

Accordingly, paragraph (*c*) of the definition of "terrorism offence" in the *Criminal Code* should be replaced by simply "a terrorist activity." A comparable amendment should also be made to the definition of "terrorism offence" in subsection 2(1) of the *National Defence Act*.[3] The Subcommittee does not believe that expanding the meaning of terrorism offence in this way will inappropriately increase the number of individuals targeted by the *Anti-terrorist Act*, as terrorist activity is limited to an offence under various United Nations conventions, or an act or omission that, with the requisite motive, intentionally causes certain categories of very serious harm.

RECOMMENDATION 6

The Subcommittee recommends that the words "an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes" be removed from paragraph (*c)* of the definition of "terrorism offence" in section 2 of the *Criminal Code*.

[3] Comparable amendments to those discussed in relation to the definition of "terrorist activity" do not need to be made to the *National Defence Act*, as subsection 2(1) of that Act incorporates by reference the definition of "terrorist activity" found in the *Criminal Code*.

RECOMMENDATION 7

The Subcommittee recommends that the words "an offence under this Act for which the maximum punishment is imprisonment for five years or more, or an offence punishable under section 130 that is an indictable offence under the *Criminal Code* or any other Act of Parliament, where the act or omission constituting the offence also constitutes" be removed from paragraph (*c)* of the definition of "terrorism offence" in section 2(1) of the *National Defence Act*.

Participating in or Facilitating Terrorist Activity

Under paragraphs 83.18(3)(*c*) and (*e*) of the *Criminal Code*, participating in or contributing to an activity of a terrorist group includes recruiting a person, or making oneself available, to facilitate or commit (i) "a terrorism offence," or (ii) "an act or omission outside Canada that, if committed in Canada, would be a terrorism offence." For similar reasons to those discussed earlier, the Subcommittee believes that the reference to terrorism offence is too narrow and should be replaced by a reference to terrorist activity. We also note that subsections 83.18(1) and (2) refer more broadly to facilitating or carrying out a "terrorist activity." The words "facilitate or commit a terrorism offence" in subparagraphs (3)(*c*)(i) and (*e*)(i) should therefore be changed to "facilitate or carry out a terrorist activity." As a terrorist activity already includes acts or omissions outside Canada, subparagraphs (3)(*c*)(ii) and (*e*)(ii) may be removed altogether.

RECOMMENDATION 8

The Subcommittee recommends that the words "commit (i) a terrorism offence, or (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence" be replaced by "carry out a terrorist activity" in paragraphs 83.18(3)(*c)* and (*e)* of the *Criminal Code*.

Instructing Terrorist Activity

Sections 83.21(1) and 83.22(1) of the *Criminal Code* set out the offences of instructing a person to carry out an activity for a terrorist group, and instructing a person to carry out a terrorist activity. However, these sections do not make it an offence to instruct another person to *facilitate* a terrorist activity. As both facilitating and carrying out terrorist activity are prohibited elsewhere, the Subcommittee believes that it should be an offence to instruct a person to facilitate or carry out a terrorist activity or an activity for a terrorist group. "Instructing to facilitate" should accordingly be added to sections 83.21 and 83.22.

RECOMMENDATION 9

The Subcommittee recommends that the words "facilitate or" be added before the first instance of the words "carry out" in sections 83.21(1) and 83.22(1) of the *Criminal Code.*

The Subcommittee further notes that the English versions of sections 83.21 and 83.22 begin with the phrase "Every person who …" whereas sections 83.18, 83.19, 83.2 and 83.23 begin with "Every *one* who …" Sections 83.21 and 83.22 should be amended for consistency.

RECOMMENDATION 10

The Subcommittee recommends that the words "Every person" be replaced by the words "Every one" in the English versions of sections 83.21(1) and 83.22(1) of the *Criminal Code.*

Finally, the Subcommittee believes that it should be an offence to instruct an entity, the definition of which includes a person, rather than only an offence to instruct a person, to facilitate or carry out a terrorist activity or activity for a terrorist group. As discussed earlier, "entity" is a broader term. It also includes a group, partnership, association or organization, all of which may be instructed, even if no one person is specifically instructed or carries out the activity. We therefore suggest that the term "entity" be used instead of "person" throughout sections 83.21 and 83.22, unless the context dictates otherwise. For example, each of the paragraphs 2(*b*) in those sections should continue to state that an offence may be committed whether or not the accused instructs a particular "person," as the context refers to a single individual.

The Subcommittee considered whether "entity" should also replace "person" in various provisions of section 83.18, which refer to "recruiting a person" and "the persons who constitute the terrorist group." However, the contexts suggest that a reference to "person" is not under-inclusive, as at least one person will necessarily have been recruited or be part of the terrorist group.

RECOMMENDATION 11

The Subcommittee recommends that the words "any person" and "the person" be replaced, respectively, by the words "any entity" and "the entity" in sections 83.21(1), 83.21(2)(*c)* and (*d)*, 83.22(1), and 83.22(2)(*c)* and (*d)* of the *Criminal Code*.

Harbouring or Concealing

The *Anti-terrorism Act* created the new offence of harbouring or concealing a person who has carried out a past terrorist activity, or is likely to carry out a future terrorist activity. In either case, as currently worded, it is only an offence to harbour or conceal a person if it is *for the purpose* of enabling the person to facilitate or carry out any terrorist activity. However, the Subcommittee believes that harbouring or concealing a person who has *already* carried out a terrorist activity should be an offence, regardless of whether the person being harboured or concealed intends to carry out a further terrorist activity. In other words, the "purpose" clause should only apply to a person accused of harbouring or concealing a person who is likely to carry out a *future* terrorist activity. With respect to a possible future event, which the accused cannot know for certain will occur, we also raise the possibility that, rather than "knowing," section 83.23 should say that the person "has reason to believe and does believe" that the event will occur, although we do not make a specific recommendation in this regard.

The Subcommittee does not believe that removing the "purpose" clause in respect of past terrorist activity will inappropriately broaden the offence, as an accused person must *knowingly* harbour or conceal as well as *know* that a past terrorist activity has been carried out. We also note that a comparable offence in section 54 of the *Criminal Code*, dealing with harbouring or concealing a deserter or absentee from the Canadian Forces, does not have a limiting purpose clause. The Subcommittee further believes that concerns about broadening the offence in section 83.23 may be alleviated, in part, by replacing the word "héberge" by "recèle" in the French version. "Héberger" may be taken to mean provide shelter or lodging to a person, whereas "receler" more closely corresponds to the English "harbour." Use of the words "cache et recèle" in section 83.23 of the *Criminal Code* would also render it consistent with the terminology used in section 54.

RECOMMENDATION 12

The Subcommittee recommends that section 83.23 of the *Criminal Code* be replaced by the following:

> **"Every one who knowingly harbours or conceals any person whom he or she knows to be a person who**
>
> **(*a*) has carried out a terrorist activity, or**
>
> **(*b*) is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity,**
>
> **is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."**

Further, the word "héberge" should be replaced by the word "recèle" in the French version of the section.

Punishment for Participation in a Terrorist Activity

Section 83.18 of the *Criminal Code* sets out a punishment for knowingly participating in any activity of a terrorist group. Section 83.19 sets out a punishment for knowingly facilitating a terrorist activity. However, there is no punishment for participating in a terrorist activity, which conduct is not the same as participating in the activity of a terrorist group, and has distinct consequences for other purposes of the *Criminal Code* (e.g., the listing of an entity under section 83.05). The Subcommittee believes that a penalty should be established for the offence of participating in a terrorist activity and that it should be up to life imprisonment.

RECOMMENDATION 13

The Subcommittee recommends that the *Criminal Code* be amended to provide that every one who knowingly participates in a terrorist activity is guilty of an indictable offence and liable to imprisonment for up to life.

Punishment for Committing an Offence for a Terrorist Group

Section 83.2 of the *Criminal Code* states that every one who commits an indictable offence for the benefit of, at the direction of or in association with a terrorist group is liable to imprisonment for life. Although section 83.26 states that certain sentences are to be served consecutively where they are imposed for offences arising out of the same event, we believe that there is ambiguity as to whether or not the punishment under section 83.2 is in addition to the punishment for the underlying indictable offence. An amendment should be made for clarity.

RECOMMENDATION 14

The Subcommittee recommends that the words "in addition to any penalty imposed for the commission of the original indictable offence" be added at the end of section 83.2 of the *Criminal Code*.

Location of Proceedings

The *Anti-terrorism Act* enacted section 83.25 of the *Criminal Code*, which gives the Attorney General of Canada the discretion to commence proceedings anywhere in Canada against a person accused of a terrorism offence, regardless of whether the accused is in Canada, where the offence was committed, and whether proceedings have already been

commenced elsewhere in Canada. The Subcommittee appreciates that, in order to bring an alleged terrorist to justice, there must be jurisdiction to hold a trial in Canada if the accused does not reside here or the offence was committed outside the country. We also understand that, even when the accused resides in Canada, there may be legitimate reasons to choose one province or territory over another, or move the location of proceedings from one jurisdiction to another. This might be warranted, for example, if the offence, co-accused persons or witnesses have a closer connection to another jurisdiction, or the trial is so complex that it must be held in a city having special court facilities to accommodate a large number of parties, language interpretation or security needs.

The Subcommittee has no significant concerns about the ability of the Attorney General to choose an appropriate territorial division in Canada to commence proceedings against a person who is not in Canada, although we believe that it should generally be where the accused normally resides in Canada, if applicable, or where the offence was committed, if it occurred in Canada. We also believe that, where the accused person is already in Canada, the usual rules for selecting the appropriate jurisdiction should almost always apply. With this in mind, the Subcommittee believes that section 83.25 is too broad. It gives the Attorney General of Canada unfettered discretion to choose or switch the location without any indication of the acceptable reasons or the factors to consider. This is a particular concern, given that the location of the proceedings may have a detrimental effect on an accused person who resides in a different jurisdiction, or who has already engaged counsel there. We therefore believe that, in order to hold proceedings in a jurisdiction that would not be the one used under the normal rules of criminal procedure, or move the proceedings to a different jurisdiction after they have already been commenced elsewhere in Canada, the Attorney General should be required to make application to a court, specifying the reason for the desired location. The court would then decide whether to permit the proceedings to be held in that location, after considering the reasons of the Attorney General and the impact on the accused.

RECOMMENDATION 15

The Subcommittee recommends that section 83.25 of the *Criminal Code* be amended so that the Attorney General of Canada is required to make an application to a court in order to commence proceedings in a territorial division that would not be the one normally used, or continue them in a different territorial division in Canada after they have already been commenced elsewhere in Canada. Any such amendment should set out the acceptable reasons for choosing a different location for the proceedings, and the factors to be considered by the court in considering the application.

CHAPTER THREE: TERRORIST FINANCING AND TERRORISM-RELATED PROPERTY

BACKGROUND

In order to prevent and counter terrorist activity, the *Anti-terrorism Act* introduced provisions into the *Criminal Code* and another piece of legislation to address terrorist financing and terrorism-related property. The approach used was essentially three-pronged. First, the Act introduced new offences into the Code that prohibit the provision of any assistance to terrorist groups or in support of terrorist activities, including monetary assistance, property or services, and regardless of whether the assistance is provided directly or indirectly. Second, the Act introduced freezing and forfeiture provisions, specifically designed to deal with terrorist property, into the Code. Third, the *Anti-terrorism Act* amended the *Proceeds of Crime (Money Laundering) Act,* renaming it in the process as the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA). The amendments introduced into the PCMLTFA allow the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to monitor and investigate suspicious financial transactions and large money transactions (those over $10,000) related to terrorism, as well as those related to money laundering. In the case of transactions raising a threat to the security of Canada, the PCMLTFA allows FINTRAC to provide certain information to law enforcement agencies and CSIS so that they may address and prevent any potential harm.

The provisions on the freezing of property are found at sections 83.08 to 83.12 of the Code, added by section 4 of the *Anti-terrorism Act*. Section 83.08 prohibits anyone in Canada and any Canadian outside Canada from dealing financially, directly or indirectly, with any property or interest owned in any degree by a terrorist group. A terrorist group means an entity listed by Cabinet, or that has terrorist activities as its goal or purpose. Section 83.1 requires anyone in Canada, and Canadians anywhere, to advise CSIS and the RCMP about terrorist group property or interests they may possess or about which they may have information. Section 83.12 makes it an offence for anyone to contravene these provisions.

The provisions on seizure and restraint of property are found at section 83.13 of the *Criminal Code*. On *ex parte* application by the Attorney General in private to the Federal Court, an order may be issued for the seizure of property in Canada or a restraint order for property outside of Canada, prohibiting transactions by Canadians in relation to it. As well, an order may be issued appointing a manager to see to the preservation of the seized or restrained property.

Property forfeiture provisions are found at sections 83.14 to 83.17 of the *Criminal Code*. Under section 83.14, the Attorney General may apply to the Federal Court for a forfeiture order in respect of the property of a terrorist group, in respect of property used to facilitate terrorist activity, or in respect of currency or monetary instruments controlled by individuals who facilitated or carried out terrorist activity or are planning to do so. If the Federal Court judge is satisfied on a balance of probabilities that the seized or restrained property is related to terrorist activities, the property can be declared forfeited to Her Majesty, and can be disposed of as directed by the Attorney General.

ISSUES OF CONCERN

Solicitor-Client Privilege

Section 83.1 of the *Criminal Code*, and other terrorist financing measures, have been of concern to the Canadian Bar Association and the Federation of Law Societies of Canada. As described briefly earlier in this chapter, section 83.1 requires every person in Canada, and Canadians anywhere, to disclose to the RCMP and CSIS the existence of property in their control or possession they know is owned or controlled by or on behalf of a terrorist group, and information about a transaction or proposed transaction related to that property. As well, the PCMLTFA requires the reporting of suspicious transactions to FINTRAC.

The Federation and the Association respectively represent the provincial and territorial self-regulating societies that oversee the legal profession throughout Canada and members of the legal profession itself. They submitted in their respective briefs that these measures are inconsistent with the constitutionally protected solicitor-client privilege. The Canadian Bar Association recommended that section 83.1 of the Code be amended to add to it an exemption for information subject to solicitor-client confidentiality and privilege. The Federation recommended that, to ensure the right to counsel is not made illusory, funds received by a lawyer for professional fees, disbursements and posting of bail be excluded from the freezing and forfeiture of property provisions of the Code. As well, it recommended that information subject to solicitor-client confidentiality be excluded from mandatory reporting requirements.

Solicitor-client privilege is an important component of the rule of law. It allows clients to seek legal advice in confidence from members of the legal profession, assured that the confidential information they provide will be protected from disclosure without their consent. It enables clients to seek and be provided with the best possible advice to resolve issues brought to their counsel for guidance in the conduct of their affairs. Both the Association and the Federation are concerned that the anti-terrorist measures being considered in this chapter are inconsistent with the constitutionally-protected principle of solicitor-client privilege, and may lead to lawyers being conscripted as state agents against the interests of their clients.

The Federation was so concerned about these issues that it started litigation against the reporting requirements of the PCMLTFA insofar as they apply to members of the legal profession. The litigation was successful in having these measures set aside. They have, in fact, been suspended, while the government and the legal profession continue to seek means by which transactions can be reported in a manner consistent with solicitor-client privilege. In the meantime, the Federation's member law societies have taken a number of steps to provide guidance to members of the legal profession who become involved in suspect transactions.

The Supreme Court of Canada has on a number of occasions in recent years, considered the issue of solicitor-client privilege and offered guidance and interpretation on what it is, and the limitations to which it is subject. The Court has said that information subject to solicitor-client privilege is beyond the reach of the state. It cannot be forcibly discovered or disclosed and is inadmissible in court. As guardians of this information, it cannot be disclosed by legal counsel without the consent of the client whose information it is. The Court has said that, although this privilege is not absolute, it is as absolute as possible and any legislated interference with it will be considered unreasonable and thus inconsistent with the *Canadian Charter of Rights and Freedoms* unless the interference is absolutely necessary. Hence, information related to client billing and similar matters will likely be protected by solicitor-client privilege, while information related to criminal transactions by counsel with a client or in which a lawyer is merely a conduit for a financial transaction will likely not.

After deliberating on this difficult issue, the Subcommittee has concluded that for legislation and strategies related to terrorist financing and terrorism-related property to be effective, the reporting requirements must apply to everyone, with the exceptions being few and narrowly drawn. The Subcommittee is convinced, however, that the issues underlying solicitor-client privilege are important enough to justify a limited exemption for the legal profession from the reporting requirements. Although provincial and territorial law societies have taken a number of steps to sensitize members of the legal profession to the perils of potentially suspect transactions, this is not enough to justify the exemption of all transactions in which they are engaged.

Parliament recently adopted Bill C-25, amending the PCMLTFA. More specifically, section 9 of this legislation added section 10.1 to the parent legislation providing that the reporting requirements do not apply to legal counsel or law firms when they are providing legal services. This appears to be a narrowly drawn exception to the general reporting requirement allowing for an exemption for transactions directly related to the provision of traditional legal services offered by counsel. This would likely cover lawyers acting in criminal law, private law, public law, or administrative law matters. Transactions in these contexts would likely relate to professional fees and disbursements.

This recent legislative change would appear to have responded to one of the issues raised by the Federation in its brief. For completeness and consistency, the Subcommittee believes a comparable amendment should be made to section 83.1 of the Code.

RECOMMENDATION 16

The Subcommittee recommends that section 83.1 of the *Criminal Code* be amended so as to exempt from its requirements legal counsel or law firms when they are providing legal services and not acting as financial intermediaries.

A Due Diligence Defence

As described earlier in this chapter, section 83.08 of the *Criminal Code* makes it an offence for any person in Canada or any Canadian to knowingly deal directly or indirectly with property owned or controlled by a terrorist group, enter into or facilitate directly or indirectly transactions in respect of property owned or controlled by a terrorist group, or provide financial or related services with respect to such property.

Concerns have been expressed, by those involved in both business and charitable activity in Canada and elsewhere, that their legitimate undertakings may make them susceptible to possible prosecution under section 83.08 of the Code. Although this provision requires that these activities with terrorist group links be knowingly undertaken, the Subcommittee believes that for greater certainty this section should be amended to allow an accused to make a due diligence defence to such charges. This would allow an accused involved in legitimate business or charitable transactions to assert that the necessary steps were taken to assess the nature of the subject transaction, and it was still not possible to determine the terrorist links.

RECOMMENDATION 17

The Subcommittee recommends that section 83.08 of the *Criminal Code* be amended to allow for a due diligence defence.

OTHER RECOMMENDED AMENDMENTS

Terrorist Financing without Lawful Justification or Excuse

To commit the offence of providing or collecting property for terrorist activity under section 83.02 of the *Criminal Code*, it must be committed “wilfully and without lawful justification or excuse.” The Subcommittee believes that “wilfully” is redundant to “without lawful justification or excuse,” as committing an act without a will to do so would

presumably be a lawful justification or excuse. We also note that "wilfully" does not appear in other provisions of the Code that use the phrase "without lawful justification or excuse."[4] We accordingly believe that "wilfully" should be removed from section 83.02.

RECOMMENDATION 18

The Subcommittee recommends that the words "wilfully and" be removed from section 83.02 of the *Criminal Code*.

The Subcommittee also notes an inconsistency in that the phrase "without lawful justification or excuse" does not appear in section 83.03 of the Code, setting out the offence of collecting or providing property for terrorist purposes, or in section 83.04, setting out the offence of using or possessing property for terrorist purposes. If a person does not commit an offence under section 83.02 if he or she had a lawful justification or excuse, we believe that the same should be true in respect of alleged offences under sections 83.03 and 83.04, as all three provisions set out comparable offences.

RECOMMENDATION 19

The Subcommittee recommends that the words "without lawful justification or excuse" be added after the words "directly or indirectly" in section 83.03 and after the word "who" in section 83.04 of the *Criminal Code*.

References to a Person

As discussed in the previous chapter of the report on terrorist activity offences, the Subcommittee believes that a statutory reference to "a person" is too narrow and that the broader and defined term "entity" is preferable, as it includes "a person, group, trust, partnership or fund or an unincorporated association or organization." With respect to the terrorist financing offence in section 83.03 of the *Criminal Code*, we believe that "entity" should be substituted for "person" so that it is an offence to invite an entity to provide property, financial or related services for a terrorist purpose, and for this to be done, in paragraph (*a*), for the purpose of benefiting any entity who is facilitating or carrying out a terrorist activity.

[4] See, e.g., sections 342.01, 342.2, 450, 451, 452, 458 and 459.

RECOMMENDATION 20

The Subcommittee recommends that the words "a person" be replaced by the words "an entity" in the opening words of section 83.03 of the *Criminal Code*, and that the word "person" be replaced by the word "entity" in paragraph (*a*).

Freezing of Property

Subsection 83.08(2) of the *Criminal Code* precludes civil liability on the part of a person who takes or does not take measures to ensure that he or she does not deal with property owned or controlled by a terrorist group, if the person "took all reasonable steps to satisfy themself that the relevant property was owned or controlled by or on behalf of a terrorist group." The Subcommittee does not consider "themself" to be a word (although it recognizes that the intention of the drafters was to avoid the masculine or feminine). Preferable wording would be "took all reasonable steps to *be satisfied* that the relevant property was owned or controlled by or on behalf of a terrorist group."

RECOMMENDATION 21

The Subcommittee recommends that the words "satisfy themself" be replaced by the words "be satisfied" in the English version of section 83.08(2) of the *Criminal Code.*

As mentioned in the background portion of this chapter, section 83.1(1) of the Code requires individuals to disclose the existence of terrorist property in their possession or control, or information about a transaction relating to it, to the Commissioner of the RCMP *and* the Director of CSIS. However, section 83.12(2) states that no person contravenes section 83.1 if disclosure is made only to the RCMP Commissioner *or* CSIS Director. If failure to advise both of these officials is not an offence under subsection 83.12(2), advising them both should not be a requirement under subsection 83.1(1). We believe that the current inconsistency is confusing. Moreover, it should be sufficient for a person to advise either the RCMP *or* CSIS of terrorist property or transactions, as those two organizations are in a position to communicate with one another.

RECOMMENDATION 22

The Subcommittee recommends that the second instance of the word "and" be replaced by the word "or" in the opening words of subsection 83.1(1) of the *Criminal Code*, and that subsection 83.12(2) be repealed.

CHAPTER FOUR:
LISTING OF TERRORIST ENTITIES

BACKGROUND

Section 4 of the *Anti-terrorism Act* added sections 83.05 to 83.07 to the *Criminal Code* dealing with the listing of "terrorist entities". Section 83.05 provides the process by which Cabinet, on recommendation of the Minister of Public Safety and Emergency Preparedness, can list entities involved in or facilitating terrorist activities. To list such an entity by regulation, Cabinet must be satisfied that there are reasonable grounds to believe that the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorism offence, or the entity is knowingly acting on behalf of, at the direction of, or in collaboration with an entity described earlier in the provision. The Minister may only make a recommendation for listing if he or she has reasonable grounds to believe an entity meets the established criteria for inclusion.

A listed entity may apply to the Minister to be removed from the list. The Minister is to decide whether there are reasonable grounds to recommend to Cabinet that the entity no longer be listed. If the Minister does not make a decision on the application within sixty days, the applicant is deemed to remain a listed entity. The Minister is required to give notice without delay of any decision or deemed decision. Within sixty days of the decision, the applicant may apply for judicial review to the Chief Justice of the Federal Court or a judge of that court designated by the Chief Justice. Sections 83.05(6) and (6.1) and 83.06 of the Code contain special evidentiary provisions for dealing with sensitive and confidential information presented to the judge. The Minister is required to have published in the *Canada Gazette* notice of any final court order that an applicant no longer be a listed entity.

The Minister is to review the list two years after it was established, and every two years thereafter, to determine whether there are reasonable grounds to recommend to Cabinet whether an entity should remain on the list. Once the review has been completed, the Minister is required to publish in the *Canada Gazette* a notice of its completion.

