SUBMISSION TO THE HOUSE OF COMMONS
SUBCOMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

REGARDING THE REVIEW OF THE *ANTI-TERRORISM ACT*

PRESENTED BY:

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EXECUTIVE SUMMARY

The Canadian Association of University Teachers represents 48,000 academic staff at universities and

colleges across Canada. The present review of the *Anti-terrorism Act* is a top priority for our organization because we believe that the values that underpin a free and democratic society are necessary conditions for the critical teaching and research that are the raison d'être of post-secondary institutions. Our members have a duty, therefore, to defend these conditions, but more than this, we feel we have a responsibility as intellectuals to help define and inform the public debate about their future in Canada.

In this submission we draw on the expertise of our members in the many areas of law affected by the *Anti- terrorism Act ("ATA")* to provide a detailed legal analysis that we hope will be of assistance to the Committee and to the public. But as much as we hope the submission's legal analysis will be helpful, we hope that the submission as a whole will help readers to view the *Act* in a historical and critical light.

Violent acts targeting civilians are abhorrent. Governments should strive to protect us from them. However, safety from what is popularly known as "terrorism" is not the sum of our human or national security, and any security policy that places "anti-terrorism" at the centre of its agenda is badly skewed. In Canada, "terrorism" poses far less of a risk to our collective and individual security than the erosion of our rule of law, democratic checks and balances, pluralism, and civil liberties, that laws like the *Anti- terrorism Act* effect. As Britain's top court has asserted in a recent judgment striking down parts of the U.K. anti-terrorism act: draconian laws are a greater threat to democracy than terrorism.

Draconian laws spread a cancer of secrecy and arbitrary power through the democratic body politic, breaking down the rule of law and putting those that govern above the governed. We see this in the *ATA,* in the sweeping and Kafkaesque regimes of secrecy it has introduced under amendments to the *Canada Evidence Act*, *Freedom of Information Act, Privacy Act, Personal Information and Electronic Documents Act*, *Income Tax Act*, and *Criminal Code*.

Draconian laws give state agents enormous discretion – a license to target certain groups in society. We see this in the *ATA*'s injection of a term into the criminal law framework – "terrorism" – that can never be precisely defined since it requires a judgment that *necessarily* depends on the social, racial, religious, political, and historical perspective of the people making the judgment.

Finally, draconian laws put extraordinary powers of investigation and surveillance into the hands of state agents. These powers lay flat the legal protections that have been developed over centuries in democratic societies to protect the individual from the state. We see this in the new investigative hearing powers, preventative arrest powers, and wiretapping powers that the *ATA* has introduced into the *Criminal Code*, as well as in its recognition of the Communications Security Establishment and that entity's surveillance of Canadians.

Some may be willing to accept the introduction of draconian laws because they believe that they can

depend on government to use them only for "good" purposes and not for "bad" ones. But we cannot know or control what this or any future government will do with draconian power. It may seem that a bright line can be drawn between those the legislation is supposed to target and those it is supposed to protect, or that draconian measures will be used only against "them" and not against "us". But the line that is bright today can easily dissolve tomorrow turning "us" into "them".

Some may think that draconian laws will not become normalized, that somehow draconian laws can be isolated from the normal background of our society. But draconian laws, enacted in a time of crisis, have a way of taking on a life of their own. If enacted as temporary or reviewable laws, like the *ATA*, they have a way of becoming permanent. Their provisions intensify. They function creep. They become "the new normal" as authorities and the public grow accustomed to their use, paving the way for even more draconian laws to be added in increasing doses over time. And, they introduce what are often lasting structural and institutional changes into systems of government, changes which usually include the strengthening of the Executive at the expense of the other branches of government.

Numerous historical examples bear out these contentions.

It is often difficult, even for people with legal and political experience, to follow all of the threads of change draconian laws introduce into a society and to be vigilant in monitoring their implications. When the alarm bells finally go off about what draconian laws have done to a society, it may already be too late to do much about it.

The Canadian Association of University Teachers calls for the repeal of Canada's draconian *Anti-terrorism Act*. We ask that the very few provisions that may be necessary to implement Canada's international obligations under the *International Convention for the Suppression of Terrorist Bombing* and the *International Convention for the Suppression of the Financing of Terrorism* be re-enacted in a way that does not go beyond the strict requirements of the conventions and that is consistent with Canada's implementation of earlier anti-terrorism conventions under s. 7 of the *Criminal Code*.

SUBMISSION TO THE HOUSE OF COMMONS SUBCOMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

I. INTRODUCTION

The Canadian Association of University Teachers represents 48,000 academic staff at universities and colleges across Canada. For us, post-September 11th civil liberties issues have been a top priority. We have been working extensively in this area since September 2001, undertaking detailed research and legal analysis, working closely with other experts in Canada and internationally, making submissions to government, and taking a leading role in a variety of projects with national and international coalitions.