Section 83.07 of the Code allows for an entity claiming not to be a listed entity to apply to the Minister for a certificate stating that it is not listed. The Minister must, within fifteen days of receiving the application, issue such a certificate if satisfied that the entity is not listed.

There are two other terrorist entity listing regimes besides the one set out in the *Criminal Code*. The first is established under the *Regulations Implementing the United Nations Resolution on the Suppression of Terrorism* (UNSTR) and the other is established under the *United Nations Al Qaida and Taliban Regulations* (UNAR). The UNSTR and UNAR respectively implement United Nations Security Council Resolutions 1373 and 1267. The implementation of these two terrorist entity listing regimes is the responsibility of the Minister of Foreign Affairs.

Amendments to the UNSTR in June, 2006 harmonized the two sets of regulations and the listing regime under the *Criminal Code* in order to abolish multiple listings, thus avoiding duplication. Consequently, individuals and organizations can only be placed on one list. The Code list now contains 40 organizations, while 36 names, both individuals and organizations, are found on the UNSTR list.

The lists differ in the tests to be applied to add names to them and in the legal consequences that flow from being listed. Insofar as the Code list is concerned, section 83.05 requires that there be reasonable grounds to believe that the entity to be listed has knowingly been involved in a terrorist activity or has knowingly assisted a terrorist group. The test for being added to the UNSTR list does not include the knowledge test, but requires that there be reasonable grounds to believe that the entity has participated in a terrorist activity. The UNAR, prohibiting dealing with Usama bin Laden, Al Qaida, and the Taliban, mirrors the list established by the United Nations Security Council Committee.

An entity included on the Code list is automatically defined as a terrorist group — this is not the case for entities included on the two other lists. If criminal charges are laid with respect to an entity listed under the Code, it is not necessary to prove that the entity is a terrorist group. Any such charges laid in relation to entities on the other two lists would require proof that the entity is a terrorist group.

ISSUES OF CONCERN

Multiple Lists

In its brief, B'nai Brith Canada addressed the existence of three lists of terrorist entities, although the ones it was referring to were those under the Code, the UNSTR, and the *Charities Registration (Security Information) Act*. It says that the existence of three separate listings and the fact that the lists are administered by different government departments are of concern to it.

Organizations whose charitable status has been denied or revoked under the *Charities Registration (Security Information) Act*, which was included as part of the *Anti-terrorism Act*, are not terrorist entities *per se*. Rather, they are organizations found to have

assisted a terrorist entity. Moreover, it appears that the provisions of the *Charities Registration (Security Information) Act* have not been used to the Subcommittee's knowledge. This means that a list of de-registered charities does not yet exist. The Subcommittee will deal with the de-registration of charities in the next chapter of the report.

Nonetheless, the recommendation made by B'nai Brith Canada that multiple lists be consolidated reflects a concern shared by the Subcommittee. Although steps have been taken to eliminate the multiple listing of entities, there are still other issues to be addressed. The three terrorist entity lists, under the Code, UNSTR and UNAR, are administered by two departments under the responsibility of different ministers — the Minister of Foreign Affairs and the Minister of Public Safety and Emergency Preparedness.[5] As well, the applicable tests to be added to the lists, and the legal consequences of being so added, differ among the three lists. The Subcommittee believes consideration should be given to further integrating the three terrorist entity lists, insofar as the departmental administration, applicable test for inclusion, and legal consequences flowing from such inclusion are concerned.

RECOMMENDATION 23

The Subcommittee recommends that consideration be given to further integrating the terrorist entity listing regimes established under the *Criminal Code*, the *Regulations Implementing the United Nations Resolution on the Suppression of Terrorism*, and the *United Nations Al Qaida and Taliban Regulations* insofar as the departmental administration, applicable test for inclusion, and legal consequences of listing are concerned.

Section 83.05(5) of the Code allows for judicial review by the Federal Court of a decision by the Minister of Public Safety and Emergency Preparedness not to remove an entity from the list. Subsection (6) allows the Federal Court to examine in private criminal or security intelligence reports, hear some or all of the evidence presented by the Minister of Public Safety and Emergency Preparedness in an *ex parte*, *in camera* proceeding, and provide the applicant for judicial review with a summary of the sensitive evidence adduced in that person's absence. A similar process is in place within the context of the de-registration of charities process, proceedings under the *Canada Evidence Act*, and security certificates under the *Immigration and Refugee Protection Act*. Each of these processes is discussed separately elsewhere in our report.

[5] Although the current Minister is called the "Minister of Public Safety", the *Criminal Code* continues to refer to the "Minister of Public Safety and Emergency Preparedness."

A number of briefs considered by the Subcommittee have proposed that a special advocate or *amicus curiae* scheme be put in place in relation to each of these processes. Rather than addressing this issue within each of these contexts, the Subcommittee deals comprehensively with this subject in a separate chapter later in the report.

OTHER RECOMMENDED AMENDMENTS

Ministerial Review of a Decision to List

Under section 83.05(2) of the *Criminal Code*, an entity that has been listed by the Governor in Council, on recommendation of the Minister of Public Safety and Emergency Preparedness, must first apply in writing to the Minister if it believes that it should not be a listed entity. Only after a decision has been made by the Minister, or one is deemed to be made, is the listed entity entitled to apply for judicial review. The Subcommittee believes that it is unfair to require a listed entity that believes that it has been improperly listed to first make application to the person who recently recommended the listing in the first place. At most, an application to the Minister should be optional. If it wishes instead, a listed entity should be able to apply directly to a court under subsection 83.05(5) for review of the initial decision to list.

RECOMMENDATION 24

The Subcommittee recommends that section 83.05 of the *Criminal Code* be amended so that, when a listed entity wishes to have an initial decision to list reviewed, it is not required to make an application to the Minister of Public Safety and Emergency Preparedness under subsection (2), but may instead apply directly to a court under subsection (5).

Although the Subcommittee believes that a listed entity should have immediate recourse to a court in the context of an application to have the *initial* decision to list reviewed, we have no concern, due to the lapse of time and possibly new information, that there must first be an application to the Minister of Public Safety and Emergency Preparedness in the context of a *subsequent* application under subsection 83.05(8), namely one based on a material change in circumstances or following a two-year review under subsection 83.05(9).

However, the Subcommittee notes some difficulty with the current wording of section 83.05 in that it is not clearly stated that the Governor in Council (i.e., Cabinet) makes the final decision regarding whether an entity should remain on or be removed from the list. While subsection (1) states that the *initial* listing of an entity is made by the Governor in Council on recommendation of the Minister, other subsections referring to ministerial recommendations do not clearly indicate that the Governor in Council considers

the recommendation and either accepts or rejects it. In fact, subsection (4) appears to assume that a recommendation by the Minister becomes the final decision, which is then communicated to the applicant, who has 60 days to apply for judicial review.

To provide clarity and consistency, the Subcommittee believes that amendments should be made to indicate that a ministerial recommendation under subsections 83.05(2), (3) and (9) to retain an entity on the list, or remove it, always results in the Governor in Council making the final decision. Further, there should be timeframes for the ultimate decision, which we believe should be within 120 days of the initial application to the Minister. If the Governor in Council does not make a decision within 120 days, the listed entity should be deemed to be removed from the list.

Also in the interest of due process, subsection 83.05(3) should be amended so that if the Minister fails to make a recommendation to the Governor in Council within 60 days of the application, the Minister is deemed to have decided to recommend that the applicant no longer be a listed entity, rather than remain a listed entity. Both the 60-day and 120-day deadlines would ensure a more just and expeditious consideration of applications. It is unfair to require an entity to make an application to the government, only to have the application not considered in a timely manner, and then the entity deemed to remain on the list, obliging it to apply for judicial review if it still wants to be removed.

For similar reasons to those just stated, the Subcommittee believes that each two-year review of the list of entities, required under subsection 83.05(9) of the Code, should also result in a final decision on the part of the Governor in Council within 120 days after the commencement of the review, failing which an entity should be deemed to be removed from the list. Given the consequences of being a listed entity, the government should be obligated to make a decision within a reasonable period of time.

If the Governor in Council decides not to remove an entity from the list following an application under subsections 83.05(2) or (8), the applicant would then have 60 days from the time of receiving notice of the decision to apply for judicial review, as is already the case under subsection (5). Also as is currently the case, judicial review would not be immediately available if the Governor in Council decides to keep an entity on the list following a two-year review under subsection (9), as a listed entity should instead apply to be removed from the list in accordance with subsection (8).

RECOMMENDATION 25

The Subcommittee recommends that section 83.05 of the *Criminal Code* be amended so that, when a listed entity applies to no longer be a listed entity in accordance with subsections (2) or (8), the Minister of Public Safety and Emergency Preparedness must make a recommendation within 60 days, failing which he or she is deemed to have decided to recommend that the applicant be removed from the list. Further, any recommendation or deemed recommendation on the

part of the Minister should expressly be referred to the Governor in Council, which is to make a final decision within 120 days of the entity's application, failing which the entity is deemed to be removed from the list.

RECOMMENDATION 26

The Subcommittee recommends that section 83.05 of the *Criminal Code* be amended so that, on each two-year review of the list of entities under subsection (9), it is clear that the Governor in Council has the final decision as to whether or not an entity should remain a listed entity. Further, the decision should be made within 120 days of the commencement of the review, failing which the entity is deemed to be removed from the list.

CHAPTER FIVE:
DE-REGISTRATION OF CHARITIES

BACKGROUND

The G7/G8 nations (including Canada), at the July 1996 Paris Ministerial Meeting on Terrorism, agreed to adopt domestic measures to prevent terrorist financing through front organizations having or claiming to have charitable goals. Canada has also been active on the 33-member Financial Action Task Force (FATF) which has developed and promoted national and international policies and best practices to first combat money laundering and later terrorist financing. Shortly after the September, 2001 attacks on the United States, FATF expanded its mandate beyond money laundering to also focus its expertise on preventing and disrupting terrorist financing.

Canada signed the United Nations *International Convention for the Suppression of the Financing of Terrorism* in February, 2000. In doing so, it committed itself to introduce legislative and other measures to prevent the financing and other forms of support for terrorist activity. The Convention placed particular emphasis on the need to cut off support provided by charities as part of the international sources of financing to some terrorist groups. The de-registration of charitable organizations measures contained in the *Anti-terrorism Act* are part of Canada's response to its international obligations in this area.

Part 6 of the *Anti-terrorism Act*, more particularly section 113,[6] contains the *Charities Registration (Security Information) Act*. This Act governs the protection and use of security and criminal intelligence in determining the eligibility and continued eligibility of organizations for charitable status under the *Income Tax Act*. It is intended to prevent terrorist organizations or organizations engaged in direct or indirect support activities from benefiting from the tax advantages accorded to charitable organizations.

Section 4 of the Act allows the Minister of Public Safety and Emergency Preparedness and the Minister of National Revenue to sign a certificate that in their opinion, based on information, there are reasonable grounds to believe that an applicant or a registered charity has made, makes, or will make available directly or indirectly resources to a terrorist entity, whether listed or not, as defined in the *Criminal Code*. It is provided in section 13 that, unless it is cancelled, such a certificate is in effect for seven years.

The Ministers are required by section 5 of the Act to serve on the applicant or registered charity a copy of the certificate and a notice that it will be referred to the Federal Court. Section 6 of the Act provides that once the certificate has been referred to the

[6] As amended by a coordinating amendment in section 125 of the *Anti-terrorism Act*.

Federal Court, the judge shall, among other things, examine in private the information on which the certificate was based as well as any other evidence, provide the applicant or registered charity with a summary of the information available to the judge so as to make known the circumstances giving rise to the certificate, and provide the applicant or registered charity with an opportunity to be heard. Under section 7, the judge is to determine whether the certificate is reasonable and if it is not, quash it. The decision as to the reasonableness of the certificate is not reviewable or appealable.

Section 8 of the Act provides that where a certificate has been determined by a Federal Court judge to be reasonable under section 7, it is deemed to provide conclusive proof that an applicant is ineligible to become a registered charity or that a registered charity does not comply with the requirements to have that status. The Minister of Public Safety and Emergency Preparedness is required to have any certificate determined to be reasonable published in the *Canada Gazette*.

An applicant or former registered charity, in relation to which a certificate has been found to be reasonable and that believes there has been a material change in circumstances, can, under section 10 of the *Charities Registration (Security Information) Act*, apply to the Minister of Public Safety and Emergency Preparedness for a review of the certificate by the Minister and the Minister of National Revenue. The Ministers may decide that since the certificate was found to be reasonable, there has been no material change in circumstances and the application should be denied, or that, even though there has been a material change in circumstances, there are reasonable grounds to continue the certificate in effect. Alternatively, they may cancel the certificate. If no decision is made within 120 days of receipt of the application, the certificate is deemed to be cancelled at the end of that period.

An applicant or former registered charity may apply to the Federal Court under section 11 of the Act for a review of a decision made by the Ministers under section 10. Any determination by the Federal Court of such an application is neither appealable nor subject to judicial review.

To the Subcommittee's knowledge, no certificates have been issued under this legislation.

ISSUES OF CONCERN

A Due Diligence Defence

The consequences of an applicant or registered charity being denied charitable status or being de-registered are dramatic. The organization loses the capacity to raise and disburse funds for its chosen field of activity. It can not issue receipts under the *Income Tax Act* to those who wish to contribute to its activities. The applicant or registered charity may

become insolvent and may have to be wound up as a consequence. There is the possible risk of civil liability for the members of its board of directors who may be perceived by some as not having fulfilled their fiduciary responsibility to adequately protect the assets of the applicant or charitable organization. There may also be some risk of criminal liability for both the applicant or charitable organization, and their directors and employees under the terrorism offence provisions of the *Criminal Code*.

Such consequences could arise in a situation where an organization has taken the best steps it can to ensure that those benefiting from charitable donations as donees are legitimate and are not connected to a terrorist entity. The steps to make such assurances may be inadequate because of the pressure on the charitable organization to help those in need in distant places around the world where calamitous occurrences have to be dealt with rapidly to temper misery and destruction. The organization may have done the best it can to determine who is benefiting from its activity, but that may not suffice.

This concern was brought dramatically to the Subcommittee's attention by the submissions contained in the briefs from Imagine Canada and World Vision Canada. More specifically, Imagine Canada said in its brief that there is no due diligence defence available in the *Charities Registration (Security Information) Act* to an organization that has taken reasonable steps to ensure that it has not been or will not be used as a vehicle to support or provide resources to terrorist activity. It recommended that the Act be amended to require the Federal Court judge to whom a certificate is referred to not find the certificate to be reasonable where an applicant or registered charity has established that it has exercised due diligence to avoid the improper use of its resources under section 4(1)(*a*),(*b*),and(*c*).

In considering this recommendation, the Subcommittee reviewed the requirements under section 4(1) of the Act. On a close reading of this provision, it appears to the Subcommittee that, for a certificate to be issued, the applicant or registered charity must have consciously and intentionally undertaken activities that directly or indirectly support terrorist activity. If such an organization undertakes the due diligence measures that are within its resource capacity to ensure that it is not being used for terrorist purposes, it is unlikely the de-registration process will be initiated against it.

The Subcommittee is conscious, however, of the concern the whole de-registration process causes to charitable organizations, especially those active outside of Canada, in areas of conflict and other forms of danger. The de-registration process is perceived by some as casting a shadow over the activities of charitable organizations. Therefore, the Subcommittee agrees that, for greater certainty and to provide reassurance to charitable organizations and those who support them, the *Charities Registration (Security Information) Act* should be amended as recommended by Imagine Canada.

RECOMMENDATION 27

The Subcommittee recommends that the *Charities Registration (Security Information) Act* be amended so that the Federal Court judge, to whom a certificate is referred, shall not find the certificate to be reasonable where an applicant or registered charity has established that it has exercised due diligence to avoid the improper use of its resources under section 4(1).

Best Practice Guidelines for Charities

As mentioned earlier in this chapter, the FATF has published special recommendations and guidelines on international best practices intended to provide charitable organizations with guidance on what to do to avoid their status being used in financial support of terrorist activity. Both the United States Department of the Treasury and the Charity Commission for England and Wales have issued guidance documents in this area. As well, the Canada Revenue Agency has issued guidance to charities active internationally.

A review of these documents shows them to be general in nature and with little practical guidance of a kind that would assist an applicant or registered charity wanting to take steps within its resource capacity to exercise due diligence in assessing its donees.

The Canadian Bar Association identified this as an issue that needs to be addressed. It recommended in its brief that the government develop made-in-Canada “best practice” guidelines in consultation with the charitable sector. The Subcommittee agrees with this recommendation. Such best practice guidelines would be based on the experience of Canadian applicants and registered charities in carrying out due diligence assessments in the Canadian context, especially when such organizations have limited resources and expertise to carry out such examinations. These best practice guidelines should suggest both general policies and checklists that could be administered by applicants and registered charities in carrying out their due diligence assessments.

RECOMMENDATION 28

The Subcommittee recommends that, in consultation with the charitable sector, the Canada Revenue Agency develop and put into effect best practice guidelines to provide assistance to applicants for charitable status and registered charities in their due diligence assessment of donees.

Right to Appeal a Finding of Reasonableness

Section 8(2) of the *Charities Registration (Security Information) Act* provides that the Federal Court judge's determination that a certificate is reasonable is not subject to appeal or review. A similar provision can be found in the *Immigration and Refugee Protection Act* dealing with the security certificate process applicable to the removal of foreign nationals and permanent residents from Canada. This latter issue is dealt with elsewhere in our report. One of the consequences of the parallel provision in the *Immigration and Refugee Protection Act* context is that, in the absence of a possible review or appeal of the decision that a security certificate is reasonable, there have been numerous collateral court challenges dealing with other legal issues because the merits of the initial reasonableness decision cannot be challenged. One of the effects of numerous court proceedings in security certificate cases has been to cause the process to be a long and arduous one. This has not happened in the de-registration of charities process because no certificates have yet been referred to the Federal Court. But it could happen.

The Subcommittee agrees with the recommendation made in its brief by Imagine Canada that there should be a legislated right of appeal or review of a determination by a Federal Court judge that a referred certificate is reasonable. Because a Federal Court judge sitting alone, likely hearing much of the evidence in the absence of the applicant or registered charity, would be making a decision that is fatal to the organization, further recourse should be made available to ensure the decision is a fair one. This can only be done by allowing for an appeal to the Federal Court of Appeal on the merits of the decision on the reasonableness of the certificate.

RECOMMENDATION 29

The Subcommittee recommends that section 8(2) of the *Charities Registration (Security Information) Act* be amended to allow for an appeal to the Federal Court of Appeal of a decision by a Federal Court judge that a referred certificate is reasonable.

Section 6 of the *Charities Registration (Security Information) Act* allows the designated Federal Court judge to whom the certificate is referred to examine the relevant information in private, hear some or all of the evidence presented by the Minister of Public Safety and Emergency Preparedness and the Minister of National Revenue in an *ex parte*, *in camera* proceeding, and provide the applicant or registered charity with a summary of the sensitive evidence adduced in its absence. A similar procedure is in place within the context of the terrorist entity listing process in the *Criminal Code*, proceedings under the *Canada Evidence Act*, and security certificates under the *Immigration and Refugee Protection Act*. Each of these processes is discussed separately elsewhere in our report.

A number of briefs considered by the Subcommittee have proposed that a special advocate or *amicus curiae* scheme be put in place in relation to each of these processes.

Rather than addressing this issue within each of these contexts, the Subcommittee deals comprehensively with this subject in a separate chapter later in the report.

OTHER RECOMMENDED AMENDMENTS

A Knowledge Requirement

Section 4 of the *Charities Registration (Security Information) Act* allows a certificate to be issued, which has the effect of denying or revoking charitable status, in one of three situations: (*a*) where an applicant for charitable status or a registered charity has made, makes or will make resources available to an entity that is listed under the *Criminal Code*; (*b*) where it has made resources available to an entity that is not listed but which was engaged, and continues to be engaged, in terrorist activities; and (*c*) where it makes or will make resources available to a non-listed entity that engages or will engage in terrorist activities.

The Subcommittee believes that it is unfair to penalize an organization when it had no reason to believe that its resources were assisting an entity engaged in terrorism. In conjunction with the due diligence defence recommended by the Subcommittee earlier in this chapter, the Subcommittee believes that paragraphs (4)(1)(*b*) and (*c*) should expressly require that the applicant for charitable status or registered charity knew or ought to have known that the entity was, is or will be engaged in terrorism. Accordingly, an applicant or registered charity would more clearly be in a position to raise a defence of due diligence, if it took all reasonable steps to ensure that it was not assisting a terrorist entity. The Subcommittee does not believe that a knowledge requirement should be included in paragraph (*a*), as the names of entities listed under the *Criminal Code* are made available to the public, which is deemed to know that they are terrorist entities.

RECOMMENDATION 30

The Subcommittee recommends that the words "the applicant or registered charity knew or ought to have known that" be added after the words "*Criminal Code* and" in paragraphs 4(1)(*b)* and (*c)* of the *Charities Registration (Security Information) Act*.

References to Terrorist Activities

Section 4(1)(*b*) and (*c*) of the *Charities Registration (Security Information) Act* refer to entities engaged in "terrorist activities." The Subcommittee believes that "activities" should be placed in the singular, so that an applicant for charitable status or registered charity does not believe or argue that a certificate is possible only where it assists an entity engaged in more than one terrorist activity. Although section 33 of the *Interpretation Act*

states that words in the plural include the singular, it is preferable for the *Charities Registration (Security Information) Act* to be clear to those reading it. It should be understood that one terrorist activity alone may justify a certificate. We also note that "terrorist activity," which is a defined term in the *Criminal Code*, appears most commonly in that statute in the singular.

RECOMMENDATION 31

The Subcommittee recommends that the words "terrorist activities" be replaced by the words "a terrorist activity," and that the words "activities in support of them" be replaced by the words "an activity in support of a terrorist activity", in paragraphs 4(1)(*b*) and (*c*) of the *Charities Registration (Security Information) Act*.

In order for a certificate to be issued under section 4(1)(*b*) of the Act, an applicant for charitable status or registered charity must have made resources available to an entity that "was at that time, and continues to be," engaged in a terrorist activity. The Subcommittee has concerns that an organization may avoid consequences under the Act if the entity that it has assisted ceases its terrorist activity before the Ministers have become aware of the assistance or are able to sign a certificate. A certificate should be possible once a charitable organization or applicant for charitable status has made resources available to an entity engaged in terrorism, regardless of whether that entity continues to be so engaged.

RECOMMENDATION 32

The Subcommittee recommends that the words "at that time, and continues to be," be removed from section 4(1)(*b*) of the *Charities Registration (Security Information) Act*.

Protecting Identity and Court Documents

After an applicant for charitable status or registered charity has been served with a certificate and given notice that a court hearing will be scheduled to consider it, it may apply to a Federal Court judge, under subsection 5(3) of the Act, for an order directing that its identity not be published or broadcast, and that any documents filed with the court be treated as confidential. Under subsection 5(4), an order is not subject to appeal or review. Given the detrimental effect that a certificate has on the reputation of an organization, the Subcommittee believes that the identity of an applicant or registered charity should be protected, and all matters relating to the certificate and proceedings should remain confidential, unless and until the certificate is found to be reasonable by the Federal Court and is published in the *Canada Gazette* under section 8. In other words, the identity of the affected organization and the content of the court documents should automatically be confidential, without the need for the organization to make an application, until it is confirmed that the organization did something wrong. Further, this protection should be

available not only from the time the certificate is signed, but throughout the investigation leading up to the certificate.

RECOMMENDATION 33

The Subcommittee recommends that subsections 5(3) and (4) of the *Charities Registration (Security Information) Act* be repealed and that the Act be amended so that, beginning from the time that an applicant or registered charity is being investigated for allegedly making resources available to a terrorist entity, its identity shall not be published or broadcast, and all documents filed with the Federal Court in connection with the reference of the certificate shall be treated as confidential, unless and until the certificate is found to be reasonable and published under section 8.

Ministerial Review and Appeals

As mentioned in the background portion of this chapter, an organization that has been denied charitable status, or has had its status revoked, may apply to the Ministers, under section 10 of the *Charities Registration (Security Information) Act*, for a review of the certificate on the basis that there has been a material change in circumstances. If the Ministers agree that there has been a material change and that there are no longer reasonable grounds for the certificate, they may cancel it. Alternatively, the Ministers may decide that there has not been a material change, and therefore deny the application under paragraph 10(5)(*a*), or decide that there has been a material change but that there remain reasonable grounds for the certificate, and therefore continue the certificate under paragraph 10(5)(*b*)(i). Either of these negative decisions may be appealed by the organization under section 11.

If the decision being appealed is one under paragraph 10(5)(*a*) that there has not been a material change in circumstances, the court may overrule that determination and send the matter back to the Ministers to decide whether there are nonetheless reasonable grounds to continue the certificate under paragraph 10(5)(*b*)(i). However, it is unclear whether an organization is entitled to appeal *both* a decision by the Ministers that there has not been a material change in circumstances *and* a subsequent decision by the Ministers that the certificate remains warranted despite a court finding that there has been a material change and a reference of the matter back to the Ministers. In other words, section 11 may be interpreted as allowing only one appeal in respect of each application for review under section 10. The Subcommittee accordingly believes that section 11 should be amended for clarity.

RECOMMENDATION 34

The Subcommittee recommends that section 11 of the *Charities Registration (Security Information) Act* be amended to make it clear that an applicant or registered charity may apply for review of a decision made under paragraph 10(5)(*b*)(i), even if it has already applied for review of a decision made under paragraph 10(5)(*a*).

CHAPTER SIX:
CANADA EVIDENCE ACT

BACKGROUND

Section 43 of the *Anti-terrorism Act* replaced sections 37 and 38 of the *Canada Evidence Act* by sections 36.1 to 38.16 and section 44 added a schedule to the Act, set out at Schedule 2 to the *Anti-terrorism Act* itself.

Sections 37 to 37.3 of the *Canada Evidence Act* allow for the Government of Canada to certify orally or in writing its objection to the disclosure of information (related to a specified public interest) to a court, person or body with jurisdiction to compel its production. The superior court hearing the objection to the production of information or, in other cases, the Federal Court determines whether the objection should be upheld in whole, in part or not at all. These provisions set out rights of appeal to the provincial court of appeal or the Federal Court of Appeal, and to the Supreme Court of Canada.

Sections 38 to 38.12 of the Act require any participant in a proceeding, who is required, or expects to be required, to disclose sensitive information related to international relations, national defence, or national security, to advise the Attorney General of Canada of the possibility of such a disclosure. The Attorney General of Canada may at any time authorize the release of some or all of this information. The Attorney General of Canada may at any time apply to the Federal Court with respect to the disclosure of information about which notice has been given. The Federal Court judge hearing the application may authorize disclosure of the information unless it is concluded that to do so would be injurious to international relations, national defence, or national security. Provision is made for appeals to the Federal Court of Appeal and the Supreme Court of Canada.

The Attorney General of Canada's power to issue a certificate in relation to sensitive information is dealt with in sections 38.13 to 38.131 of the *Canada Evidence Act*. Where a decision or order has been made that may result in the disclosure of sensitive or potentially injurious information related to international relations, national defence, or national security, the Attorney General of Canada may issue a certificate prohibiting such disclosure. The certificate is to be published in the *Canada Gazette*, to be in force for fifteen years (unless it is re-issued), and may be reviewed by a judge of the Federal Court of Appeal on application by a party to the proceedings in relation to which it was issued. The judge can confirm, vary, or cancel the certificate. There is no appeal from this decision. No such certificates have, to the Subcommittee's knowledge, been issued.

The Attorney General of Canada may, under section 38.15 of the Act, serve a fiat on a prosecutor in a prosecution conducted by a provincial attorney general where sensitive or potentially injurious information may be disclosed. The effect of serving the fiat

is to establish the full authority of the Attorney General of Canada with respect to the conduct of the prosecution or related process. There is no provision with respect to judicial review or publication of such a fiat. As well, there has, to the Subcommittee's knowledge, been no use of this provision.

ISSUES OF CONCERN

Duration of an Attorney General Certificate

The provisions of the *Canada Evidence Act* set out at sections 38.13 and 38.131 dealing with the issuance of a certificate by the Attorney General of Canada have been of particular concern to some of those whose briefs have been considered by the Subcommittee. Although many of the other amendments to the *Canada Evidence Act* contained in the *Anti-terrorism Act* had precedents in this and other legislation, the allowance of the issuance of certificates appears to have been unprecedented and a new departure in Canadian law. Attorney General of Canada certificates appear to give the government a pre-emptive trump card that can be exercised if it is not satisfied with the outcome of judicial or adjudicative procedures, or even in the absence of, or prior to, such procedures. A particularly striking possible use of such certificates was drawn to the Subcommittee's attention in the submissions of the Privacy Commissioner and the Information Commissioner with respect to investigations of complaints carried out by their offices.

The Subcommittee accepts that in exceptional circumstances, resort to the certificate process may be necessary to protect truly sensitive information, the disclosure of which would be more harmful than its not being released. Although the Attorney General of Canada's certificate process appears to be unprecedented in Canada, its not having been used since it was put into place clearly demonstrates that there will be restraint exercised in any recourse to it. This does not mean, however, that the Subcommittee is fully satisfied with the process as it now exists. The level of transparency and accountability with respect to these certificates can and must be improved upon.

As mentioned earlier in this chapter, section 38.13(9) of the *Canada Evidence Act* provides that a certificate expires fifteen years after it has been issued, and it can be re-issued. Both the Privacy Commissioner in her brief, and Alan Leadbeater of the Information Commissioner's office during his testimony before the predecessor to the Subcommittee, expressed their views on this issue. Both of them proposed that such a certificate should expire five years after being issued.

The Subcommittee agrees with these submissions that fifteen years is too long a time to allow such a certificate to be in force. It should be noted, however, that the first reading version of the *Anti-terrorism Act* had no limit for the period of time for which such certificates would be in force after their issuance. Although the Subcommittee believes

fifteen years is too long for such certificates to be in force, it also thinks that a five-year period would be too short. The sensitive or potentially injurious information to which such certificates are to be applied is likely of such a type as to require protection from disclosure for a longer, rather than a shorter, period of time. With this factor in mind, the Subcommittee has concluded that ten years is a more appropriate time frame after the issuance of a certificate for it to be in force.

RECOMMENDATION 35

The Subcommittee recommends that section 38.13(9) of the *Canada Evidence Act* be amended so that a certificate expires ten years after it has been issued.

Right to Apply for Leave to Appeal

Section 38.131 of the *Canada Evidence Act* allows a party to a proceeding with respect to which a certificate has been issued to apply to the Federal Court of Appeal for an order that the certificate be varied or cancelled. A single judge of the Federal Court of Appeal is to hear the proceeding. Section 38.131(11) provides that the finding of the judge of the Federal Court of Appeal is final and not subject to review and appeal by any court. It should be noted that the original version of the *Anti-terrorism Act* did not contain even this limited review of a certificate issued by the Attorney General of Canada.

This issue, among others, was raised by the Privacy Commissioner in her brief. She recommended that consideration be given to allowing an appeal from the judicial review of these certificates so as to encourage further checks and balances in this process. As an alternative, she suggested that the judicial review itself could be carried out by a three-member panel of Federal Court of Appeal judges. The Subcommittee prefers the first of these recommendations, that is, the allowance of an appeal from the initial judicial review.

The Subcommittee believes that because of the extraordinary impact of the issuance of a certificate, it is essential that the initial judicial review process be carried out expeditiously and efficiently. Although it is unusual for a single judge of the Federal Court of Appeal to preside over proceedings of this type (usually this is done by a Federal Court judge sitting alone), the Subcommittee does not believe this is where a change to add more scrutiny of the certificate process is required. Rather, provision should be made for an appeal to the Supreme Court of Canada of the finding of the Federal Court of Appeal judge. Provision should be made for a party to the judicial review of a certificate who is not satisfied by the outcome to have a right to apply for leave to appeal to the Supreme Court of Canada on the merits of the initial decision. Because it is essential that the appeal of such an initial decision be dealt with expeditiously, the Subcommittee believes that such an appeal from a Federal Court of Appeal judge's decision should be heard by a reduced panel of three members of the Supreme Court of Canada. The Court already has experience with three-member panels who consider applications for leave to appeal lower court decisions.

RECOMMENDATION 36

The Subcommittee recommends that section 38.131(11) of the *Canada Evidence Act* be repealed and that there be established a right to apply to the Supreme Court of Canada for leave to appeal the decision of a Federal Court of Appeal judge who has conducted a judicial review of a certificate issued by the Attorney General of Canada. Such an appeal should be considered by a reduced panel of three members of the Supreme Court.

Annual Reports on the Use of Certificates and Fiats

Section 38.13(7) of the *Canada Evidence Act* requires the Attorney General of Canada to cause a certificate to be published in the *Canada Gazette* without delay after it has been issued. This provision was not found in the original first reading version of the *Anti-terrorism Act*. There is no similar publication requirement with respect to fiats under section 38.15. It is likely the framers of the legislation, having inserted this provision into it while it was in committee in the House of Commons, envisioned publication in the *Canada Gazette* as a means of making the certificate process visible to those not directly involved in it. The reality is, however, that only a small fraction of Canadians are regular readers of the *Canada Gazette*.

There is a better way of making the certificate process visible to Canadians. The Privacy Commissioner recommended in her brief that the certificate process be subject to the same reporting and sunset provisions as those applicable to investigative hearings and recognizance with conditions found in that part of the *Criminal Code* dealing with terrorist activity.

The Subcommittee does not agree with her with respect to that part of her recommendation proposing that the certificate process be sunsetted, in other words subject to expiry after a period of time. It does agree with her, however, that the Attorney General of Canada should be required to table an annual report in Parliament providing an account of use of both the certificate process and the resort to fiats with respect to prosecutions where there is concern sensitive or potentially injurious information may be disclosed. Such annual reports are already tabled in Parliament with respect to investigative hearings, recognizances with conditions (also known as preventive arrests), section 25.1 *Criminal Code* justifications of acts or omissions, and the law enforcement use of electronic surveillance.

RECOMMENDATION 37

The Subcommittee recommends that the *Canada Evidence Act* be amended to require the Attorney General of Canada to table in

Parliament an annual report setting out the usage of section 38.13 certificates and section 38.15 fiats.

There are two provisions within the *Canada Evidence Act* which allow for proceedings to be held in private, and at which the involved parties are to make *ex parte* submissions in the absence of the opposite parties. This can occur under sections 38.11 and 38.131(6) of the Act with respect to hearings and appeals or reviews. A similar procedure is in place within the context of the terrorist entity listing process in the *Criminal Code*, the charities de-registration process, and security certificates under the *Immigration and Refugee Protection Act*. Each of these processes is discussed separately elsewhere in our report.

A number of briefs considered by the Subcommittee have proposed that a special advocate or *amicus curiae* scheme be put in place in relation to each of these processes. Rather than addressing this issue within each of these contexts, the Subcommittee deals comprehensively with this subject in a separate chapter later in the report.

OTHER RECOMMENDED AMENDMENTS

Applications to the Federal Court

Under the *Canada Evidence Act*, as discussed earlier, every participant in a proceeding, who believes that sensitive or potentially injurious information is about to be disclosed, must give notice to the Attorney General of Canada and not disclose the information unless authorized. If the Attorney General does not give notice of a decision, or permits disclosure of only part of the information or disclosure with conditions, other than by agreement with the party, section 38.04(2) provides for an application to the Federal Court to determine whether the information may be disclosed. However, whether an application is mandatory or optional, and who has the responsibility of initiating it, depends on one of three situations.

If the person who gave the original notice is a witness in a proceeding, the Attorney General must bring the application if he or she does not authorize full disclosure. If the person who gave notice is not a witness, and was *required* to disclose the information during a proceeding, that person must bring the application. If the person who gave notice was not required to disclose the information, but only *wishes* to disclose it, he or she has the option of applying to the Federal Court if the Attorney General does not permit full disclosure. When a person other than the Attorney General makes an application, he or she must give notice to the Attorney General under section 38.04(3).

The Subcommittee questions why the Federal Court is not automatically involved in all cases where the Attorney General allows, other than by agreement with the party, none or only some of the information to be disclosed following notice from a party to a

proceeding. We believe that whenever the Attorney General refuses to permit full unconditional disclosure except by agreement, proceedings should be initiated in Federal Court. We further believe that the responsibility of initiating the proceedings should always rest with the Attorney General, as it is his or her decision that sets the process in motion, and it is burdensome to require an ordinary citizen, government employee or other participant in proceedings to bring the application. Accordingly, in addition to amending subsection 38.04(2) so that the Attorney General must bring the application with respect to disclosure in all cases, subsection (3), which refers to notice on an application by someone else, should be repealed.

RECOMMENDATION 38

The Subcommittee recommends that section 38.04 of the *Canada Evidence Act* be amended to require the Attorney General of Canada, with respect to information about which notice was given from a party to proceedings under any of subsection 38.01(1) to (4), to apply to the Federal Court for an order with respect to disclosure of the information in every case where, except by agreement with the party, the Attorney General does not permit full disclosure without conditions.

Duty of Entities to Notify the Attorney General

Section 38.02(1.1) of the *Canada Evidence Act* requires designated entities, who make a decision or order that would result in the disclosure of sensitive or potentially injurious information, to notify the Attorney General of Canada. They must then not cause the information to be disclosed for ten days, to give the Attorney General an opportunity to consider prohibiting disclosure. While the duty applies only in the context of certain purposes or matters, the designated entities include judges of the Federal Court, members of the Immigration and Refugee Board, a service tribunal or military judge under the *National Defence Act*, the Public Service Labour Relations Board, the Information Commissioner, the Privacy Commissioner, the Security Intelligence Review Committee, and certain boards and commissions of inquiry.

The Subcommittee has concerns about the capacity of designated entities to know whether or not information is sensitive or potentially injurious. Particularly where the entity is not routinely involved in matters of national security, it may be difficult to judge the nature of a specific piece of information and the consequences of permitting its disclosure. The statutory definitions of “potentially injurious” and “sensitive” information are not, in and of themselves, very helpful. The Subcommittee therefore suggests that there be written guidelines to assist judges, administrative adjudicators and government officials in fulfilling their responsibility under section 38.02(1.1). Where warranted, depending on the underlying expertise of the person making the decision or order to disclose, there should also be appropriate review mechanisms within the entities to ensure that notice is or is not given to the Attorney General, as appropriate. For example, members of the Immigration and Refugee Board or Public Service Labour Relations Board should have access to

someone who is able to confirm whether the information is indeed sensitive or potentially injurious, and that disclosure should not be made pending notice to the Attorney General.

RECOMMENDATION 39

The Subcommittee recommends that the government prepare written guidelines, and implement appropriate review mechanisms, to assist designated entities in fulfilling their duty to prevent the disclosure of sensitive or potentially injurious information and to notify the Attorney General of Canada under section 38.02(1.1) of the *Canada Evidence Act*.

Removal of Judicial Discretion

There are particular provisions of the *Canada Evidence Act* that, depending on the conclusions of the court, give it discretion to authorize the disclosure of information withheld by the government. However, the Subcommittee believes that if the specified conclusions are or are not made, as the case may be, the court should be *required* to authorize disclosure. The first such provision is subsection 37(4.1), which states that the court "may" authorize disclosure unless it concludes that disclosure would encroach upon a specified public interest. The Subcommittee believes that the word "may" should be replaced by "shall" so that the court must authorize disclosure if it does not find that disclosure would encroach upon a specified public interest. To allow the information to continue to be withheld, despite the conclusion that it does not encroach upon a specified public interest as claimed by the government, would defeat the purpose of the court application for disclosure.

If the court concludes that disclosure would encroach upon a specified public interest, subsection 37(5) of the *Canada Evidence Act* requires it to proceed to a second step of considering the public interest in disclosure. If the court concludes that the public interest in disclosure outweighs in importance the specified public interest, subsection (5) states that the court "may," after considering other factors such as the form of disclosure and conditions attached to it, authorize disclosure in one of various forms. Again, the Subcommittee believes that the court should be required to authorize disclosure once it concludes that it would be in the public interest.

The other provisions where, depending on certain conclusions, disclosure should be mandatory rather than merely permitted, are subsections 38.06(1) and (2) of the *Canada Evidence Act*. These subsections are analogous to the two just discussed, except that they deal with information withheld in the interest of national defence, national security or international relations, rather than a specified public interest. First, unless the judge concludes that the disclosure of the information would be injurious to international relations, national defence or national security, the Subcommittee believes that he or she should be required to make a disclosure order under subsection 38.06(1). Second, if the judge

concludes that disclosure of the information would be injurious, but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the Subcommittee believes that he or she should be required to authorize disclosure in one of the indicated forms under subsection 38.06(2).

RECOMMENDATION 40

The Subcommittee recommends that the word "may" be replaced by the word "shall" in subsections 37(4.1), 37(5), 38.06(1) and 38.06(2) of the *Canada Evidence Act*.

When a Disclosure Order Takes Effect

To allow an opportunity to appeal, subsection 37(7) of the *Canada Evidence Act* sets out when an order authorizing the disclosure of information that had been withheld by the government due to a specified interest takes effect. It states: "An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order, or a judgment of an appeal court that confirms the order, has expired, or no further appeal from a judgment that confirms the order is available." The Subcommittee believes that this subsection is awkwardly worded, is somewhat difficult to understand, and should therefore be redrafted for clarity.

RECOMMENDATION 41

The Subcommittee recommends that subsection 37(7) of the *Canada Evidence Act* be replaced by the following:

> **"An order of the court that authorizes disclosure does not take effect until**
>
> ***(a)*** **the time provided or granted to appeal the order has expired, or**
>
> ***(b)*** **a judgment of an appeal court has confirmed the order and the time provided or granted to appeal the judgment has expired, or no further appeal is available."**

Although a disclosure order in relation to information withheld on the basis of a specified interest does not take effect until the time provided for under subsection 37(7) of the Act, there is no comparable provision to prevent disclosure pending a possible appeal of an order, under section 38.06, authorizing disclosure of information that had been withheld on the basis of international relations, national defence or national security. As it is perhaps even more important that such information not be disclosed until all appeals have been exhausted, the Subcommittee believes that a provision akin to subsection 37(7) should be enacted with respect to disclosure orders made under section 38.06.

RECOMMENDATION 42

The Subcommittee recommends that the *Canada Evidence Act* be amended so that an order authorizing disclosure under subsections 38.06(1) or (2) does not take effect until (*a*) the time provided or granted to appeal the order has expired, or (*b*) a judgment of an appeal court has confirmed the order and the time provided or granted to appeal the judgment has expired, or no further appeal is available.

Private Hearings

Under section 38.11 of the *Canada Evidence Act*, a hearing to address information withheld by the government for reasons based on national defence, national security or international relations, and an appeal or review of a court order authorizing disclosure or confirming the prohibition of disclosure, must be held in private. When the *Anti-terrorism Act* was enacted, a comparable provision was included in section 37.21 with respect to hearings and appeals in relation to information withheld on the grounds of a specified public interest. However, section 37.21 was repealed in 2004. It was regarded as unnecessary, given the inherent jurisdiction of the court to provide for a private proceeding.

The Subcommittee finds it inconsistent that section 37.21 was repealed but section 38.11 was not. While we recognize that the sections deal with information withheld for different reasons, Parliament should either require private hearings in both types of cases, or defer to the inherent jurisdiction of the court. Given the sensitivity of matters affecting national defence, national security, international relations, and specified public interests, the Subcommittee prefers that private hearings be legislatively mandated in all cases.

RECOMMENDATION 43

The Subcommittee recommends that section 37.21 of the *Canada Evidence Act*, which was repealed in 2004, be re-enacted.

CHAPTER SEVEN: COMMUNICATIONS SECURITY ESTABLISHMENT AND THE CSE COMMISSIONER

BACKGROUND

Established after the Second World War, then renamed and transferred to the Department of National Defence in 1975, the Communications Security Establishment (CSE) was provided with a legislative basis for the first time at section 102 of the *Anti-terrorism Act* which added Part V.I (sections 273.61 to 273.7) to the *National Defence Act*. These provisions set out both its (foreign) signals intelligence and information technology security mandates in section 273.64 of the Act.

Under the direction of the Minister of National Defence, the Chief of CSE is responsible for its management and control (section 273.62(2)). The Minister may issue written directions to the Chief of CSE on the carrying-out of that person's duties and functions (section 273.62(3)). These directions are not subject to the *Statutory Instruments Act*, which means they do not have to be published in the *Canada Gazette* or elsewhere.

Because CSE is a foreign signals intelligence agency, the law*,* until the adoption of the *Anti-terrorism Act* in 2001, did not allow for it to intercept, retain, and analyze foreign electronic communications originating in, or being sent to, Canada. It was advised by the Department of Justice at that time that such activity would have to be judicially authorized under the electronic surveillance provisions of the *Criminal Code*. To address this issue, section 273.65 of the *National Defence Act* allows for the ministerial authorization of the interception, retention, and analysis of such types of communication. Such ministerial authorizations may be in force for renewable periods not to exceed one year in length, and are reviewed by the CSE Commissioner. The Minister of National Defence may also issue directions to the Canadian Forces to provide support to CSE in carrying out these types of activities.

There is also provision in section 273.63 of the Act for the appointment of a CSE Commissioner. This is the continuation of a position established in 1996 by order-in-council under the *Inquiries Act*. This person reviews CSE's activities to ensure they are in compliance with the law, investigates complaints and advises the Minister of National Defence of any activities not in compliance with the law. The CSE Commissioner has all the investigation powers of a commissioner appointed under Part II of the *Inquiries Act*,

and submits an annual report to the Minister of National Defence which is tabled in both Houses of Parliament. The CSE Commissioner may also carry out other duties assigned to the office by other Acts of Parliament or authorized by the Governor-in-Council.

ISSUES OF CONCERN

Review of the Interception of Private Communications

As mentioned earlier in this chapter, section 273.65 of the *National Defence Act* allows for the Minister of National Defence to authorize the interception of private communications in Canada where the sole purpose is to obtain foreign intelligence when a person or entity targeted is outside of Canada. The authorized interception of private communication in Canada is incidental to the collection of foreign intelligence outside of the country.

More specifically, section 273.65(2) of the Act provides that the Minister may only authorize the interception of such private communications if satisfied that the interception is directed at foreign entities located outside of Canada, the information to be obtained could not be reasonably obtained by other means, the foreign intelligence value of the information to be obtained by the interception justifies it, and adequate measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security. Similar provisions dealing with CSE's information technology security mandate can be found at section 273.65(3) and (4) of the Act.

CSE, under section 273.66 of the Act, may only undertake activities that are within its mandate, consistent with ministerial directions, and consistent with ministerial authorizations issued under section 273.65. Finally, section 273.65(8) of the Act requires the CSE Commissioner to review activities carried out under ministerial authorizations to ensure they are authorized and is to report to the Minister.

The Privacy Commissioner has commented on this issue and has by implication said that the review mandate in relation to the authorization of the interception of private communications is too narrow and needs to be more inclusive. More specifically, she has recommended that section 272.65(8) of the *National Defence Act* should be amended so as to require the CSE Commissioner not only to review activities under ministerial authorizations to ensure they are authorized, but also to ensure that both the activities and the authorizations themselves are in compliance with the *Canadian Charter of Rights and Freedoms* and the requirements of the *Privacy Act*.

The Subcommittee agrees with this recommendation. Section 273.65 of the *National Defence Act* represented a major departure from CSE's foreign intelligence mandate when it was enacted by Parliament. Prior to the adoption of the *Anti-terrorism Act*

in 2001, CSE would have had to obtain judicial authorization under the *Criminal Code* before it could intercept private communications in Canada, even for foreign intelligence purposes. This change in the law was made to clarify this aspect of CSE's activities and to give it a proper legislative basis. It should also be noted that section 273.69 of the *National Defence Act* excludes the relevant provisions of the *Criminal Code* dealing with the judicial authorization of the interception of private communications from application to CSE in this context.

Although there are protections within section 273.65 with respect to the ministerial authorization of the interception of private communications, they are not as extensive as those set out in a similar context in the *Criminal Code*. Consequently, the functions carried out by the CSE Commissioner are essential to ensuring that such ministerial authorizations are only issued when necessary, and both they and the activities carried out under their ambit are consistent with the rule of law, as well as the rights and freedoms of Canadians. Thus, the Commissioner should be required to carry out, in light of the rights and freedoms of Canadians, the review functions assigned to the office when examining the private communication interception activities carried out under ministerial authorization.

RECOMMENDATION 44

The Subcommittee recommends that section 273.65(8) of the *National Defence Act* be amended to require the Commissioner of the Communications Security Establishment to review the private communication interception activities carried out under ministerial authorization to ensure they comply with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Privacy Act*, as well as with the authorization itself (as already required).

Restraints on CSE Activities

The following consequential amendment should also be made to section 273.66 of the *National Defence Act* so as to extend the principles set out above to the exercise by CSE of the mandate given to it by Parliament. Although, in strict terms of legal interpretation, such an amendment may not be necessary, the Subcommittee believes this guidance from Parliament should be explicit so as to reassure Canadians that the activities of this government agency are subject to the same restraints on its activities as those applicable to other public institutions.

RECOMMENDATION 45

The Subcommittee recommends that section 273.66 of the *National Defence Act* be amended to require the Communications Security Establishment to only undertake activities consistent with the

Canadian Charter of Rights and Freedoms **and the** ***Privacy Act*****, in addition to the restraints on the exercise of its mandate already set out in that section.**

Issues Raised in the Latest Annual Report

In his last Annual Report (for the year 2005-2006), former CSE Commissioner Antonio Lamer said that there were ambiguities and uncertainties in the law, particularly in relation to the provisions allowing for the ministerial authorization of the interception of private communications. He went on to say that there was a disagreement between his office and Department of Justice counsel with respect to key provisions that influence the nature of the assurance that his office can provide to Parliament and Canadians.

Without making a specific recommendation in this regard, the Subcommittee urges government counsel and the new Commissioner to resolve these issues as expeditiously as possible, if they have not already done so. As well, the Subcommittee believes the Government, in its response to this report, should, to the extent that it can do so, provide some indication as to what the issues of disagreement are and how they have been resolved, if they have been. Failing this, the new Commissioner should provide these details in his next annual report.

OTHER RECOMMENDED AMENDMENTS

Appointment of a Commissioner

Section 273.63(1) of the *National Defence Act* allows the Governor in Council to appoint a supernumerary judge or a retired judge of a superior court as Commissioner of the Communications Security Establishment. However, because the entire subsection begins with “The Governor in Council may…,” the provision suggests that, in addition to discretion to appoint a Commissioner, there is also discretion in deciding whether the post is to be filled by a judge. The Subcommittee understands the provision to mean that *if* the Governor in Council chooses to appoint a Commissioner, he or she *must* be a supernumerary judge or a retired judge of a superior court. Section 273.63(1) should be amended for clarity.

RECOMMENDATION 46

The Subcommittee recommends that the words “The Governor in Council may appoint a supernumerary judge or a retired judge of a superior court as Commissioner of the Communications Security Establishment” be replaced by the words “The Governor in Council

may appoint a Commissioner of the Communications Security Establishment, who shall be a supernumerary judge or a retired judge of a superior court," in section 273.63(1) of the *National Defence Act*.

No Activities Directed at Canadians

Paragraph 273.64(2)(*a*) of the *National Defence Act* states that certain activities of the Communications Security Establishment, most importantly foreign intelligence gathering, "shall not be directed at Canadians or any person in Canada." The intent of the provision was to preclude the activities from being directed at Canadians anywhere in the world, although the words may also be interpreted to refer only to Canadians in Canada. For certainty, the paragraph should refer to Canadians "anywhere."

RECOMMENDATION 47

The Subcommittee recommends that the word "anywhere" be added after the word "Canadians" in paragraph 273.64(2)(*a*) of the *National Defence Act*.

CHAPTER EIGHT:
SECURITY OF INFORMATION ACT

BACKGROUND

Sections 24 to 30 of the *Anti-terrorism Act* extensively revised and renamed the then sixty-two year old and rarely used *Official Secrets Act*. It is now known as the *Security of Information Act*. Section 27 of the *Anti-terrorism Act* replaced section 3 of the former *Official Secrets Act's* definition of a spying offence by an extensive definition of actions inside and outside of Canada that are prejudicial to the safety or interests of the State.

Section 29 of the *Anti-terrorism Act* replaced sections 6 to 15 of the former *Official Secrets Act*. Section 6 of the new Act makes it an offence to approach or enter a prohibited place for purposes prejudicial to the safety of the State. Section 7 makes it an offence to interfere with a peace officer or a member of the Canadian Forces on guard or patrol duty in the vicinity of a prohibited place.

Section 10 of the new Act permits the deputy head of a government institution to designate as a person permanently bound to secrecy anyone who by reason of office, position, duties, contract, or arrangement has, has had, or will have access to special operational information, if it is in the interest of national security to so designate that person. Sections 13 and 14 make it offences for designated persons to intentionally without authority communicate or confirm special operational information. Section 15 provides for a public interest defence to any person charged with such offences, and sets out factors to be considered by a judge or court hearing such a case.

Sections 16 to 18 of the new Act set out a number of offences related to the communication to terrorist groups or foreign entities of information that the federal or provincial governments take measures to safeguard, or special operational information. Sections 19 to 23 created the offences of economic espionage, foreign-influenced or terrorist-influenced threats or violence, harbouring or concealing persons committing offences under the Act, preparatory acts intended to assist the perpetration of offences set out in the Act, and conspiracies and attempts to commit offences set out in the Act. Section 24 requires the consent of the Attorney General of Canada for any prosecution under the Act.

On January 21, 2004, the RCMP executed search warrants under section 4 (unauthorized use or possession of classified information) of the *Security of Information Act* at the home and office of an *Ottawa Citizen* journalist. The media outlet challenged the constitutionality of section 4 and requested that the court quash the search warrants. Section 4 of the *Security of Information Act* was previously found in the *Official Secrets Act*, and was not amended by the *Anti-terrorism Act*, although sections 26 and 27 of the *Anti-*

terrorism Act amended the definition of several words and expressions found in section 4. Although section 4 was not found in or amended by the *Anti-terrorism Act*, both this Subcommittee and its predecessor examined the issues which arose from it because they were inseparable from the more general review itself. More will be said about this in the next part of this chapter.

ISSUES OF CONCERN

Section 4 of the *Security of Information Act*

When the RCMP executed the search warrants at the home and office of the *Ottawa Citizen* journalist in January 2004, they were looking for evidence related to the November 8, 2003 publication in that newspaper of an article by the journalist entitled "Canada's Dossier on Maher Arar". The article purported to be based on information contained in classified law enforcement or intelligence documents whose release had not been authorized. The search warrant indicated that the search was being carried out as part of an investigation of possible offences under subsections 4(1)(*a*), (3), and (4)(*b*) of the *Security of Information Act*.

Following this search of the home and office of the journalist, there was an outcry from the media, commentators, civil libertarians, and others about the adverse impact all of this was having on the constitutionally protected freedom of expression and the press. More particularly, section 4 of the Act was the subject of much criticism for its breadth, vagueness, and the chilling effect it was having on journalists and others.

Shortly after the search warrants were executed, the *Ottawa Citizen* and its journalist instituted court proceedings to quash them and to challenge the constitutionality of section 4 of the Act, arguing that it is in violation of the *Canadian Charter of Rights and Freedoms* because it infringes the freedom to gather and disseminate information of public interest and public concern.

This part of the chapter will deal with the issues related to section 4 of the *Security of Information Act*. First, it is important to understand this provision in some detail. The most obvious characteristics of this legislative provision are its complexity, breadth, vagueness, and antiquated terminology. Section 4 contains hundreds of possible criminal offences related to unauthorized information disclosure or "leakage".

Subsection 4(1) of the Act deals with the wrongful communication of "secret", "official" code words, passwords, sketches, plans, models, articles, notes, documents, information, etc. The words "secret" and "official" are not defined in the *Security of Information* Act. It applies to information entrusted to anyone holding office under Her Majesty. Paragraph (*a*) of the subsection deals with the unauthorized communication of these documents to someone not authorized to receive them. Paragraph (*b*) deals with the

use of this information for the benefit of a foreign power or in any other manner prejudicial to the interests of the State. Paragraph (*c*) deals with the retention of this information when the person has no right to retain it or the person fails to follow lawful instructions with regard to the return or disposal of the information. Paragraph (*d*) of the subsection deals with a failure to take reasonable care of the information or endangering the safety of it.

Subsection 4(2) of the Act makes it an offence to communicate any of the described information to a foreign power or in any way prejudicial to the interests of the State. This provision is not limited to information entrusted to anyone holding office under Her Majesty.

Subsection 4(3) deals with the receipt of secret, official information by a person who knows or has reasonable grounds to believe that the information was given to him or her in contravention of the legislation. This does not apply if the person proves that the communication was contrary to his or her "desire".

Subsection 4(4) deals with the retention of information by a person who has no right to retain it, or the failure by that person to follow instructions to return or dispose of it, and allowing another person to have access to such information.

Anyone convicted of an offence under section 4 of the *Security of Information Act* is subject to a sentence of imprisonment for no more than fourteen years if prosecuted by way of indictment or to imprisonment for no more than twelve months and/or a fine of no more than $2,000 if prosecuted by way of summary conviction.

There has been only one actual prosecution of a media outlet and journalist under section 4 of either the former *Official Secrets Act* or current *Security of Information Act*. The recent case involving the *Ottawa Citizen* and its journalist had not reached the actual prosecution stage when the constitutionality of section 4 was addressed by the Ontario Superior Court, as discussed in more detail below. In *R. v. Toronto Sun Publishing et al.*,[7] the media outlet was prosecuted under subsections 4(1)(*a*) and (3) of the *Official Secrets Act*. After a preliminary inquiry, Waisberg, Prov. Ct. J.(Ont.), dismissed the charges. He did so because the documents the journalist and the media outlet were alleged to have were also apparently in the possession of a member of the House of Commons and a television outlet. Because the document was so widely publicly available, it had lost its secret description. The case did not proceed to trial.

Legislative History and Previous Calls for Reform

Section 4 of the *Security of Information Act* has to also be understood within the context of the development and review of official secrets legislation in Canada. The United Kingdom enacted its first official secrecy legislation in 1889. Legislation virtually identical to this British law was enacted by Parliament in 1890. Canada's first *Criminal Code* in 1892

[7] (1979), 98 D.L.R. (3d) 524.

included the 1890 legislation adopted by Parliament. The first British official secrets legislation was repealed in 1911 and replaced by an *Official Secrets Act*. This British Act extended its coverage to include Canada.

In 1920, the United Kingdom Parliament adopted a new *Official Secrets Act* whose coverage was not extended to Canada. This caused the anomaly of 1911 British legislation, no longer applicable there, continuing to be in force in Canada.

The Canadian Parliament in 1939 adopted an *Official Secrets Act* in terms virtually identical to the British legislation. The Canadian legislation has only rarely been amended by Parliament since its initial adoption. In June, 1969, the Royal Commission on Security, known as the Mackenzie Commission, recommended that consideration be given to a complete revision of the *Official Secrets Act*.

When Parliament in 1973 adopted amendments to the *Criminal Code* allowing for wiretaps and other forms of judicially approved electronic surveillance, the *Official Secrets Act* was amended by adding a provision allowing for the approval of electronic surveillance by the Solicitor General of Canada. The McDonald Commission in its 1980 First Report, entitled *Security and Information*, made a number of recommendations for the amendment of section 4 of the *Official Secrets Act* to address what it called "leakage".

In 1984, Parliament adopted the *Canadian Security Intelligence Service Act* establishing CSIS and doing some other things. It repealed the provision of the *Official Secrets Act* allowing for the Solicitor General to approve wiretaps or other forms of electronic surveillance. This was replaced by a requirement that any such intrusive investigative technique be approved by a Federal Court judge.

The former Law Reform Commission of Canada, in a 1986 Working Paper entitled *Crimes Against the State*, recommended that section 4 of the *Official Secrets Act* be re-cast as a criminal offence dealing with the leakage of government information. In 1990, the Special House of Commons Committee that carried out the statutorily-mandated review of the *Canadian Security Intelligence Service Act* recommended that the House establish a national security subcommittee and that it undertake a review of the *Official Secrets Act* as part of its agenda. Such a subcommittee was established, but it did not carry out the recommended review of the *Official Secrets* Act. After that report and its recommendation, the *Official Secrets Act* was under active review within government during the 1990's. Parliament made no further changes to Canada's official secrets legislation until the adoption of the *Anti-terrorism Act* in 2001.

To return to the court challenge launched by the *Ottawa Citizen* and its journalist, Ontario Superior Court Justice Ratushny released her reasons for judgment in this case on October 19, 2006.[8] She ruled that sections 4(1)(*a*), 4(3), and 4(4)(*b*) of the *Security of*

[8] *O'Neil* v. *Canada (Attorney General)*, [2006] O.J. No. 4189 (QL), Court File No 11828.

Information Act were of no force and effect because they were in violation of sections 2(*b*) (freedom of expression and the press) and 7 (principles of fundamental justice) of the *Canadian Charter of Rights and Freedoms,* and could not be saved by section 1 as a reasonable limit imposed by law in a free and democratic society. She came to this conclusion because these provisions of the Act were overbroad and vague, without limitation as to their application, imposing possible criminal liability on those who could inadvertently violate them. She also found that some of the language used in these provisions was arcane and undefined, reflecting the legislative reality of another era. Finally, Justice Ratushny ruled that her finding that these provisions are of no force and effect was to be applied immediately, and not at a later date as requested by the Crown to allow Parliament to fill the legislative void.

There are several points to be made about section 4 of the *Security of Information Act* and the court ruling on it. As stated earlier, section 4 itself is not part of the *Anti-terrorism Act* and is essentially unchanged since Canada adopted the now-repealed *Official Secrets Act* in 1939. Thus, Justice Ratushny's judgment did not strike down part of the *Anti-terrorism Act* since section 4 was not directly affected by its enactment. As well, those elements of section 4 that were not declared by Justice Ratushny to be of no force and effect are still in effect.

Then-Attorney General and Minister of Justice of Canada Vic Toews announced on November 3, 2006 that in the public interest there would be no appeal from the judgment rendered by Justice Ratushny. He went on to say that the government would consider its legislative options in relation to section 4 of the Act within the context of the reports to result from the parliamentary reviews of the *Anti-terrorism Act*.

Guidance on How Section 4 Might Be Amended

The Subcommittee was not surprised by the outcome of the court challenge launched by the *Ottawa Citizen* to the constitutionality of section 4. A mere reading of this convoluted, arcane provision in light of the *Canadian Charter of Rights and Freedoms* and the case law to which it has given rise could lead to no other conclusion. What is surprising to the Subcommittee is that those who drafted the *Anti-terrorism Act* did not re-draft section 4 when they were re-casting the *Official Secrets Act* as the new *Security of Information Act*. The problems with section 4 were obvious then and there had been authoritative recommendations as to how to address them.

While the Subcommittee does not make any specific recommendation as to how section 4 of *Security of Information Act* should be amended, we note that if the government decides that it wants to re-cast section 4, ideas for doing so can be drawn from several of the submissions on this issue considered by the Subcommittee.

The Canadian Civil Liberties Association in its brief recommended that for purposes of national security, the Act should be amended so that: further dissemination of leaked information not be prohibited unless its disclosure could reasonably be expected to cause serious harm to the physical safety and defence of Canada; such further dissemination of information should not be prohibited unless it contains markings indicating its classified nature, and unless there is a systematic way to challenge the validity of the marking; the mere receipt of leaked information by itself should no longer be an offence; and in the absence of an intent to harm Canada or a reckless disregard for Canada's interests, the penalty for merely disclosing such information should be significantly less than it is now.

Craig Forcese, law professor at the University of Ottawa, said in his brief that section 4 of the Act should be repealed and replaced by a new provision defining carefully and narrowly the sorts of secrets covered by these criminal offences and require that there be proof of actual harm by such un-authorized disclosure of information. As well, a disclosure-in-the-public-interest defence should be included in any such replacement for section 4.

The Canadian Newspaper Association in its brief urged that section 4 be repealed, and that any replacement provision should be narrowly drawn and reduce the scope of secrecy to what is strictly necessary, erring on the side of openness. As well, it recommended that the act of receiving secret information should not be a criminal offence, and that journalists, publishers, and all journalistic activity should be exempt from sanction, at least where publication has not proven to have harmed national security.

OTHER RECOMMENDED AMENDMENTS

Removal of a Heading

Before the *Anti-terrorism Act* was enacted, section 3 of the *Official Secrets Act* set out certain offences. However, section 3 of what is now the *Security of Information Act* no longer sets out any offences. The heading entitled "Offences" before section 3 should therefore be removed.

RECOMMENDATION 48

The Subcommittee recommends that the heading "Offences", preceding section 3 of *Security of Information Act*, be removed.

Purposes Prejudicial to the Safety or Interests of the State

Section 3 of the *Security of Information Act* now sets out what constitutes a purpose prejudicial to the safety or interests of the State. However, it is not clear, from the wording of the section itself, whether the list of conduct is exhaustive or non-exhaustive. The Subcommittee does not believe that the 14 paragraphs are an exhaustive (closed) list, as it is not possible to envisage every act that would be prejudicial to Canada, and the former *Official Secrets Act* operated without a similar provision. Instead, we believe that section 3 lists conduct that, for certainty, is *deemed* to be prejudicial, and that it leaves open the possibility of other conduct that a court might find to be prejudicial.

This interpretation is reinforced in that other sections of the *Security of Information Act* mention prejudicial conduct that is not already included in section 3. Sections 4(1)(*b*), 4(2) and 5(1) each name a specific act or acts followed by the words "or in any *other* manner prejudicial to the safety or interests of Canada." The first-mentioned conduct (for example, using information for the benefit of any foreign power, communicating information to any foreign power, and gaining admission to a prohibited place) are therefore implied to be prejudicial to Canada, although they are not listed in section 3. The Subcommittee accordingly believes that section 3 of the Act should use the word "includes" or be amended in some other way so that, for clarity, the list of conduct prejudicial to the safety and interest of the State is understood to be non-exhaustive.

RECOMMENDATION 49

The Subcommittee recommends that section 3 of the *Security of Information Act* be amended, for example through use of the word "includes," so that the list of what constitutes a purpose prejudicial to the safety or interests of the State is clearly non-exhaustive.

Harbouring or Concealing

In addition to creating the offence of harbouring or concealing a person who has carried out or is likely to carry out a terrorist activity under section 83.23 of the *Criminal Code*, which is discussed in an earlier chapter of our report, the *Anti-terrorism Act* created a comparable offence under section 21 of the *Security of Information Act*. Subsection 21(1) states: "Every person commits an offence who, for the purpose of enabling or facilitating an offence under this Act, knowingly harbours or conceals a person whom he or she knows to be a person who has committed or is likely to commit an offence under this Act." For the same reasons discussed earlier in the context of section 83.23 of the Code, the Subcommittee believes that the "purpose" clause should apply only if the accused is harbouring or concealing a person who is likely to commit a future offence, not a past one. The French version should also use the word "recèle" rather than "héberge."

Further, to avoid confusion between the person harbouring or concealing and the person being harboured or concealed, the Subcommittee believes that section 21 of the *Security of Information Act* should begin with "Every one." Finally, the purpose clause should be redrafted so that it is the person being harboured or concealed who might be facilitating an offence. As currently worded, section 21 contemplates the harbourer to be enabling or facilitating an offence, whereas section 83.23 of the *Criminal Code* contemplates the harbourer to be enabling the *other person* to facilitate something. The Subcommittee believes that there should be consistency.

RECOMMENDATION 50

The Subcommittee recommends that subsection 21(1) of the *Security of Information* be replaced by the following:

> **"Every one commits an offence who knowingly harbours or conceals a person whom he or she knows to be a person who**
>
> **(i) has committed an offence under this Act, or**
>
> **(ii) (ii) is likely to commit an offence under this Act, for the purpose of enabling the person to facilitate or commit an offence under this Act."**

Further, the word "héberge" should be replaced by the word "recèle" in the French version of the section.

CHAPTER NINE: SECURITY CERTIFICATES UNDER THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

BACKGROUND

The resort to security certificates within the immigration law context since September, 2001 has attracted a lot of attention and been the object of much commentary.

Those who oppose this process argue that if there are concerns and evidence that an individual has been involved in terrorist activity, that person should be charged with criminal offences, no matter whether they are foreign nationals, permanent residents or citizens of Canada. They say that security certificates have been used to target Arabs and Muslims, resulting in lengthy detention without charge, and the risk of deportation to torture. Attention is brought by them to the concerns expressed about the security certificate process by the United Nations Working Group on Arbitrary Detention and the United Nations Human Rights Committee.

Those who support the security certificate process argue that it provides for a balanced approach to dealing with situations of possible terrorist activity that protects the rights and freedoms of the person who is the subject of it, safeguards the confidential information possessed by Canadian intelligence authorities that is at times provided by partners in trans-national counter-terrorist activities, and protects society as a whole from potentially dangerous persons. It is argued by them that the intent, which has been found by Canadian courts to be constitutionally acceptable, is to disrupt and prevent terrorist activity, and not to criminally sanction it after the fact when it will be too late and the damage will have been done. They also say that the process has been used with great restraint, and anyone subject to it always has the legal option of leaving Canada.

Although security certificates within the immigration law is not found in, or amended by, the *Anti-terrorism Act*, both this Subcommittee and its predecessor examined the issues which arose from it because they are inseparable from the more general review itself.

Security certificates within the immigration law context have existed since 1976, and thus pre-date the attack on the United States in September, 2001. Over the years, there have been a number of legislative changes made by Parliament to the security certificate process, with the most recent being found in the *Immigration and Refugee Protection Act* adopted in 2001.

Section 77 of the Act allows the Ministers of Citizenship and Immigration and Public Safety and Emergency Preparedness to sign a certificate stating that a permanent resident or a foreign national is inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality, and to refer it to the Federal Court.

Section 78 of the Act requires the Federal Court judge to ensure the confidentiality of the information on which the certificate is based, and of any other evidence that may be provided if its disclosure would be injurious to national security or to the safety of any person. All or part of the evidence may be heard by the Federal Court judge to whom the security certificate has been referred in the absence (*ex parte, in camera*) of the person named in it and their counsel if the judge believes that its disclosure would be injurious to national security or to the safety of any person. A summary of the evidence heard in the absence of the named foreign national or permanent resident and their counsel, allowing them to be reasonably informed of the circumstances giving rise to the certificate, is to be provided to them by the Federal Court judge. The judge is to deal with all matters informally and as expeditiously as is consistent with fairness and natural justice.

Section 80 of the Act requires the Federal Court judge, to whom the certificate has been referred to determine, based on the available evidence and information, whether the certificate is reasonable. The determination of reasonableness by the judge may be neither appealed nor judicially reviewed. Once a security certificate has been determined to be reasonable, the effect under section 81 is to make the named foreign national or permanent resident inadmissible to Canada and ineligible to apply for protection under section 112. The certificate itself, once determined to be reasonable, is a removal order which is not appealable.

Under section 82 of the Act, pending a determination of the reasonableness of the certificate, a warrant may be issued for the arrest and detention of a permanent resident who is named in the certificate. Foreign nationals who are named are subject to detention without the issuance of a warrant. If the security certificate is determined by the Federal Court judge to whom it is referred to be reasonable, detention may continue until the person is deported. Where deportation is not possible due to the risk faced by the person in their home country, detention may continue for a long time.

Section 112 of the Act allows a foreign national or a permanent resident named in a security certificate to apply to the Minister of Citizenship and Immigration for protection if they are at risk of persecution, cruel and unusual treatment or punishment, or torture. Such an application has to be made before the security certificate has been determined to be

reasonable. The effect of the application is to suspend the certificate process until the protection issue has been determined by the Minister. If protection is granted, the named person cannot be removed from Canada unless the security certificate is subsequently found to be reasonable and, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature or severity of acts committed or of danger to the security of Canada.

There have been 28 security certificates issued in Canada since 1991, and only six since September 11, 2001, demonstrating that the process is not used often. Nineteen individuals have been removed as a result of a security certificate. The most recent was the deportation of Paul William Hampel to Russia in December, 2006. Three security certificates have been found by the courts to be unreasonable (although one of these was subsequently re-issued). Currently, there are six people in Canada who are the subject of a security certificate, namely Hassan Almrei, Adil Charkaoui, Mohamed Harkat, Mahmoud Jaballah, Mohamed Mahjoub, and Manickavasagam Suresh. Three of these individuals are still in detention (Almrei, Jaballah and Mahjoub), although the release of two of them (Jaballah and Mahjoub) on strict conditions has been authorized by the Federal Court. Three of the individuals have already been released on strict conditions (Charkaoui, Harkat and Suresh).

The Supreme Court of Canada on February 23, 2007 released its decision in the appeals of Charkaoui, Almrei and Harkat.[9] The Court found in its judgment that the security certificate process was inconsistent with the requirements of the *Canadian Charter of Rights and Freedoms*. It concluded that those provisions of the Act that allow for the use of *in camera*, *ex parte* proceedings, from which the named person and their counsel are excluded, violate the right to life, liberty, and security of the person under section 7 of the *Charter*. The Court found that the right to a fair hearing includes the right to a hearing before an independent and impartial judge who decides the case on the facts and the law, the right to know the case that has to be met, and the right to meet that case. Since evidence heard *in camera* and *ex parte* cannot be tested by the named person and cannot be disclosed by a judicially authorized summary of that evidence, the provisions of the Act violate the *Charter* section 7 right to liberty. The Court also concluded that the provisions could not be saved by section 1 of the *Charter* as being demonstrably justified limitations necessary in a free and democratic society.

Based on these findings and others, the Court gave Parliament one year to replace and reform the relevant portions of the Act. In the course of setting out its reasons for judgment, the Court made reference to the existence of special counsel, special advocate or *amicus curiae* measures used in Canada and the United Kingdom, where there is a requirement to protect sensitive information while still recognizing the right of individuals to meet the case with which they are confronted. It described these measures as “less intrusive alternatives” to the current process, whereby ways have been found to protect sensitive information while treating individuals fairly. The Subcommittee deals with this

[9] *Charkaoui* v. *Canada (Citizenship and Immigration),* 2007 SCC 9.

issue more extensively in Chapter 10 of the report, in which it proposes that a Panel of Special Counsel be established.

ISSUES OF CONCERN

Divergent Views on the Proper Balance

The security certificate process is one that has given rise to great controversy, with views being strongly held and vigorously expressed. The debate captures much of what can be said about many other issues related to strategies, legislation, and agencies that have the goal of preventing, pre-empting, and prohibiting terrorist activity, be it actual or anticipated. It goes to the heart of the level of coercion to be available to the state and its agencies in a democratic society which gives primary importance to constitutionally entrenched rights and freedoms.

Democratic societies have an obligation to protect themselves against efforts to undermine and attack their institutions. The first responsibility of the state in such a society is to ensure the safety and security of its citizens. It must do so in a manner consistent with the rule of law, while imposing only reasonable limits on constitutional rights and freedoms. It is within this general philosophical context that the Subcommittee has reviewed the security certificate process.

As indicated elsewhere in this chapter, the security certificate process has been in place for many years, pre-dating the September 2001 attacks on the United States. As well, resort to it has been restrained, only 28 times since 1991, compared with thousands of removals under other parts of the immigration law. However, this is not the whole story.

It must be admitted that those subjected to the security certificate process do not have all the protections available to those prosecuted for criminal offences. As well, the burden of proof placed on immigration authorities is less than that imposed on the prosecution in a criminal case. Finally, the procedure and disclosure provisions are not of the same kind as those in the criminal justice system. But there are reasons for this.

The security certificate process is preventive, intended to deal with those in Canada who are or have been involved in terrorist activity before they have a chance to do so here or elsewhere. Because they are foreign nationals or permanent residents, they are not entitled under Canadian law to the full array of rights and freedoms available to Canadian citizens under section 6 (mobility rights) and other provisions of the *Canadian Charter of Rights and Freedoms*. Because the security certificate process is an administrative law one, the burden of proof, hearing procedures, and disclosure rules are different from those in the criminal law.

The Subcommittee believes that the security certificate process now in place represented a serious attempt to balance the rights and freedoms of those subject to it and the obligation of democratic state institutions to protect themselves from being undermined or attacked. However, after reviewing the briefs and submissions on the security certificate process, the Subcommittee believes that more needs to be done to further assure the rights and freedoms of those subject to it.

Rules of Evidence

The first issue to be dealt with relates to the rules of evidence to be applied by a Federal Court judge to whom a security certificate has been referred. Section 78(j) of the *Immigration and Refugee Protection Act* allows the judge to receive into evidence anything that, in the judge's opinion, is "appropriate", even if it is inadmissible in a court of law. The judge may base the decision on the reasonableness of the security certificate on that evidence.

The British Columbia Civil Liberties Association (BCCLA) has commented on a similar provision in the *Canada Evidence Act* (section 38.06(3.1)) as well as section 78(*j*) of the *Immigration and Refugee Protection Act*. In reference to the *Canada Evidence Act* provision, the BCCLA says that the words "reliable and appropriate" should be replaced by "relevant and reliable". With respect to the *Immigration and Refugee Protection Act*, it proposes that these same words replace "appropriate" in section 78 (*j)*. In support of this recommendation, the BCCLA says that although it accepts that the standard of evidence in the national security context may have to be relaxed, its proposal will make it clear that information obtained by torture or similar means is inadmissible.

Although the Subcommittee agrees with the intent of the BCCLA proposal and with the suggested use of the word "reliable", it does not agree that the suggested use of the word "relevant" will achieve the policy goal identified in the BCCLA's brief, that is, to make information obtained by torture or similar means inadmissible. Information received by the use of torture or similar means is considered by many not to be the best source of truthful, accurate facts. It is often misleading or incomplete, intended by the person providing it to cause the torture or mistreatment to cease. Such information is thus often unreliable because of the means used to obtain it. The better test for admitting such information is therefore its reliability.

Provisions similar to section 78 (*j)* of the *Immigration and Refugee Protection Act* can be found in evidentiary contexts in several Acts included within the *Anti-terrorism Act*. They are at section 83.05(6.1) of the *Criminal Code*, sections 37(6.1), 38.06(3.1), and 38.131(5) of the *Canada Evidence Act*, and section 6 (*j)* of the *Charities Registration (Security Information) Act*. The words "reliable and appropriate" are used in each of these provisions.

The Subcommittee believes, therefore, that the word “reliable” should be added to section 78 (*j)* of the *Immigration and Refugee Protection Act*. This addition would reflect the type and effect of the information to which the Federal Court judge’s attention should be brought for the special consideration it merits when issues of admissibility into evidence may arise. This is especially important when it is considered that the decision on the reasonableness of the security certificate may be based in part on such evidence. Amending the Act in this way will harmonize section 78(*j)* with similar provisions found in several component Acts forming part of the *Anti-terrorism Act*.

RECOMMENDATION 51

The Subcommittee recommends that section 78(*j*) of the *Immigration and Refugee Protection Act* be amended by adding the words “reliable and” before the word “appropriate”.

Applications for Protection

As described earlier in this chapter, section 112 of the *Immigration and Refugee Protection Act* allows a foreign national or a permanent resident who is the subject of a security certificate to apply to the Minister of Citizenship and Immigration for protection. The effect of such an application for protection is, under section 79 of the Act, to require the Federal Court judge to whom the security certificate has been referred to suspend the proceedings at the request of the Minister, or the foreign national or permanent resident. The proceedings only resume when the Minister has dealt with the application for protection. Once a security certificate has been determined to be reasonable, section 81 states that there can no longer be an application to the Minister for protection.

There are problems with the sequence in which the reasonableness of the security certificate and the application for protection are addressed. First of all, if an application for protection is made and there is no request that the security certificate proceedings themselves be suspended, the two processes will unfold at the same time. Secondly, if such a request for suspension of the security certificate proceedings is made, the judge has no discretion and must grant it. The consequence is that the security certificate process itself is in abeyance until the application for protection is addressed. Consequently, there is a built-in delay in the determination of the reasonableness of the security certificate.

Both the security certificate process and the application for protection are important for the foreign national or the permanent resident. The Subcommittee believes they must be dealt with more expeditiously and through a simpler process. The primary issue here is whether a person should be declared inadmissible to Canada through the process that has as its purpose the determination of the reasonableness of the security certificate. It is only at the moment that a person becomes removable from Canada that the danger of such a removal becomes important. The Subcommittee thus believes that a simpler, more expeditious process has to be put into place whereby an application to the Minister for

protection can only be made once the Federal Court has determined the reasonableness of the security certificate. If the certificate is determined not to be reasonable, there will be no need for an application for protection. Conversely, if the certificate is determined to be reasonable, the named person should remain entitled to apply for protection.

RECOMMENDATION 52

The Subcommittee recommends that sections 79, 81, 112, and other provisions of the *Immigration and Refugee Protection Act* be amended so as to allow for an application to the Minister of Citizenship and Immigration for protection only after a security certificate has been found by a Federal Court judge to be reasonable.

The provisions allowing for *ex parte, in camera* proceedings under the *Immigration and Refugee Protection Act* are set out earlier in this chapter. Similar procedures are in place within the contexts of the terrorist entity listing process in the *Criminal Code*, the charities de-registration process, and the *Canada Evidence Act*. Each of these processes is discussed separately elsewhere in our report.

A number of briefs considered by the Subcommittee have proposed that a special advocate or *amicus curiae* scheme be put in place in relation to each of these processes. Rather than addressing this issue within each of these contexts, the Subcommittee deals comprehensively with this subject in the next chapter of the report.

CHAPTER TEN:
PANEL OF SPECIAL COUNSEL

BACKGROUND

The recourse to *in camera*, *ex parte* proceedings (where an affected party must be absent) and the limited disclosure of information and evidence, which are of interest to the Subcommittee, occur in relation to the listing of terrorist entities, the de-registration of registered charities or applicants, the *Canada Evidence Act* and the security certificate process under the *Immigration and Refugee Protection Act*. Although the contexts in which this may occur have been briefly set out in earlier chapters of our report, a more detailed description will now be given. This will be followed by a review of the experience in Canada and a formulation of the Subcommittee's findings and recommendations regarding the provision of legal representation in relation to views adverse to those of the government in proceedings where both disclosure of, and challenges to, information and evidence are limited.

As described earlier in our report, sections 83.05 to 83.07 of the *Criminal Code* allow the Governor in Council to list an organization or individual as a terrorist entity if there are reasonable grounds to believe that the entity has knowingly carried out a terrorist activity, or is knowingly acting on behalf of a terrorist entity. A listed entity may apply for judicial review of the decision to list. Under the *Charities Registration (Security Information) Act*, an organization may have its charitable status revoked, or an applicant may be denied such status, if there are reasonable grounds to believe that it has made or will make resources available to a terrorist entity or in support of terrorist activities. The certificate setting out the decision is automatically referred to the Federal Court for review.

On review of both a decision to list a terrorist entity, and to deny or revoke an organization's charitable status, the following provisions on the disclosure of information, or the ability to be heard, apply:

- The judge examines in private the information such as security or criminal intelligence reports on which the decision to list or deny/revoke charitable status was based.

- Any other evidence or information is heard in the absence of the listed entity or its counsel, if the Minister of Public Safety and Emergency Preparedness so requests, and the judge believes that disclosure would injure national security or the safety of any person.

- The judge is to provide the listed entity with a summary of the information that may not be disclosed, so that it is reasonably informed of the reasons for the decision to list or deny/revoke charitable status.

- The Minister of Public Safety and Emergency Preparedness may make an application to the judge, in private and in the absence of the entity or organization and its counsel, to withhold information from it. If the judge believes that the information is relevant, but that disclosure would injure national security or the safety of any person, the information shall not be included in the summary of information provided to the entity or organization, but may still be considered by the judge when reviewing the decision to list or deny/revoke charitable status.

Under section 38.06 of the *Canada Evidence Act*, as set out elsewhere in our report, an application may be brought to authorize the disclosure of information withheld by the government as a result of international relations, national defence or national security. Under section 38.131 of the Act, an application may be brought to vary or cancel an Attorney General's certificate prohibiting the disclosure of information that was obtained in confidence from a foreign entity, or in relation to a foreign entity, national defence or national security.

During an application under section 38.06 to authorize the disclosure of withheld information, the following provisions on the disclosure of information, or the ability to be heard, apply:

- The judge determines who is to receive notice of the hearing and who may make representations.

- The application is confidential and the information relating to it is confidential.

- The judge may or may not authorize disclosure, depending on whether disclosure would be injurious to international relations, national defence or national security, and whether the public interest in disclosure outweighs the public interest in non-disclosure.

- The judge may authorize the disclosure (with or without conditions) of all of the information, part of it, a summary, or a written admission of facts.

During review under section 38.131 of an Attorney General certificate prohibiting the disclosure of information, the following provisions on the disclosure of information, or the ability to be heard, apply:

- The Attorney General must give notice of the certificate to all parties to the proceedings, and any party may apply to vary or cancel it.

- The parties do not have access to the information unless disclosure is authorized by the judge.

- The judge is to confirm the certificate (i.e., confidentiality) with respect to all information that he or she determines was obtained in confidence from a foreign entity, or in relation to a foreign entity, national defence or national security.

Under sections 77 to 81 of the Immigration and Refugee Protection Act, as set out earlier in our report, a security certificate may be issued if a permanent resident or a foreign national is found to be inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality. The certificate is then referred to the Federal Court for a determination of its reasonableness. The following provisions on the disclosure of information, or the ability to be heard, apply:

- The judge examines all information and evidence in private, ensuring the confidentiality of the information on which the security certificate is based, and any other evidence the disclosure of which the judge believes would be injurious to national security or the safety of any person.

- Information or evidence is heard in the absence of the foreign national or permanent resident and his or her counsel, if the Minister of Public Safety and Emergency Preparedness so requests and the judge believes that disclosure would be injurious to national security or the safety of any person.

- The judge is to provide the foreign national or permanent resident with a summary of the information that may not be disclosed, so that he or she is reasonably informed of the circumstances giving rise to the security certificate.

- If the judge believes that information or evidence is relevant, but that disclosure would injure national security or the safety of any person, the information shall not be included in the summary of information provided to the foreign national or permanent resident, but the judge may still consider it when reviewing the security certificate.

EXPERIENCE IN CANADA

There are two examples where innovative approaches were taken to address the complex issues that can arise in the national security context where, because of the sensitivity of the information involved, special steps have to be taken to contain the degree of disclosure that can take place and, at certain times, to exclude individuals and their counsel from some parts or all of a hearing.

The Security Intelligence Review Committee (SIRC) has a dual role with respect to the Canadian Security Intelligence Service (CSIS). It conducts reviews of the activities undertaken by CSIS, and it hears complaints with respect to the Service and deals with security clearance denials. It is the complaints hearing process that is of particular interest to the Subcommittee.

For a number of years, SIRC had a panel of security-cleared legal counsel in private practice upon whom it could call for advice and assistance in its complaints hearings. SIRC counsel carried out a number of functions. They participated in pre-hearing conferences with other counsel at which the ground rules were addressed and attempts were made to identify the points of disagreement among the parties.

Portions of the hearings were held in private. The function of SIRC counsel then was to assist the members conducting them and, in the absence of the complainant and their counsel, to cross-examine CSIS witnesses. In carrying out the cross-examination function, SIRC counsel would liaise with counsel for the complainant to ensure that the questions they wanted to ask were pursued. Complainants' counsel were at a disadvantage in developing their questions because they did not have access to the information and evidence adduced *in camera.* SIRC counsel performed similar functions during the period when the Review Committee dealt with security certificates.

CSIS counsel would then prepare a summary of the evidence heard at the *in camera* hearing which was then negotiated with SIRC counsel before it was provided to the complainant and their counsel. This was not always a satisfactory process because the information disclosed was often incomplete and unhelpful.

More recently, Justice O'Connor, who presided over the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, engaged both commission counsel and an *amicus curiae*. Commission counsel acted in support of the Commission, assessing and presenting evidence, and examining witnesses in both public and *in camera* hearings. As part of the functions he performed during *in camera* hearings, he consulted with counsel for Mr. Arar and other intervenors as part of his preparation. The functions performed by the *amicus curiae* were somewhat different. During *in camera* hearings, he was mandated to make submissions challenging the national security

confidentiality claims made by government agencies in opposition to the public disclosure of sensitive information. His function was to advocate in favour of accountability and transparency in the public interest.

Justice O'Connor in December, 2006 released his second report, dealing with the policy review element of his mandate, entitled *A New Review Mechanism for the RCMP's National Security Activities*. He recommended that an Independent Complaints and National Security Review Agency for the RCMP (ICRA) be established. More specifically, he proposed at recommendation 5(*h*) that ICRA be given discretion to appoint security-cleared counsel, independent of the RCMP and the government, to test the need for confidentiality in relation to certain information before it and to test the information itself that may not be disclosed to the complainant and the public. Further, as discussed in the preceding chapter of this report, the Supreme Court of Canada recently concluded that the security certificate process requires additional safeguards in order to be constitutional, and it pointed to the use of special counsel as a solution.

In general terms, Justice O'Connor sees the functions of independent counsel as being two-fold. Firstly, the person tests the need for confidential information and for the closed hearing in regard to some or all of the evidence. Secondly, independent counsel tests the evidence itself from the perspective of the parties excluded from the closed hearing. Justice O'Connor admits that this is not a complete solution from the perspective of those excluded from a closed hearing. He sees it, however, as a compromise that allows for cross-examination and adversarial argument in what are now *ex parte*, *in camera* proceedings.

OUR PROPOSAL

The issues being dealt with in this chapter are difficult, pitting important values against one another, but can be resolved by developing a mechanism that can be made to work.

One of the basic premises of the rule of law and any legal system is the right to confront one's accusers or those who represent an adverse interest. This is especially important when liberty interests may be affected by being compelled to leave the country, or when financial or charitable activities may be irrevocably damaged. Confronting this premise is the obligation of the state to conserve and protect genuinely sensitive information related to international relations, national defence, and national security.

The balance is not an easy one to strike — the current provisions dealing with the listing of terrorist entities, the de-registration of registered charities, *Canada Evidence Act* proceedings and immigration law security certificates set out in this chapter do not do so.

A number of briefs considered by the Subcommittee suggest a means of redressing the imbalance where closed hearings and limited disclosure occur. They suggest that a special advocate or *amicus curiae* scheme be put into place to challenge the evidence adduced in closed hearings and the limited disclosure of information and evidence. Most of these recommendations were made in the context of the security certificate process under the *Immigration and Refuge Protection Act*, but they can be applied in the other areas dealt with in this chapter as well. Such recommendations were included in the briefs submitted by the Canadian Civil Liberties Association, the Federation of Law Societies of Canada, the Privacy Commissioner, the Canadian Bar Association, B'nai Brith Canada and the British Columbia Civil Liberties Association.

More particularly, the British Columbia Civil Liberties Association recommended in relation to immigration law security certificates that the government establish a regime of security-cleared lawyers to review all secret evidence, advocate the maximum disclosure of evidence to the person affected and the public, oppose the removal of the person named in the certificate, and have access to all relevant information whether it is relied upon by the government or not.

The Subcommittee believes that the imbalance between the state and the individual or entity can be redressed by developing a scheme whereby security-cleared counsel can challenge evidence in closed hearings, and adduce evidence of their own, and advocate on behalf of transparency and accountability in situations where the limited disclosure of information make it difficult, if not impossible, for affected persons to fully defend their interests. The comments by Justice O'Connor described earlier in this chapter capture the Subcommittee's view, as do the comments of the Supreme Court in its recent decision regarding the security certificate process.

The new scheme should involve the government establishment of a Panel of Special Counsel in consultation with the legal profession and the judiciary. Those appointed to the Panel should be security-cleared members of the Bar with relevant expertise. The Panel members should be provided with the necessary training to carry out the functions assigned to them. As well, the Panel should have the capacity to provide each counsel with the investigative, forensic and other tools they need to carry out the functions assigned to them.

Counsel from the Panel should be assigned at the request of the judge presiding over a hearing, or by a party excluded from *in camera, ex parte* proceedings. The assigned counsel is to carry out the expected advocacy functions in the public interest, and not as counsel to the party affected by the proceedings. The Subcommittee expects these public interest functions to include arguing for the disclosure of information and testing the reliability, relevance and appropriateness of the evidence presented, bearing in mind the highly sensitive nature of some of it. Acting in the public interest will avoid difficult-to-resolve conflicts between a lawyer's access to confidential information that may not be disclosed even to a client and the solicitor-client relationship with that person.

RECOMMENDATION 53

The Subcommittee recommends that a Panel of Special Counsel be established by the government in consultation with the legal profession and the judiciary. Counsel appointed to the Panel should be security-cleared and have expertise relevant to issues related to the listing of terrorist entities under the *Criminal Code*, the de-registration of registered charities and denial of charitable status to applicants under the *Charities Registration (Security Information) Act*, applications for the disclosure of information under the *Canada Evidence Act*, and the security certificate process under the *Immigration and Refugee Protection Act*. The functions of Special Counsel should be to test the need for confidentiality and closed hearings, and to test the evidence not disclosed to a party.

RECOMMENDATION 54

The Subcommittee recommends that counsel from the Panel should be appointed at the request of a judge presiding over a hearing or by a party excluded from an *ex parte*, *in camera* proceeding.

RECOMMENDATION 55

The Subcommittee recommends that the Panel should have the capacity to provide counsel appointed to it with the investigative, forensic and other tools they require to effectively carry out the functions assigned to them.

RECOMMENDATION 56

The Subcommittee recommends that counsel appointed to the Panel be provided with the necessary training to allow them to effectively carry out the functions assigned to them.

CHAPTER ELEVEN:
REVIEW AND OVERSIGHT

BACKGROUND

Since the early 1980's, Parliament has inserted clauses requiring comprehensive parliamentary committee reviews of the provisions and operation of selected legislation it has adopted. Typically, these comprehensive reviews have had to be commenced within three or five years of the legislation coming into force, to be completed a year later. Such committees have been designated by the Senate or the House of Commons, or by both chambers. In a small number of instances, committees of both chambers have simultaneously conducted the legislatively required reviews.

To carry out the reviews, parliamentary committees have held hearings, visited sites and facilities in Canada and travelled outside of the country. At the end of this process, they have developed and tabled their findings and recommendations, calling upon the government of the day to respond to them. Committee recommendations have not always been accepted in their entirety by governments.

Parliament has adopted the practice of future parliamentary review in relation to legislation where the issues being addressed are controversial and complex, where opinion may be sharply divided and basic constitutional, public, and social values are at the core of the debates. By adopting a clause requiring a comprehensive review of the provisions and operation of such legislation, Parliament carries out one of its most important functions, that is, revisiting an area of public policy so as to determine if the intentions of Parliament are being carried out or may need some mid-course correction. Such review clauses also bring the issues underlying a particular Act back to public attention and encourage a reconsideration of any controversy by those who are both interested in, and affected by, it. This is done by the hearings held by parliamentary committees and their consideration of briefs submitted to them.

ANOTHER COMPREHENSIVE REVIEW

Both this Subcommittee and its predecessor, on whose work much of what has been recommended in this report is based, have illustrated during their hearings and proceedings what is described in the preceding paragraphs.

Section 145 of the *Anti-terrorism Act* required a comprehensive review of its provisions and operation to be commenced within three years after it received royal assent in December, 2001, and to be completed within one year after that date, subject to possible

extension. Such a review was to be carried out by a designated or specially established committee of the Senate or the House of Commons, or of both chambers. The predecessor to this Subcommittee was established in the autumn of 2004 and commenced its work in December of that year. At the same time, the Senate established a special committee to carry out this same review. The work of both committees was interrupted by the November, 2005 dissolution of Parliament. The Senate special committee continued its work in this Parliament, and this Subcommittee carried on where its predecessor had left off.

The issues dealt with by the Subcommittee were difficult and the debate around them was at times characterized by basic disagreement not always easy to reconcile. The legislation itself is complex, often difficult to analyze and comprehend. Much guidance was received by the Subcommittee from the briefs and submissions it received, and witness responses to members' questions during the public hearings. A number of issues came up in public debate, in the courts, and elsewhere during the review which helped to spur on the discussions among Subcommittee members as they carried out their work.

Because the Subcommittee believes that much public good comes out of reviews such as the one it has carried out, it believes there should be another comprehensive review of the provisions and operation of the *Anti-terrorism Act*. It has come to this conclusion because it is only five years since Parliament adopted this legislation — this is a relatively short time and the experience with its implementation is somewhat limited. As well, terrorist activity has shown no signs of abating in the last five years and the form it takes is in constant flux. The Subcommittee believes that such a review should begin in four years and be completed within the next following year.

RECOMMENDATION 57

The Subcommittee recommends that section 145 of the *Anti-terrorism Act* be amended so as to require that there be another comprehensive review of its provisions and operation, to be commenced no later than December 31, 2010 and completed no later than December 31, 2011.

NATIONAL SECURITY COMMITTEE OF PARLIAMENTARIANS

During the last Parliament, the government of the day on November 24, 2005 introduced Bill C-81, the proposed *National Security Committee of Parliamentarians Act*, which proceeded no further because of dissolution later that month and the calling of a General Election.

This Bill proposed that there be established a nine-member committee of parliamentarians, to be composed of no more than three members of the Senate and no more than six members of the House of Commons. Members were to be appointed by Cabinet and were to hold office during pleasure until the dissolution of Parliament following

their appointment. Opposition party members were to be appointed after their leader had been consulted. Neither Ministers nor Parliamentary Secretaries were to be appointed to the committee. Members were to be permanently bound to secrecy under the *Security of Information Act*.

The proposed committee was provided with a two-part mandate. It was to review the legislative, regulatory, and administrative framework for national security in Canada and activities of federal departments and agencies with respect to national security. It was also mandated to review any matter related to national security referred to it by the Minister designated by Cabinet as responsible for the Act.

The mandate provided to the proposed committee appeared to be broad enough to allow it to engage in on-going compliance audits of the departments and agencies making up the security and intelligence community in Canada. Among these government institutions are the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment, national security elements of the Royal Canadian Mounted Police (RCMP), the Canadian Border Services Agency (CBSA), elements of the Department of Foreign Affairs, and others. Such audits would have as their purpose the assurance that law and policy directions are being properly applied, and that rights and freedoms are being respected in day-to-day activities.

It appears that the mandate set out in the bill would have been flexible enough to allow it to audit the implementation of a particular Act adopted by Parliament when reviewing the activities of departments and agencies applying it. For example, when reviewing the national security activities of the RCMP, CSIS, and CBSA, it could audit their implementation of elements of the *Anti-terrorism Act*. If the mandate as set out in Bill C-81 is not adequate to allow for this type of activity, it should be amended to do so.

In the preceding section of this chapter, the Subcommittee recommended that there be another comprehensive review of the Act. Building upon its on-going compliance auditing of the implementation of the Act, as proposed in the preceding paragraph, the committee envisaged in Bill C-81 would be well-equipped to carry out the next comprehensive review. If the mandate set out in Bill C-81 is not adequate to allow for this type of activity, it should be amended to do so. The review should be done by parliamentarians who are able to hear witnesses, take evidence and report their findings publicly.

Much work was done in the last Parliament in developing the ideas that led to the tabling of Bill C-81. A multi-party consensus emerged in support of providing parliamentarians and Parliament with an important means for overseeing the Canadian security and intelligence community. The momentum built up should not be lost: Bill C-81, or a variation of it, should be introduced in Parliament at the earliest opportunity.

RECOMMENDATION 58

The Subcommittee recommends that Bill C-81 from the 38th Parliament, the proposed *National Security Committee of Parliamentarians Act*, or a variation of it, be introduced in Parliament at the earliest opportunity.

RECOMMENDATION 59

The Subcommittee recommends that the mandate of the proposed National Security Committee of Parliamentarians be clarified so as to ensure that in carrying out its activities, in relation to departments and agencies in respect of national security, it is empowered to conduct compliance audits in relation to the *Anti-terrorism Act*.

RECOMMENDATION 60

The Subcommittee recommends that the mandate of the proposed National Security Committee of Parliamentarians be clarified so as to ensure that it can carry out the next comprehensive review of the *Anti-terrorism Act* under an amended section 145 of that Act, failing which the review should be carried out by a committee of Parliament.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

The Subcommittee recommends that the definition of "terrorist activity" contained in section 83.01(1) of the *Criminal Code* not be amended.

RECOMMENDATION 2

The Subcommittee recommends that the *Criminal Code* be amended to make it an offence to glorify terrorist activity for the purpose of emulation. Any such amendment should require the consent of the provincial attorney general to a prosecution, require the prosecution to prove that the accused intended to encourage emulation by the glorification of terrorist activity, and make available to the accused special defences similar to those included in section 319(3) of the Code.

RECOMMENDATION 3

The Subcommittee recommends that section 83.18 of the *Criminal Code* be amended so as to ensure that counsel providing legal services to those accused of terrorism offences can properly act on their behalf without fear of being charged themselves with terrorism offences.

RECOMMENDATION 4

The Subcommittee recommends that, unless the context dictates otherwise, the words "the Government of Canada or of a province" be replaced by the words "any government in Canada" throughout the provisions enacted or amended by the *Anti-terrorism Act*.

RECOMMENDATION 5

The Subcommittee recommends that the words "a person" and "the person" be replaced, respectively, by the words "an entity" and "the entity" in clause (*b*)(i)(B) of the definition of "terrorist activity" in section 83.01 of the *Criminal Code*.

RECOMMENDATION 6

The Subcommittee recommends that the words "an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes" be removed from paragraph (*c*) of the definition of "terrorism offence" in section 2 of the *Criminal Code*.

RECOMMENDATION 7

The Subcommittee recommends that the words "an offence under this Act for which the maximum punishment is imprisonment for five years or more, or an offence punishable under section 130 that is an indictable offence under the *Criminal Code* or any other Act of Parliament, where the act or omission constituting the offence also constitutes" be removed from paragraph (*c*) of the definition of "terrorism offence" in section 2(1) of the *National Defence Act*.

RECOMMENDATION 8

The Subcommittee recommends that the words "commit (i) a terrorism offence, or (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence" be replaced by "carry out a terrorist activity" in paragraphs 83.18(3)(*c*) and (*e*) of the *Criminal Code*.

RECOMMENDATION 9

The Subcommittee recommends that the words "facilitate or" be added before the first instance of the words "carry out" in sections 83.21(1) and 83.22(1) of the *Criminal Code.*

RECOMMENDATION 10

The Subcommittee recommends that the words "Every person" be replaced by the words "Every one" in the English versions of sections 83.21(1) and 83.22(1) of the *Criminal Code.*

RECOMMENDATION 11

The Subcommittee recommends that the words "any person" and "the person" be replaced, respectively, by the words "any entity" and "the entity" in sections 83.21(1), 83.21(2)(*c*) and (*d*), 83.22(1), and 83.22(2)(*c*) and (*d*) of the *Criminal Code*.

RECOMMENDATION 12

The Subcommittee recommends that section 83.23 of the *Criminal Code* be replaced by the following:

> **"Every one who knowingly harbours or conceals any person whom he or she knows to be a person who**
>
> > **(*a*) has carried out a terrorist activity, or**
> >
> > **(*b*) is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity,**
>
> **is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."**

Further, the word "cache" should be replaced by the word "recèle" in the French version of the section.

RECOMMENDATION 13

The Subcommittee recommends that the *Criminal Code* be amended to provide that every one who knowingly participates in a terrorist activity is guilty of an indictable offence and liable to imprisonment for up to life.

RECOMMENDATION 14

The Subcommittee recommends that the words "in addition to any penalty imposed for the commission of the original indictable offence" be added at the end of section 83.2 of the *Criminal Code*.

RECOMMENDATION 15

The Subcommittee recommends that section 83.25 of the *Criminal Code* be amended so that the Attorney General of Canada is required to make an application to a court in order to commence proceedings in a territorial division that would not be the one normally used, or continue them in a different territorial division in Canada after they have already been commenced elsewhere in Canada. Any such amendment should set out the acceptable reasons for choosing a different location for the proceedings and the factors to be considered by the court in considering the application.

RECOMMENDATION 16

The Subcommittee recommends that section 83.1 of the *Criminal Code* be amended so as to exempt from its requirements legal counsel or law firms when they are providing legal services and not acting as financial intermediaries.

RECOMMENDATION 17

The Subcommittee recommends that section 83.08 of the *Criminal Code* be amended to allow for a due diligence defence.

RECOMMENDATION 18

The Subcommittee recommends that the words "wilfully and" be removed from section 83.02 of the *Criminal Code*.

RECOMMENDATION 19

The Subcommittee recommends that the words "without lawful justification or excuse" be added after the words "directly or indirectly" in section 83.03 and after the word "who" in section 83.04 of the *Criminal Code*.

RECOMMENDATION 20

The Subcommittee recommends that the words "a person" be replaced by the words "an entity" in the opening words of section 83.03 of the *Criminal Code*, and that the word "person" be replaced by the word "entity" in paragraph (*a*).

RECOMMENDATION 21

The Subcommittee recommends that the words "satisfy themself" be replaced by the words "be satisfied" in the English version of section 83.08(2) of the *Criminal Code.*

RECOMMENDATION 22

The Subcommittee recommends that the second instance of the word "and" be replaced by the word "or" in the opening words of subsection 83.1(1) of the *Criminal Code*, and that subsection 83.12(2) be repealed.

RECOMMENDATION 23

The Subcommittee recommends that consideration be given to further integrating the terrorist entity listing regimes established under the *Criminal Code*, the *Regulations Implementing the United Nations Resolution on the Suppression of Terrorism*, and the *United Nations Al Qaida and Taliban Regulations* insofar as the departmental administration, applicable test for inclusion, and legal consequences of listing are concerned.

RECOMMENDATION 24

The Subcommittee recommends that section 83.05 of the *Criminal Code* be amended so that, when a listed entity wishes to have an initial decision to list reviewed, it is not required to make an application to the Minister of Public Safety and Emergency Preparedness under subsection (2), but may instead apply directly to a court under subsection (5).

RECOMMENDATION 25

The Subcommittee recommends that section 83.05 of the *Criminal Code* be amended so that, when a listed entity applies to no longer be a listed entity in accordance with subsections (2) or (8), the Minister of Public Safety and Emergency Preparedness must make a recommendation within 60 days, failing which he or she is deemed to have decided to recommend that the applicant be removed from the list. Further, any recommendation or deemed recommendation on the part of the Minister should expressly be referred to the Governor in Council, which is to make a final decision within 120 days of the entity's application, failing which the entity is deemed to be removed from the list.

RECOMMENDATION 26

The Subcommittee recommends that section 83.05 of the *Criminal Code* be amended so that, on each two-year review of the list of entities under subsection (9), it is clear that the Governor in Council has the final decision as to whether or not an entity should remain a listed entity. Further, the decision should be made within 120 days of the commencement of the review, failing which the entity is deemed to be removed from the list.

RECOMMENDATION 27

The Subcommittee recommends that the *Charities Registration (Security Information) Act* be amended so that the Federal Court judge, to whom a certificate is referred, shall not find the certificate to be reasonable where an applicant or

registered charity has established that it has exercised due diligence to avoid the improper use of its resources under section 4(1).

RECOMMENDATION 28

The Subcommittee recommends that, in consultation with the charitable sector, the Canada Revenue Agency develop and put into effect best practice guidelines to provide assistance to applicants for charitable status and registered charities in their due diligence assessment of donees.

RECOMMENDATION 29

The Subcommittee recommends that section 8(2) of the *Charities Registration (Security Information) Act* be amended to allow for an appeal to the Federal Court of Appeal of a decision by a Federal Court judge that a referred certificate is reasonable.

RECOMMENDATION 30

The Subcommittee recommends that the words "the applicant or registered charity knew or ought to have known that" be added after the words "*Criminal Code* and" in paragraphs 4(1)(*b*) and (*c*) of the *Charities Registration (Security Information) Act*.

RECOMMENDATION 31

The Subcommittee recommends that the words "terrorist activities" be replaced by the words "a terrorist activity," and that the words "activities in support of them" be replaced by the words "an activity in support of a terrorist activity", in paragraphs 4(1)(*b*) and (*c*) of the *Charities Registration (Security Information) Act*.

RECOMMENDATION 32

The Subcommittee recommends that the words "at that time, and continues to be," be removed from section 4(1)(*b*) of the *Charities Registration (Security Information) Act*.

RECOMMENDATION 33

The Subcommittee recommends that subsections 5(3) and (4) of the *Charities Registration (Security Information) Act* be repealed and that the Act be amended so that, beginning from the time that an applicant or registered charity is being investigated for allegedly making resources available to a terrorist entity, its identity shall not be published or broadcast, and all documents filed with the Federal Court in connection with the reference of the certificate shall be treated as confidential, unless and until the certificate is found to be reasonable and published under section 8.

RECOMMENDATION 34

The Subcommittee recommends that section 11 of the *Charities Registration (Security Information) Act* be amended to make it clear that an applicant or registered charity may apply for review of a decision made under paragraph 10(5)(*b*)(i), even if it has already applied for review of a decision made under paragraph 10(5)(*a*).

RECOMMENDATION 35

The Subcommittee recommends that section 38.13(9) of the *Canada Evidence Act* be amended so that a certificate expires ten years after it has been issued.

RECOMMENDATION 36

The Subcommittee recommends that section 38.131(11) of the *Canada Evidence Act* be repealed and that there be established a right to apply to the Supreme Court of Canada for leave to appeal the decision of a Federal Court of Appeal judge who has conducted a judicial review of a certificate issued by the Attorney General of Canada. Such an appeal should be considered by a reduced panel of three members of the Supreme Court.

RECOMMENDATION 37

The Subcommittee recommends that the *Canada Evidence Act* be amended to require the Attorney General of Canada to table in Parliament an annual report setting out the usage of section 38.13 certificates and section 38.15 fiats.

RECOMMENDATION 38

The Subcommittee recommends that section 38.04 of the *Canada Evidence Act* be amended to require the Attorney General of Canada, with respect to information about which notice was given from a party to proceedings under any of subsection 38.01(1) to (4), to apply to the Federal Court for an order with respect to disclosure of the information in every case where, except by agreement with the party, the Attorney General does not permit full disclosure without conditions.

RECOMMENDATION 39

The Subcommittee recommends that the government prepare written guidelines, and implement appropriate review mechanisms, to assist designated entities in fulfilling their duty to prevent the disclosure of sensitive or potentially injurious information and to notify the Attorney General of Canada under section 38.02(1.1) of the *Canada Evidence Act*.

RECOMMENDATION 40

The Subcommittee recommends that the word "may" be replaced by the word "shall" in subsections 37(4.1), 37(5), 38.06(1) and 38.06(2) of the *Canada Evidence Act*.

RECOMMENDATION 41

The Subcommittee recommends that subsection 37(7) of the *Canada Evidence Act* be replaced by the following:

"An order of the court that authorizes disclosure does not take effect until

> ***(a)*** **the time provided or granted to appeal the order has expired, or**
>
> ***(b)*** **a judgment of an appeal court has confirmed the order and the time provided or granted to appeal the judgment has expired, or no further appeal is available."**

RECOMMENDATION 42

The Subcommittee recommends that the *Canada Evidence Act* be amended so that an order authorizing disclosure under subsections 38.06(1) or (2) does not take effect until (*a*) the time provided or granted to appeal the order has expired, or (*b*) a judgment of an appeal court has confirmed the order and the time provided or granted to appeal the judgment has expired, or no further appeal is available.

RECOMMENDATION 43

The Subcommittee recommends that section 37.21 of the *Canada Evidence Act*, which was repealed in 2004, be re-enacted.

RECOMMENDATION 44

The Subcommittee recommends that section 273.65(8) of the *National Defence Act* be amended to require the Commissioner of the Communications Security Establishment to review the private communication interception activities carried out under ministerial authorization to ensure they comply with the requirements of the *Canadian Charter of Rights and Freedoms* and the *Privacy Act*, as well as with the authorization itself (as already required).

RECOMMENDATION 45

The Subcommittee recommends that section 273.66 of the *National Defence Act* be amended to require the Communications Security Establishment to only undertake

activities consistent with the *Canadian Charter of Rights and Freedoms* and the *Privacy Act*, in addition to the restraints on the exercise of its mandate already set out in that section.

RECOMMENDATION 46

The Subcommittee recommends that the words "The Governor in Council may appoint a supernumerary judge or a retired judge of a superior court as Commissioner of the Communications Security Establishment" be replaced by the words "The Governor in Council may appoint a Commissioner of the Communications Security Establishment, who shall be a supernumerary judge or a retired judge of a superior court," in section 273.63(1) of the *National Defence Act*.

RECOMMENDATION 47

The Subcommittee recommends that the word "anywhere" be added after the word "Canadians" in paragraph 273.64(2)(*a*) of the *National Defence Act*.

RECOMMENDATION 48

The Subcommittee recommends that the heading "Offences", preceding section 3 of *Security of Information Act,* be removed.

RECOMMENDATION 49

The Subcommittee recommends that section 3 of the *Security of Information Act* be amended, for example through use of the word "includes," so that the list of what constitutes a purpose prejudicial to the safety or interests of the State is clearly non-exhaustive.

RECOMMENDATION 50

The Subcommittee recommends that subsection 21(1) of the *Security of Information* be replaced by the following:

"Every one commits an offence who knowingly harbours or conceals a person whom he or she knows to be a person who

(i) has committed an offence under this Act, or

(ii) is likely to commit an offence under this Act, for the purpose of enabling the person to facilitate or commit an offence under this Act."

Further, the word "héberge" should be replaced by the word "recèle" in the French version of the section.

RECOMMENDATION 51

The Subcommittee recommends that section 78(j) of the *Immigration and Refugee Protection Act* be amended by adding the words "reliable and" before the word "appropriate".

RECOMMENDATION 52

The Subcommittee recommends that sections 79, 81, 112, and other provisions of the *Immigration and Refugee Protection Act* be amended so as to allow for an application to the Minister of Citizenship and Immigration for protection only after a security certificate has been found by a Federal Court judge to be reasonable.

RECOMMENDATION 53

The Subcommittee recommends that a Panel of Special Counsel be established by the government in consultation with the legal profession and the judiciary. Counsel appointed to the Panel should be security-cleared and have expertise relevant to issues related to the listing of terrorist entities under the *Criminal Code*, the de-registration of registered charities and denial of charitable status to applicants under the *Charities Registration (Security Information) Act*, applications for the disclosure of information under the *Canada Evidence Act*, and the security certificate process under the *Immigration and Refugee Protection Act*. The functions of Special Counsel should be to test the need for confidentiality and closed hearings, and to test the evidence not disclosed to a party.

RECOMMENDATION 54

The Subcommittee recommends that counsel from the Panel should be appointed at the request of a judge presiding over a hearing or by a party excluded from an *ex parte*, *in camera* proceeding.

RECOMMENDATION 55

The Subcommittee recommends that the Panel should have the capacity to provide counsel appointed to it with the investigative, forensic, and other tools they require to effectively carry out the functions assigned to them.

RECOMMENDATION 56

The Subcommittee recommends that counsel appointed to the Panel be provided with the necessary training to allow them to effectively carry out the functions assigned to them.

RECOMMENDATION 57

The Subcommittee recommends that section 145 of the *Anti-terrorism Act* be amended so as to require that there be another comprehensive review of its provisions and operation, to be commenced no later than December 31, 2010 and completed no later than December 31, 2011.

RECOMMENDATION 58

The Subcommittee recommends that Bill C-81 from the 38th Parliament, the proposed *National Security Committee of Parliamentarians Act*, or a variation of it, be introduced in Parliament at the earliest opportunity.

RECOMMENDATION 59

The Subcommittee recommends that the mandate of the proposed National Security Committee of Parliamentarians be clarified so as to ensure that in carrying out its activities in

relation to departments and agencies in respect of national security, it is empowered to conduct compliance audits in relation to the *Anti-terrorism Act*.

RECOMMENDATION 60

The Subcommittee recommends that the mandate of the proposed National Security Committee of Parliamentarians be clarified so as to ensure that it can carry out the next comprehensive review of the *Anti-terrorism Act* under an amended section 145 of that Act, failing which the review should be carried out by a committee of Parliament.

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Thirty-Eighth Parliament, 1st Session		
Department of Justice	03/22/2005	7
Gérard Normand General Counsel and Director, National Security Group		
Department of Public Safety and Emergency Preparedness		
Paul Kennedy Senior Assistant Deputy Minister, Emergency Management and National Security		
Anne McLellan Minister		
Bill Pentney Assistant Deputy Attorney General		
Department of Justice	03/23/2005	8
Douglas Breithaupt Senior Counsel, Criminal Law Policy Section		
Stanley Cohen Senior General Counsel, Human Rights Law Section		
Irwin Cotler Minister		
Gérard Normand General Counsel and Director, National Security Group		
Daniel Therrien Senior General Counsel, Office of the Assistant Deputy Attorney General		
Financial Transactions and Reports Analysis Centre of Canada	04/13/2005	9
Josée Desjardins Senior Counsel		
Horst Intscher Director		
Sandra Wing Deputy Director, External Relationships		
Canada Border Services Agency	04/20/2005	10
Caroline Melis Director General, Intelligence Directorate		

Organizations and Individuals	Date	Meeting
Canadian Security Intelligence Services	04/20/2005	10
Robert Batt Counsel		
Department of Citizenship and Immigration		
Daniel Jean Assistant Deputy Minister, Policy and Program Development		
Department of Justice		
Daniel Therrien Senior General Counsel, Office of the Assistant Deputy Attorney General		
Department of Public Safety and Emergency Preparedness		
Paul Kennedy Senior Assistant Deputy Minister, Emergency Management and National Security		
Communications Security Establishment	05/04/2005	11
David Akman Director and General Counsel, Legal Services		
Keith Coulter Chief		
Barbara Gibbons Deputy Chief, Corporate Services		
John Ossowski Director General, Policy and Communications		
Office of the Superintendant of Financial Institutions Canada		
Julie Dickson Assistant Superintendant, Regulation Sector		
Brian Long Director, Compliance Division		
Alain Prévost General Counsel, Legal Services Division		
Canada Customs and Revenue Agency	05/18/2005	12
Michel Dorais Commissioner		
Maurice Klein Senior Advisor, Anti-terrorism, Charities Directorate, Policy and Planning Branch		
Elizabeth Tromp Director General, Charities Directorate, Policy and Planning Branch		
Royal Canadian Mounted Police	06/01/2005	13
Mark Scrivens Senior Counsel		

Organizations and Individuals	Date	Meeting
Royal Canadian Mounted Police	06/01/2005	13
Giuliano Zaccardelli Commissioner		
Office of the Privacy Commissioner of Canada	06/01/2005	14
Raymond D'Aoust Assistant Privacy Commissioner		
Patricia Kosseim General Counsel		
Jennifer Stoddart Privacy Commissioner		
Office of the Information Commissioner of Canada	06/08/2005	15
Daniel Brunet General Counsel		
J. Alan Leadbeater Deputy Information Commissioner		
Security Intelligence Review Committee		
Timothy Farr Associate Executive Director		
Sharon Hamilton Senior Researcher		
Marian McGrath Senior Counsel		
Commission for Public Complaints Against the Royal Canadian Mounted Police	06/08/2005	16
Shirley Heafey Chair		
Steven Mc Donell Senior General Counsel		
Canadian Human Rights Commission	06/15/2005	17
Ian Fine Director, Policy		
Mary Gusella Chief Commissioner		
Robert W. Ward Secretary General		
Office of the Communications Security Establishment Commissioner		
Antonio Lamer Commissioner		
Joanne Weeks Executive Director		

Organizations and Individuals	Date	Meeting
B'nai Brith Canada	09/20/2005	19
David Matas Senior Legal Counsel		
Canadian Arab Federation		
Omar Alghabra President		
Canadian Council on American-Islamic Relations		
Riad Saloojee Executive Director		
Canadian Islamic Congress		
Faisal Joseph Legal Counsel		
Canadian Jewish Congress		
Mark Freiman Honorary Counsel, Ontario Region		
Canadian Muslim Lawyers Association		
Ziyaad Mia		
Muslim Council of Montreal		
Salam Elmenyawi Chairman		
As an Individual	09/20/2005	20
Craig Forcese Law Professor, University of Ottawa		
Canadian Association for Security and Intelligence Studies		
Tony Campbell Acting Executive Director		
Canadian Civil Liberties Association		
A. Borovoy Counsel		
Canadian Newspaper Association		
David Gollob Vice-President, Public Affairs		
Imagine Canada		
Peter Broder Corporate Counsel and Director, Regulatory Affairs		
World Vision Canada		
Kathy Vandergrift Director of policy		
As an Individual	09/21/2005	21
Paul Copeland		

Organizations and Individuals	Date	Meeting
Amnesty International Canada	09/21/2005	21
Alex Neve Secretary General, English Speaking Section		
Campaigns to Stop Secret Trials in Canada		
Matthew Behrens		
Canadian Council for Refugees		
Janet Dench Executive Director		
International Civil Liberties Monitoring Group		
Warren Allmand Member of Steering Committee		
Justice for Mohamed Harkat Committee		
Christian Legeais Campaign Manager		
Canadian Association of University Teachers	09/21/2005	22
James Turk Executive Director		
Maureen Webb Legal Officer		
Canadian Bar Association		
Greg Del Bigio Vice-Chair, National Criminal Justice Section		
Tamra Thomson Director, Legislation and Law Reform		
Civil Liberties Union		
Denis Barrette Legal Counsel		
Federation of Law Societies of Canada		
Katherine Corrick Director, Policy and Legal Affairs		
George Hunter Vice-President		
University of Calgary	10/05/2005	24
Gavin Cameron Professor, Departement of Political Science		
American Center for Democracy	10/26/2005	25
Rachel Ehrenfeld Director		
B.C. Civil Liberties Association		
Jason Gratl President		

Organizations and Individuals	Date	Meeting
Mackenzie Institute	10/26/2005	25
John Thompson President		
As an Individual	11/01/2005	26
Lord Carlile of Berriew		
Clive Walker Professor, University of Leeds, School of Law		
As an Individual	11/02/2005	27
Boaz Ganor Executive Director, International Policy Institute for Counter-terrorism		
Martin Rudner Director, Canadian Centre of Intelligence and Security Studies		
Canadian Association of Chiefs of Police		
Vince Bevan Vice-president and Chief, Ottawa Police Service		
Bill Blair Chief, Toronto Police Service		
Vincent Westwick Co-Chair, Law Amendments Committee		
As an Individual	11/16/2005	28
Maureen Basnicki		
Air India 182 Victims Families Association		
Bal Gupta Chair		
Nicola Kelly National Spokesperson		
Department of Justice		
Douglas Breithaupt Senior Counsel, Criminal Law Policy Section		
Stanley Cohen Senior General Counsel, Human Rights Law Section		
Irwin Cotler Minister		
Department of Public Safety and Emergency Preparedness		
Anne McLellan Minister		

Organizations and Individuals	Date	Meeting
Thirty-Ninth Parliament, 1st Session		
Department of Justice	21/06//2006	2
Douglas Breithaupt Senior Counsel, Criminal Law Policy Section		
Bill Pentney Senior Assistant Deputy Minister, Policy Sector		
Vic Toews Minister		
Department of Public Safety and Emergency Preparedness		
Stockwell Day Minister		
William J.S. Elliott Associate Deputy Minister		

APPENDIX B
LIST OF BRIEFS

Organizations and Individuals

Thirty-Eighth Parliament, 1st Session

Air India 182 Victims Families Association

American Center for Democracy

Amnesty International Canada

B.C. Civil Liberties Association

B.C. Freedom of Information and Privacy Association

Barreau du Québec

Basnicki, Maureen

B'nai Brith Canada

Campaign to Stop Secret Trials in Canada

Canadian Arab Federation

Canadian Association of University Teachers

Canadian Bar Association

Canadian Civil Liberties Association

Canadian Council for Refugees

Canadian Council on American-Islamic Relations

Canadian Jewish Congress

Canadian Muslim Lawyers Association

Canadian Newspaper Association

Canadian Security Intelligence Service

Organizations and Individuals

Carter and Associates Professional Corporation

Civil Liberties Union

Commission for Public Complaints Against the Royal Canadian Mounted Police

Confederation of Canadian Unions

Copeland, Paul D.

Department of Justice

Department of Public Safety and Emergency Preparedness

Federation of Law Societies of Canada

Financial Transactions and Reports Analysis Centre of Canada

Forcese, Craig

Ganor, Boaz

Garant, Patrice

Imagine Canada

Information and Privacy Commissioner of Ontario

International Civil Liberties Monitoring Group

Justice for Mohamed Harkat Committee

KAIROS - Edmonton Committee

Keeble, Edna

MacDonald, Alex

Mackenzie Institute

Office of the Privacy Commissioner of Canada

Organizations and Individuals

Registry of the Federal Court of Canada

Religious Society of Friends (Quakers), Toronto, Ontario

Security Intelligence Review Committee

World Vision Canada

Thirty-Ninth Parliament, 1st Session

Alli, Wasim

Communications Security Establishment Commissioner

Department of Justice

Department of Public Safety and Emergency Prepardness

Finkelstein, Michael J.

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meeting No. 34) is tabled.

Respectfully submitted,

Garry Breitkreuz, MP
Chair

RIGHTS, LIMITS, SECURITY: A COMPREHENSIVE REVIEW OF THE ANTI-TERRORISM ACT AND RELATED ISSUES

Dissenting Opinion from Joe Comartin and Serge Ménard

Introduction

The *Anti-terrorism Act* (ATA) is the main piece of legislation passed in Canada after the horrifying attacks that destroyed the World Trade Center on September 11, 2001, killing 2,973 people and leaving thousands injured.

When such a shocking and devastating event occurs, everyone in authority feels the need to act, in order to show that they are doing something to prevent a repetition of the tragedy and also to prevent any similar though smaller-scale tragedies from prolonging the insecurity into which the whole community has been plunged.

Legislators therefore feel obliged to legislate.

They do it hastily, to show they are responding to the emergency as the new situation demands. In this case, our Parliament's haste matched the horror of the tragedy that sparked it. In just three months, Parliament pushed a 170-page bill through all the stages for it to become law.

Reading the ATA is remarkably difficult. Without a solid university grounding in law, and wide experience with federal legislation, it is almost impossible to grasp all its implications. Even with such training and experience, it takes hours and even days of efforts to begin to understand all aspects of it.

The arcane nature of the ATA has significant consequences for the public debate that should surround such major legislation. Because few people have both the training and the time needed to understand it sufficiently to reach an informed judgment, the public debate comes down to trust.

Either the public trusts the ministers who claim that despite their haste a fair balance has been struck between the requirements of fighting terrorism and respect for fundamental freedoms, and in the police who assure us that in any event they will not abuse the new powers that they have been given; or they trust the civil liberties organizations and the academics who devote their lives to studying the legal conditions necessary for respecting our rights.

The verdict of these latter groups is disturbing, to say the least.

Apart from a few provisions necessary so that Canada can meet its international commitments, they call the ATA “useless and dangerous”.

The ATA and its hasty passage may have achieved the goal of reassuring the public about our leaders’ willingness to confront the threats this new kind of terrorist organization represents. But it was at the cost of serious violations of a number of fundamental rights that constitute the very core of our democratic societies.

In this sense, passage of the ATA was a partial victory for the forces of terrorism that today threaten societies based on laws and liberty.

Our rights and freedoms have been acquired over the past few centuries and we have fallen into the habit of considering them the product of our accumulated wisdom.

We have just lost some of that.

Some preliminary remarks are needed.

We have already pointed out in our interim report that:

> *Terrorism cannot be fought with legislation; it must be fought through the efforts of intelligence services combined with appropriate police action.*
>
> *There is no act of terrorism that is not already a criminal offence punishable by the most stringent penalties under the Criminal Code. This is obviously the case for pre-meditated, cold-blooded murders; however, it is also true of the destruction of major infrastructures.*
>
> *Moreover, when judges exercise their discretion during sentencing, they will consider the terrorists’ motive as an aggravating factor. They will find that the potential for rehabilitation is very low, that the risk of recidivism is very high and that deterrence and denunciation are grounds for stiffer sentencing. This is what they have always done in the past and there is no reason to think they will do differently in the future.*
>
> *We must also consider that, when it comes to terrorism, deterrence has limitations. First, it will have very little impact on someone considering a suicide bombing. Second, those who decide to join a terrorist group generally believe that they are taking part in an historic movement that will have a triumphant outcome in the near future and that will see them emerge as heroes.*
>
> *Therefore, one cannot expect that new legislation will provide the tools needed to effectively fight terrorism.*
>
> *Legislation can, however, be amended if police do not seem to have the legal means needed to deal with the new threat of terrorism.*

> *Consequently we must ensure that the proposed measure does not unduly disturb the balance that must exist between respect for the values of fairness, justice and respect for human rights, which are characteristic of our societies, while also ensuring better protection for Canadians and for the entire world community.*[1]

The Canadian Bar Association, in the brief it tabled when the *Anti-terrorism Act* was being reviewed, pointed out that that "[t]he government currently has many legal tools to combat a terrorist threat" and that "existing provisions of the Criminal Code provide an impressive arsenal to combat terrorist organizations".[2]

The Association's brief included the following examples, which were put before us again by the Civil Liberties Union:

- Section 2 of the Criminal Code: definitions of "criminal organization," "criminal organization offence" and "offence-related property" (proceeds of crime);

- Section 7: extraterritorial offences on aircraft, ships and fixed platforms, offences involving internationally protected persons and offences involving nuclear material;

- Section 17: removal of "compulsion" as a defence for certain offences, including piracy, causing bodily harm, kidnapping, hostage-taking, etc.;

- Section 21: participation in an offence by persons who aid or abet, conspiracy;

- Section 22: participation by persons who counsel the commission of an offence;

- Section 23: accessory after the fact;

- Section 24: attempt.

Among the offences against public order in Part II of the Code, we would note:

- Sections 74 and 75: piratical acts;

- Section 76: hijacking;

- Section 77: endangering safety of aircraft or airport;

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1 The dissenting report can be found at the end of the third majority report, *Review of the Anti-terrorism Act: Investigative Hearings and Recognizance with Conditions,* at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&SourceId=193469&SwitchLanguage=1

2 Canadian Bar Association, submission to the three-year review of the *Anti-terrorism Act*, May 2005.

- Section 78: taking an offensive weapon or explosive substance on board an aircraft;

- Section 78.1: various similar offences committed on board a ship or fixed platform;

- Sections 79 to 82.1: offences relating to the handling of dangerous substances;

and offences relating to firearms and other weapons, set out in Part III:

- Section 430(2): mischief that causes actual danger to people's lives, subject to life imprisonment;

- Section 431: attack on official premises, private accommodation or means of transport of an internationally protected person, subject to imprisonment for 14 years;

- Section 433 *et seq.*: arson and other fires;

- Section 495: the power of peace officers to arrest without warrant, where there are reasonable grounds to believe that the accused has committed or is about to commit an offence.

Obviously we could also add all the provisions involving any kind of homicide.

Because the Criminal Code already contains this "solid arsenal" of provisions for combating terrorism, the ATA has simply added two that no police force has yet seen the need to use.

These were the provisions dealt with in our interim report.

As for the provisions creating new offences, they have been used only in conjunction with other charges that already existed in the Criminal Code and covered the same acts. Judges could certainly have handed down appropriate sentences even without the supplementary charges under the ATA.

So the ATA is useless, apart from some provisions stemming from Canada's international commitments, and these could have been drafted much more simply.

But the ATA is also dangerous, because it is a frontal attack on a number of fundamental principles that underpin our system of law, the system that distinguishes us most sharply from the ideology motivating the terrorists who confront us.

The Civil Liberties Union[3] and the Canadian Association of University Teachers [4] drew up a long list of such principles, including:

- the presumption of innocence;
- the right to privacy and to be secure against searches and any kind of invasion of privacy;
- the right not to be stopped, questioned, arrested or detained based on mere suspicion or on racial, religious or ethnic profiling;
- the right of every individual to a public, just and fair trial, and the right to appeal;
- the right to make full answer and defence;
- the right to be secure against arbitrary imprisonment and torture;
- the right to bail while awaiting trial, and to have the validity of detention reviewed by way of *habeas corpus*;
- the right of asylum;
- the right to information and to freedom of the press.

We must also learn from our overreactions in the past when faced with danger. As the danger recedes, we feel obligated to compensate the innocent victims of useless measures taken out of fright.

Not only did these measures do nothing to increase our security, but we devoted a great deal of energy to them that could have been better employed in fighting the real danger more effectively.

One example is the way we treated Canadians of Japanese origin during the Second World War. In 1942, 22,000 people of Japanese origin were arrested and detained, and their property confiscated. 75% of them had been born in Canada. And yet, government documents finally made public in 1970 revealed that both the Department of National Defence and the Royal Canadian Mounted Police were convinced that Japanese-Canadians in no way threatened the country's security.

In 1988, the federal government agreed to make an official apology, in which it recognized that these people had been treated unjustly and their human rights

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[3] Civil Liberties Union, "The *Anti-terrorism Act*, 2001: A Misleading, Useless and … Dangerous Law". Brief presented to the Special Senate Committee on the Anti-terrorism Act and to the Subcommittee on Public Safety and National Security of the Standing House of Commons Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, May 9, 2005.

[4] The Canadian Association of University Teachers, submission to the House of Commons Subcommittee on Public Safety and National Security, February 28, 2005.

violated. The apology was accompanied by symbolic redress of $21,000 for each eligible Japanese-Canadian. The sum of $12 million was allocated to creating educational, social and cultural activities and programs. A further $12 million was spent on setting up the Canadian Race Relations Foundation, whose mandate is to promote racial harmony and transcultural understanding, and to help eliminate racism.

During the First World War, some 5,000 Ukrainians were interned and 80,000 others were required to report regularly to the police. A number were forced to endure harsh living and working conditions and more than a hundred died during their internment.

During the Second World War, 17,000 Italians were detained for varying periods, 700 of them for the entire four years the war with Italy lasted.

More recently, over 450 people were arrested during the October Crisis of 1970, almost all of them needlessly. They included a popular singer (Pauline Julien), a widely-admired poet who later became Quebec's Minister of Immigration and Cultural Communities (Gérald Godin), and almost all the candidates of the FRAP, a municipal political party that opposed Montreal Mayor Jean Drapeau. In 1971 the Quebec government decided to pay compensation to them.

All these futile arrests were sparked by events that were deeply traumatic for Canadian society. Wars are obviously the most traumatic of all such events. But the kidnapping of a diplomat and then of a provincial cabinet minister, who was later assassinated, caused an uproar similar to the one we lived through after September 11.

While fear may be a natural and understandable feeling, it can be a very poor adviser.

Respect for our values is an important element in the war against terrorism. At the plenary closing session of the International Summit on Democracy, Terrorism and Security in Madrid on March 10, 2005, United Nations Secretary General Kofi Annan declared once again, "[T]errorism is a threat to all states, to all peoples." He added,

> *[Terrorism] is a direct attack on the core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflicts.*

But he then went on to say,

> *[T]errorism is in itself a direct attack on human rights and the rule of law. If we sacrifice them in our response, we will be handing victory to the terrorists… I regret to say that international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms… Upholding human rights is not merely*

compatible with successful counter-terrorism strategy. It is an essential element.

Before we examine in greater detail the provisions of the ATA that pose the greatest danger to the fundamental principles characteristic of free and democratic societies, it is necessary to say a few words about the work accomplished by the Subcommittee of which we have been members for over two years.

We wish to acknowledge the extensive work by the other members of the Subcommittee on Public Safety and National Security. We agree with a number of their recommendations, both those which resolve drafting problems with the original *Anti-terrorism Act (ATA)*, but more importantly where the recommendations would have the effect of curtailing or eliminating the potential excesses of the *ATA.*

However, we have come to the conclusion that the *ATA* is fundamentally flawed. We believe that the philosophical and jurisprudential underpinnings of this Act are incompatible with the values of Canadians who wish to live in a country that prizes human rights and civil liberties. We believe that the *ATA* does not reflect those values.

Analysts constantly speak of the need to balance freedoms with security. We view the two as going hand-in-hand; it is not possible to have liberty without security and it is not possible to have security without liberty and freedoms. We do not believe that the Subcommittee's recommendations allow the *Anti-terrorism Act* to achieve the necessary balance, that there remain breaches of many freedoms and that it does not achieve any increase in security to Canadian citizens.

It is the absolute responsibility of every democratic state to provide protection to their citizenry. It is this fundamental truth that should have been the guiding principle in drafting legislation of public safety nature; instead of reacting to a crisis, as we did in 2001.

Specific Critique of the Anti-terrorism Act

We have in our interim minority report set out our position on the sections that authorize the use of Investigative Hearings and Preventative Arrests and affirm that position to have these sections sun-setted at this time.

Even though a terrorist organization fits the definition of a criminal group in the *Criminal Code*, they still have specific methods of obtaining funding. It is therefore necessary to set out provisions designed to interdict the funding and provisions against freezing. However, the measures provided for in the *Anti-terrorism Act* are so broad that they authorize numerous abuses, as the Canadian Association of University Teachers points out on pages 28 and 29 of its submission:

Under the new financing terrorism offenses that the ATA adds to the Criminal Code, the problems of overbreadth, vagueness, and incomplete offenses being piled on incomplete offenses are only compounded.

Under ss. 83.02 to 83.04 of the Criminal Code as amended by the ATA, it is a criminal offence to provide, collect, use, possess, invite a person to provide, or make available property (and in some of these cases, financial and other related services) intending or knowing that it be used in whole or part for various purposes. Depending on the provision, the prohibited purposes range from the commission of the terrorist offenses listed in s. 83.01(1) a of the Criminal Code: to "facilitating or carrying out any terrorist activity," to "benefiting" a "terrorist group" or "any person facilitating or carrying out [terrorist] activity". "Terrorist group", it should be recalled, is defined in s. 83.01 as an entity (including a person) that has as one of its purposes or activities facilitating or carrying out any terrorist activity", or a listed entity under s. 83.05.

Read together, with their various verbs and purposes, the provisions are complex, and confusing in their overlap since they all carry the same 10 year maximum penalty. But more disturbing than this, is the "broad brush" approach that they take. Any economic connection with so-called "terrorist activity", however remote, is caught by the provisions. The provisions catch a corner store that sells milk to a "person facilitating terrorist activity", a barbershop that gives a haircut to a such a person, and a restauranteur that serves meals to a "terrorist group" – regardless of how minimal the material contribution to the aims of the person or group, and regardless of whether the accused desired to further these aims. In this regard, the provisions are broader than aiding and abetting and conspiracy in the criminal law, and than the new "participating and contributing" offences in ss. 83.18 and 83.19 of the Criminal Code as amended by the ATA. They also go beyond the requirements of the International Convention for the Suppression of the Financing of Terrorism which they are supposed to implement. That Convention only requires states to criminalize the provision or collection of funds, not any economic activity. Notably, the provisions also make having an intention alone criminal. Under s. 83.04(b) one commits a criminal offence just by possessing property and intending it be used to facilitate or carry out a terrorist activity. No act towards carrying out the intention is required. Again, this goes beyond the requirements of the Financing of Terrorism Convention.

Under ss. 83.12 and 83.08 it is a criminal offence to have virtually any kind of dealings, or to provide any financial or related services in respect property on behalf of, or at the direction of a "terrorist group". Under ss. 83.12 and 83.1 (1) it is a criminal offence to fail to disclose to authorities the existence of any property in one's possession or control that relates to a terrorist group, or any transaction in respect of such property.

Glorification of Terrorism

We believe that the existing Hate Propaganda Section of the Criminal Code is sufficient in protecting Canadian society from the promulgation of hate speech or writings. In addition, it is our belief that legislation such as this would infringe on freedom of expression, a fundamental democratic right that was moreover

entrenched in the *Charter of Rights and Freedoms* in the first place to protect against excesses provoked by a traumatic event.

Financing of Terrorist Activities, Listing of Terrorist Entities, De-registration of Charities

One of the goals evident in many of the provisions of the ATA is secrecy. Secrecy for the government of the day, and its corollary: power concentrated in the hands of the Executive branch of government at the expense of that owed in a democracy to the legislative and judicial branches.

Amendments to the Canada Evidence Act

Part 3 of the Anti-terrorism Act, amending ss. 37 and 38 of the Canada Evidence Act, gives broad powers to government officials to control proceedings and gives the Attorney General virtually unfettered power to prohibit the disclosure of information in proceedings. These new powers apply in civil, criminal and administrative law proceedings, commission of inquiry proceedings and even parliamentary and provincial assembly proceedings. They replace the common law doctrine of public interest immunity codified in the Canada Evidence Act, doing away with the need for government to show that there is any public interest in non-disclosure. They override the open court principle making court proceedings, court records and even government representations secret whenever the government argues for non-disclosure. In the case of Attorney General “secrecy” certificates, they suspend the operation of the Access to Information Act, the Privacy Act and the Personal Information Protection and Electronic Documents Act -- important regimes which protect the citizen’s right to know and her right to privacy and control over personal information.

These powers are unjustified in our legal system and they invite abuse. With them, any government of the day could keep secret from Parliament, the public, or an individual complainant whether it be a corruption scandal, a controversial program, a serious environmental threat, a miscarriage of justice, an operational fiasco, or any other kind of government wrongdoing.

Terrorist Listing with Secret Evidence

Under s. 83.05 the government can list an entity (defined in s. 83.01 as a person, group, trust, partnership or fund, or an unincorporated association or organization) if there are reasonable grounds to believe the entity has knowingly engaged in terrorist activity or is knowingly acting on behalf of an entity knowingly engaged in terrorist activity. After the fact of listing, the entity may make an application for judicial review but the judge must examine any criminal intelligence reports about the entity in private and hear the evidence of the government *ex parte* if, in the judge’s opinion, disclosure would injure national security or endanger the safety of

any person. The entity receives only a summary of the evidence without the information that would injure national security or endanger the safety of any person. If the judge finds that the listing is reasonable it becomes final and the entity can make no further application absent a material change in circumstances.

We question the necessity of creating a terrorist list for Canada. Listing reduces complex historical and political situations to a simple "black and white" category of terrorism, which rarely serves to solve such situations. As English Members of Parliament have shown in respect to its terrorist list, it can be an extremely politicized process. Governments often bow to the political pressure of foreign regimes, listing the opponents of those regimes for no other reason than political expediency. Listing can disenfranchise populations and impede peace and reconstruction processes. Groups which are listed but also have a legitimate political wing or social welfare wing, which are constructive or at least crucial players in such processes.

For these reasons, as well as the requirements of due process discussed below, we contend that if the government insists on creating a terrorist list for Canada, the persons or groups proposed for listing must be afforded the opportunity to know the allegations and evidence used to support the listing, as well as the opportunity to respond. Further, in order to comply with Canada's obligation under the Convention Against Torture, no evidence which may have been obtained through torture can be allowed to support a listing. Individuals and groups must, therefore, have sufficient disclosure to determine whether any evidence on which the government relies may have been obtained through such means.

Deregistration of Charities with Secret Evidence

Part 6 of the ATA enacts the new Charities Registration (Security Information) Act and consequential amendments to the federal Income Tax Act. It allows the government to sign a certificate on the basis of secret reports, denying or revoking an organization's charitable status, where there are reasonable grounds to believe that the organization has made any resources available directly or indirectly to an entity that engages or will engage in terrorist activities, or activities in support of terrorism.

While the certificate can be reviewed by the Federal Court, the security or criminal intelligence reports on which the certificate is based is most often reviewed in private. The ordinary rules of evidence are waived and the charity receives only a censored summary of the information available to the judge.

These provisions are unnecessary given that the individuals knowingly providing aid to a terrorist group through a charity would be guilty of ordinary criminal offences which Canadian criminal courts could claim jurisdiction over, as well as the new terrorist offences enacted by the ATA should the government insist on retaining them. The provisions are unwise because they will choke off the valuable work done by Canadian charities in the conflict zones of the world, since no charity

has the ability to absolutely control who their resources benefit, or the clairvoyance to predict who in a complex political landscape might be deemed terrorist.

Throughout the review process we heard repeated evidence from long-standing respected charitable organizations such as World Vision who are experiencing an "operational chill" out of fear that when involved in foreign development in response to humanitarian aid they may be working with groups who are on a terrorist list. In addition, these groups have indicated that there is also some significant impact on fundraising activities in Canada.

We believe that if the "terror listing" continues and charitable organizations are faced with the threat of de-registration, then respected and long standing agencies should be given limited and/or specific exemptions based on the need to deliver humanitarian relief in areas where they are forced to deal with groups that may be "listed". The government could look to the example of the Red Cross, which is permitted in a "war zone" to provide aid to enemy combatants, as a model for a humanitarian aid exemption.

Loss of Due Process Protections

"Due process" is a cornerstone of our common law system. In a democracy it mediates between state and individual interests, ensuring transparency and fairness. We maintain that the ATA abrogates well-established due process standards in a variety of ways.

Terrorist Listing

The entire concept of Terrorist Listing is one area where due process is abrogated. While United Nations Security Council Resolution 1267 creates a list for members and associates of Al Qaeda and the Taliban, and calls on states to freeze the assets of persons and entities on that list, Canada bears no international obligation to create its own separate terrorist list.

What is required by due process depends on the interest at stake for the individual or group subject to listing. Under the ATA the consequence of listing is criminalization of membership and, due to the vague and very broad inchoate offences introduced by the ATA, of almost any kind of association with a listed "entity", once listed, a person or group is presumptively a terrorist group for the purposes of the new terrorism offences.

If the government insists on creating a terrorist list, there should be a regular review mechanism by which those listed can seek delisting and call new evidence. In addition, an automatic delisting, after a reasonable period of time, subject to renewal through the same processes used in the initial listing, should be put in place.

Attorney General "Secrecy" Certificates

The Attorney General's power to prohibit the disclosure of information in proceedings will have foreseeable and egregious effects on due process in criminal, civil and administrative law cases.

A secrecy certificate issued by the Attorney General overrides the rights of the accused in the criminal justice system to full disclosure by the Crown of exculpatory as well as inculpatory evidence, and the right to make full answer and defense. While courts might throw out cases where they found the Attorney General's secrecy certificate affected the accused's right to a fair trial this is a situation in which the legislature has a responsibility to ensure its legislation will have a constitutional effect. It is untenable to leave this responsibility solely to the courts.

In civil cases, citizens with valid claims against the government may have those claims frustrated when they are unable to get the disclosure they are entitled to because of an Attorney General's secrecy certificate.

In administrative hearings, the due process rights afforded by the doctrine of natural justice and the duty of fairness may be overridden by a secrecy certificate issued by the Attorney General. Reduced powers should be given to the Attorney General of Canada, while powers should be increased for the Courts.

Unjustified Surveillance

Amendments to the National Defense Act – CSE Domestic Spying

Section 273.65 of the National Defense Act allows the Minister of Defense to give the Canadian Security Establishment a blanket authorization to spy on Canadians' international communications. The Minister must articulate an activity or class of activities that the interception is to relate to, but this is a completely open-ended requirement. He might designate "terrorist activities", but he might also designate "illegal activities", "business activities", or "religious and NGO activities". The term "relate" requires only a very loose connection between the designated activity and the interception.

In his annual report for the year ending in March 2006, CSE Commissioner Antonio Lamer indicated that Department of Justice lawyers were interpreting these authorizing provisions differently than his own independent counsel, and that there were ambiguities in the legislation that should be addressed by Parliament. He also noted that the lack of clarity in documentation provided to him by the CSE to support Ministerial authorizations made it difficult for his staff to assess compliance with the legislation.

In reality, there is nothing in s. 273.65 or any other ATA section that prevents the CSE from trawling through Canadians' emails and telephone calls with artificial

intelligence in the same way the National Security Agency is doing in respect of Americans' telecommunications in its highly controversial domestic spying program.

If the government insists on allowing the CSE to turn its powerful gaze to communications within Canada, it should be on an individual case by case basis and on terms at least as restrictive as those which govern CSIS access to domestic communications under the Canadian Security Intelligence Service Act and only after independent judicial authorization.

Security of Information Act

We need to examine and make changes to the *Security of Information Act, (SOIA).* As a result of the *Anti-terrorism Act* this new Act was created to address changes to the *Official Secrets Act*. While the *SOIA* incorporated most of the components of the old *Official Secrets Act* including Section 4 which deals with "leaks" or communicating secret information, there were changes which broaden the scope of information that can be withheld or for which charges could be laid. The SOIA replaces the "classified information" terminology from the *Official Secrets Act* and replaces it with the broader language, "information that the Government of Canada or of a province is taking measures to safeguard".

While the entire Act needs to be reviewed, it is Section 4 which has received perhaps the most attention. It was under Section 4 that search warrants were executed upon Ottawa Citizen reporter Juliet O'Neill in January 2004 by RCMP officers in an attempt to find evidence that one of their own officers may have leaked information in the Maher Arar case.

In October of 2006 the Ontario Superior Court of Justice ruled that sections 4(1) (a), 4(3) and 4(4) (b) of the *SOIA* were unconstitutional as they violated sections 7 and 2(b) of the *Canadian Charter of Rights and Freedoms*. Section 4(1) (a) makes it an offence to communicate, unlawfully, secret or official information to persons not authorized to receive the information. The companion sections 4(3) and 4(4) (b) create offences for unlawfully receiving secret information and for transmitting secret information to someone not authorized to receive it.

In light of the Ontario Superior Court ruling and the expanded scope of material that is to be excluded from public dissemination, it is critical that a review and changes to the SOIA needs to be concluded at the earliest possible opportunity.

Parliamentary Oversight Committee

Canada is unique among western nations in its lack of a Security oversight committee. Over the course of the review we heard testimony from individuals and organizations who stressed the importance of creating a mechanism for overseeing disparate national security activities. In 2004 an Interim Committee of Parliamentarians on National Security was set up to make recommendations to the government of the day, it presented a report to Parliament in April of 2005 and on

November 24, 2005, the government tabled a bill (C-81) to establish a National Security Committee of Parliamentarians.

We would support recommendation 58 in the majority report. We would, however, further strengthen the recommendation to ensure that any Committee has authority to oversee all security agencies. In the examination of the Air India tragedy and the events surrounding the deportation and torture of Maher Arar, to cite but two examples, we have seen and heard of too many problems created when information is improperly shared or withheld from one agency to another.

The National Security Committee must in addition to providing a review function, be empowered to oversee current polices and conduct to ensure their adequacies. We have throughout the course of the review heard that vast amounts of information are deemed of national security interest and therefore inaccessible to the public or judiciary. Therefore, the proposed National Security Committee must be able to examine this information and where appropriate provide a graduated scale for the release of previously classified information.

Security Certificates

The authors of this report having a different opinion on security certificates, you will find this section after the recommendations.

Recommendations

While the purpose of the ATA review was to examine the existing legislation and, while we cannot write an entirely new law, we would recommend that the existing ATA be terminated. However, if a new law were to be drafted, the following considerations should guide the process:

> That new legislation seek to provide the utmost protection to, and not oppression of, our citizens;
>
> That the new legislation be guided by the spirit and principles of the Charter;
>
> That new legislation would prohibit “evidence” garnered from torture domestic or international, in our courts or tribunal;
> That there be an absolute ban on sending people back to their country of origin or any other country where there is a reasonable risk of torture or death.

We recommend that in sentencing we consider intent and use organized crime sections of the Criminal Code to increase penalties where the motivation for the offence is terrorism against the state or individuals.

We recommend increased resources for judicial training in intelligence matters and would further reinforce the importance of independent judicial oversight to provide greater confidence amongst our citizens in the rule of law.

We recommend the immediate creation of a Parliamentary Oversight Committee to oversee and provide proactive direction to our security services.

We recommend that the Charities Registration (Security Information) Act and the sections of the federal Income Tax Act which can arbitrarily de-register charities be extinguished.

On the basis of the foregoing, we recommend that Canada meet, but not exceed, its international obligations, particularly with respect to interdicting the funding of terrorist groups.

SECURITY CERTIFICATES

Opinion of Serge Ménard

MP for Marc-Aurèle-Fortin

Security certificates can be thought of as the accessory to a deportation order. That is why they do not apply to Canadian citizens. Banishment does not exist in Canada. Canadian citizens who represent a security risk are dealt with by our judicial system.

This mechanism for deporting an immigrant for security reasons has thus been part of Canadian legislation since 1978. It was, however, amended on June 28, 2002, and certain protections were eliminated at that time on the pretext of speeding up the removal process: the most important amendment was unquestionably the elimination of the right of appeal.

The current security certificates procedure is set out in the Immigration and Refugee Protect Act (IRPA): the ministers of Citizenship and Immigration (CIC) and Public Safety and Emergency Preparedness (PSEPC) can sign a security certificate attesting that a permanent resident or foreigner is inadmissible to Canada for security reasons.

Once the security certificate is signed, it goes to the Federal Court, which holds *in camera* hearings without the accused's lawyer and the accused when the Court deems that the disclosure of certain evidence or testimony would be injurious to national security or the safety of any person.

The judge may hear the person against whom the certificate was issued. The Judge summarily informs the individual of the grounds for the application for deportation, but must not reveal the grounds or the evidence that it would not be in the public interest to make public. The individual therefore does not know completely either the charges to which he or she must answer nor what he or she must explain.

It is not properly speaking a judicial procedure. Moreover, at least one Federal Court judge has expressed unease at having to make a decision that involves an individual's freedom under such circumstances.

Justice Hugessen writes:

> *I can tell you because we [the judges of the Federal Court] talked about it, we hate it. We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined. If there is one thing that I learned in my practice at the Bar ... it is that good cross-*

> *examination requires really careful preparation and a good knowledge of your case. And by definition judges do not have that ... We do not have any knowledge except what is given to us and when it is given to us by only one party we are not well-suited to test the materials that are put before us.*[i]

He notes as well that there is an essential difference between the provisions of the amended CEA and the IRPA regarding the hearing and the absence of one party and those that are held to obtain search warrants and warrants for electronic surveillance:

> *[P]ersons who swear affidavits for search warrants or for electronic surveillance can be reasonably sure that there is a high probability that those affidavits are going to see the light of day someday. With these national security affidavits, if they are successful in persuading the judge, they never will see the light of day and the fact that something improper has been said to the Court may never by revealed …*[ii]

It may not be a judicial proceeding, but for immigrants who have fled their country fearing for their life or safety, and who thus fear returning to it, the deportation order, if confirmed, is tantamount to an indefinite prison sentence.

These individuals are condemned without knowing all the reasons for the decision and without knowing all the evidence presented against them, thus, without being able to respond fully to it. They are incarcerated following partially secret hearings that neither they nor their lawyer attended.

For human rights advocates, this procedure incorporates the worst violations of the basic rights that are the main characteristic of fair and democratic societies. Section 10 of our Charter of Rights and Freedoms states:

> *Everyone has the right on arrest or detention*
>
> *a) to be informed promptly of the reasons therefor*
>
> *c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.*

Section 11 states:

> *Any person charged with an offence has the right:*
>
> *a) to be informed without unreasonable delay of the specific offence*
>
> *d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal*

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[i]. James K. Huguessen, "Watching the Watchers: Democratic Oversight," in David Daubney, ed., *Terrorism, Law and Democracy* (Montréal:Yvon Blais, 2002) 381 at 384.

[ii]. *Ibid*., at 385.

Obviously, he or she is not “charged,” since he or she is not accused of anything. Nevertheless, he or she risks indefinite incarceration, which is reserved for the worst criminals.

Some proponents of these certificates derive some comfort from the fact that, in order to escape from this indefinite imprisonment, the person need only return to his or her country. They talk about a three-wall prison.

That is true for those who can return to their own country or even to another, but some cannot because they fear torture or death, or both, if they return to their native country and because no other country wants to accept someone that Canada has deemed a security risk.

For these people, the three-wall prison is bordered by a precipice on its fourth side.

So what was supposed to be the simple exercise of any sovereign country’s prerogative — the right to prohibit someone it considers dangerous from entering or remaining in the country — has become the symbol of a drift away from our system of laws towards practices that we normally considered characteristic of totalitarian regimes.

This is particularly true when the security certificates are issued against people who have been in Canada for a number of years, have started a family here, held down a job and lived a blameless life.

Here in Canada, we all feel that this procedure is not worthy of being applied to Canadian citizens. It must be remembered that the rights that are being violated are basic human rights, not privileges of citizenship.

The least that can be said is that this procedure must be seriously revised.

At the time we had to give our opinion on security certificates, the Supreme Court of Canada had not yet made its decision in the cases of Charkaoui, Harkat and Almrei, where it must rule whether this procedure complies with the Charter of Rights and Freedoms.

Before being made public, our opinion has to be translated and submitted to the Committee on Public Safety and Emergency Preparedness so that it can be discussed before being tabled in the House of Commons.

If the Court rules that the expulsion order issued pursuant to a security certificate is unconstitutional because it contravenes the Charter, it will render our reflections moot. If the ruling goes the other way, we feel, as do most of the members of our subcommittee, that these reflections could be useful. They will also be useful if the Court’s ruling is more nuanced.

We should then consider certain principles.

First, we acknowledge that it is a fundamental right of every country to refuse entry to a foreigner who presents a security risk.

If this right is exercised at the time, or shortly after, such people arrive in Canada, if their return to their native country does not pose a problem for their safety, or if they can be removed to another country willing to accept them, both the expeditious procedure and a decision based on a reasonable belief that they represent a security risk are more acceptable.

Recently, a Russian citizen who was travelling under several identities and carrying considerable sums of currency from several countries was deported without raising any concerns among human rights advocates.

It is after a person has been allowed to settle here as an immigrant for a certain amount of time that the question of respecting human rights arises. It becomes increasingly worrisome if a number of years have passed since his or her arrival in Canada and he or she has started a family here, held down one or several jobs and always led a blameless life.

We therefore feel that this deportation mechanism cannot be kept without a thorough revision in order to re-establish the appropriate balance between what is needed to fight terrorism and respect for basic rights. To that end, we are proposing six measures.

Abolition of arrest without warrant

First, the IRPA, which provides for arrest without warrant for foreigners, should be amended. It does not seem excessive to require that a warrant be issued for the arrest of foreigners, as is done for permanent residents. Let us remember that many foreigners live like Canadian citizens even if they have not yet obtained their citizenship. If it were necessary to arrest them to prevent the imminent commission of a criminal act, it could be done pursuant to section 495 of the *Criminal Code*, which states:

> *(1) A peace officer may arrest without warrant:*
>
> > *(a) a person … who, on reasonable grounds, he or she believes has committed or is about to commit an indictable offence;*

In all other cases, it is normal that they not be arrested in an arbitrary fashion and that they benefit from the counterbalancing effect of the warrant.

The burden of proof

We also feel that the Federal Court judge should be convinced beyond any reasonable doubt that the individual represents a threat to the safety of Canadians before ordering his or her deportation. Since the individual cannot be charged with a formal offence, he or she at least deserves the benefit of reasonable doubt.

Restore the right of appeal

We also feel that there is no valid reason for having abolished the right of appeal. We think it is risky to leave a decision as important as returning an immigrant to his or her native country where he or she may be tortured in the hands of a single judge without the possibility of appealing that decision. Under the former *Immigration Act,* moreover, the individual had the right to appeal the removal action.

Secret hearings on the evidence

Some of the security information that is used to decide whether an individual represents a security risk is secret and it is important that it remain so. It could be because, if its source were revealed, it would endanger the lives or safety of our agents. It could be because it comes from our allies, who provide it to us on condition that it be kept secret. It could also be because we do not want to reveal the investigation methods that were used to obtain it so as to prevent the terrorists from learning how to elude them. That is what justifies not revealing part of the evidence and, sometimes, even the grounds for the deportation order.

We have already mentioned that judges are very uncomfortable having to decide as if it were a trial without the benefit of hearing the other side. On the other hand, if there must be a lawyer before them challenging the claims of the government's lawyers, then that lawyer must be bound to secrecy if the judge decides that certain information must remain secret.

We are thus in complete agreement with the recommendations in Chapter Ten of the majority report regarding the *amici curiae*, those independent lawyers who have received security clearance and can serve as the legal representative of the accused during secret hearings. This institution was not found to be completely satisfactory in England, where it was tested, but it definitely represents an improvement over the current situation.

The risks of torture

At present, the Federal Court has no mandate to ensure that there is no risk of torture before confirming a security certificate. The Federal Court may very well therefore render a decision that will lead to an individual's deportation to a country where he or she risks being tortured, in contravention of Canada international obligations as a signatory of the Convention Against Torture. Canada has moreover admitted before the UN that its security certificate procedure violates its international commitments.

We feel that this violation of Canada's international commitments is unacceptable. When it analyses the merits of a security certificate, the Federal Court must absolutely decide, based on the evidence submitted to it, whether the individual risks being tortured in the country to which he or she is to be deported. If the Court decides that there is indeed a risk of torture and it further concludes that the individual represents "beyond any reasonable doubt" a threat to the safety of

Canadians, it should then give the Attorney General a short period in which to bring formal charges against the individual under the *Criminal Code*.

A period after which security certificates could not be issued

Security certificates cannot be issued against Canadian citizens. Those that argue the need for them tell us that this is a privilege of citizenship. Except that the rights affected in the procedure initiated by these certificates are not citizenship rights but human rights. The right not to be deprived of one's freedom without a fair and public trial, the right to be informed in a specific and complete manner of the reasons for which we are to be deprived of that freedom, the right to know the evidence against us and challenge it, and the right to a full and complete defence are basic rights of every human being.

It may be understandable that we agree to infringe on these rights for important security considerations when a foreigner enters the country, or shortly after, but the fact remains that, after a certain time, that individual must be treated, in matters of justice, like the other human beings who inhabit this country.

Conclusion

As we explained earlier on, this opinion will probably be made public after the Supreme Court's ruling on the security certificates' compliance with the provisions of the Charter.

That ruling may make this a moot point. If not, we continue to believe that the measures we are proposing are best able to re-establish the balance between individuals' basic rights and public safety. If there is no risk of torture, we will always be able to deport an individual to his or her native country when he or she represents a real threat to the safety of Canadians and Quebecers and yet still respect human rights as much as possible.

Serge Ménard

MP for Marc-Aurèle-Fortin

Member of the Subcommittee on the Review of the Anti-Terrorism Act

Member of the Standing Committee on Public Safety and National Security

SECURITY CERTIFICATES

Opinion of Joe Comartin

MP for Windsor—Tecumseh

We concur with the description of the character and use of the security certificates as represented in the majority report. Subsequent to the initial drafting of the report, one individual, Mohammad Mahjoub has been ordered released; however, two individuals remain in detention and are well into the third month of a hunger strike at a new detention centre in Kingston. It is apparent that the system was unprepared to deal with the Security Certificate detainees and with the substantial expenses that were incurred in building the Kingston facility. The governments' lack of a clear plan to deal with the security certificate process has been demonstrated throughout the entire detention process, first in a provincial facility and now in a federal centre.

Because the security certificate procedure set out in the Immigration and Refugee Protection Act ("IRPA") is a judicial proceeding [presided over by a Federal Court judge], and because the serious consequences facing those named in certificates [loss of liberty, a deportation order, and the possible removal to torture], strong procedural safeguards are required. However, under the current legislation, those strong procedural safeguards are severely lacking or non-existent.

One well-recognized aspect of fundamental justice is the right of full answer and defence - the right to know the allegations against oneself and the opportunity to respond to those allegations. In the present certificate process, that right is, for all intents and purposes, non-existent. Critical evidence may be presented to the presiding judge in the absence of the detainee and his/her counsel. Not only will this evidence not be disclosed to the detainee or his/her counsel, it cannot even be described in a summary. Nevertheless, the judge can consider this evidence in determining that the certificate is reasonable. Such a finding cannot be appealed or judicially reviewed and results in a deportation order against the detainee which also cannot be appealed. Under the current scheme, the detainee may never know the reasons why he is being deported from Canada, let alone have a meaningful opportunity to challenge those "reasons".

The government has not shown that the protection of national security requires that individuals' right to fundamental justice be compromised through the use of secret evidence. On the contrary, the fact that no such measures are applied to citizens, despite the fact that citizens could pose as much of a security threat as non-citizens, strongly suggests that the measures are in fact not necessary and represent unfair discrimination against non-citizens.

One proposal that has been made to better safeguard the rights of the individual named in a certificate, while at the same time protecting Canada's security interests, is the use of an *amicus curae* or "special advocate". The example of the United Kingdom is often cited by those who support modifying, rather than

abolishing, the security certificate system. However, these proceedings, where security-sensitive evidence is not disclosed, and a “special advocate” who has the right to attend and participate in in-camera sessions, have been subject to several court cases that have ruled against the arbitrarily imposed limits.

Given, that the UK Lords of Appeal have ruled against provisions of the process and that Ian MacDonald, QC, a Special Advocate with over 7 years experience quit over the failure of the government to address the problems with the system, it seems hardly an ideal proposal. It also, strengthens our contention that a system that denies the right of full answer and defence cannot be corrected through mere procedural adjustments.

Another area where the security certificate scheme fails is the distinction between foreign nationals and permanent residents for the purposes of detention. Once named in a certificate, foreign nationals are automatically detained, without warrant. Unlike permanent residents named in certificates, who have a right to an immediate review of their detention, foreign nationals have no right to have their detention reviewed until at least 120 days after a finding that the certificate is reasonable, if by that point they have not already been removed from Canada. Although the law contemplates making distinctions between permanent residents and foreign nationals in certain circumstances, there is no rational reason for this distinction, as the risk one poses to national security is unrelated to one’s immigration status. As a consequence, the security certificate procedure deprives foreign nationals of their right not to be arbitrarily detained under section 9 of the Charter and under international law, including article 9 of the International Covenant on Civil and Political Rights. With respect to having their detentions reviewed, foreign nationals and permanent residents ought to be treated equally.

Over the course of the review of the ATA, (almost two and a half years) the Committee has heard from many witnesses who have presented a number of proposals as to how to build in safeguards into the Security Certificate process. However, at the end of the day it is our belief that despite the recommendations, it is not possible to adjust the existing process so we have a system that provides for a full defence and full hearings.

We would recommend that because it is fundamentally unjust and because it is not essential to protect security, the certificate process should be abolished.

We recommend the immediate abolishment of Security Certificates under the Citizenship and Immigration Act.

We would like to acknowledge the valuable input and contributions made by the International Civil Liberties Monitoring Group. Their advice and expertise over the course of the review of the ATA made our work in writing this report much easier. Thank you.