We believe that this review of the *Anti-terrorism Act* is a defining moment for Canadian society. The *Anti- terrorism Act* is only one piece of a web of measures that have been enacted since September 11, 2001, but, it is perhaps, the "centre piece", since it affects so fundamentally our legal and democratic system in Canada.

The rule of law, the separation of powers with its concomitant checks and balances on each branch of government, pluralism, due process, the presumption of innocence, freedom from arbitrary detention, the right to privacy and freedom from unreasonable state surveillance, freedom of information, and freedom of expression, religion, and association – *all under attack by the ATA* – are the foundations of a free and democratic society. They are also the necessary conditions for free intellectual inquiry. CAUT members have a direct interest in defending these preconditions of academic freedom, but more than this, we feel have a responsibility as intellectuals to help define and inform a debate about their future in Canada.

Violent acts targeting civilians are abhorrent. Governments should strive to protect us from them. However, safety from what is popularly known as "terrorism" is not the sum of our human or national security, and any security policy that places "anti-terrorism" at the centre of its agenda is badly skewed. "Terrorism" poses a far smaller risk to humankind than poverty, illegitimate wars, unjust immigration policies, repressive governments, and denials of basic human rights. In democratic societies like Canada, "terrorism" poses far less of a risk to our collective and individual security than the erosion of our rule of law, democratic checks and balances, pluralism, and civil liberties. If history has taught us nothing else, we should know that *these* are the bulwarks of our security and strength. Upon *these* freedoms our survival as a nation depends.

As Britain's top court has asserted in a recent judgment striking down parts of the U.K. anti-terrorism act: draconian laws are a greater threat to democracy than terrorism.[1]

The Canadian Association of University Teachers calls for the repeal of the *Anti-terrorism Act*. The very few provisions contained in it which may be necessary to implement Canada's international obligations under the *International Convention for the Suppression of Terrorist Bombing* and the *International Convention for the Suppression of the Financing of Terrorism* should be re-enacted in a way that does not go beyond the strict requirements of the conventions and that accords with Canada's implementation of earlier anti-terrorism conventions under s. 7 of the *Criminal Code*.

II. THE CANCER OF SECRECY AND ARBITRARY POWER

> *We do not believe any group of men adequate enough or wise enough to operate without scrutiny or without criticism. We know that the only way to avoid error is to detect it, that the only way to detect it is to be free to inquire. We know that in secrecy error undetected will flourish and subvert*.
>
> - J. Robert Oppenheimer, former director of the Manhattan Project

Two hallmarks of draconian laws are secrecy and arbitrary, or unreviewable, power in the hands of the Executive. Invoked as necessities in times of crisis for a specific purpose, they easily become a habit of those in power and a cancer in the democratic body politic.

In Canada since September 11, 2001, there has been a proliferation of measures invoking a need for secrecy and arbitrary power. Where once these extraordinary powers were either confined to the notorious security certificate procedures of the immigration context[2] or carefully limited (see the discussion about secrecy and the *Canada Evidence Act* below), they are now becoming ubiquitous and broadly delineated in our legal framework. And, in many instances, the government has mandated their use for purposes *other* than fighting terrorism.

The *Anti-terrorism Act* is responsible for much of this proliferation and function creep:

- *ATA* Part 3 amendments to ss. 37 and 38 of the *Canada Evidence Act* ("*CEA*") replace the common law doctrine of public interest immunity codified in the *CEA* with astounding new powers in the hands of government officials to control proceedings and prohibit the disclosure of information. These powers apply not only in criminal proceedings but also in civil and administrative law proceedings, examination for discovery and commission of inquiry proceedings, and even in Senate, House and provincial Assembly proceedings *(the proceedings of the present committee included*);
- *ATA* ss. 87, 103, and 104 remove the new power of the Attorney General to issue secrecy certificates under Part 3 of the *ATA* from the application and oversight of the *Access to Information Act*, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act;*

- *ATA* s. 16(2) creates a new power allowing publication bans in "terrorism" trials on the identities of all "justice system participants" including judges, prosecutors, investigators and government Ministers and officials;
- *ATA* Part 6 allows the Solicitor General (soon to be the Minister of Public Safety with the passage of Bill C-6) and the Minister of National Revenue to deregister charities on the basis of secret information received from foreign governments, institutions, and agencies; and
- *ATA* s. 4 amendments to ss. 83.05 to 83.07 of the *Criminal Code* allow the Solicitor General (Minister of Public Safety) and the Governor in Council to list individuals and groups on the basis of secret information as "terrorist".

1. ATA Part 3 Amendments to the Canada Evidence Act

ATA Part 3 amendments to the *CEA* throw out the traditional doctrine of public interest immunity to create a sweeping regime of secrecy in all proceedings where evidence may be compelled.

Under the pre-existing provisions of the *CEA*, which codified the common law doctrine of public interest immunity, an official could object to the disclosure of information in a proceeding on the grounds of a specified public interest.
The validity of the claim, however, was for a court to determine, since, as Wigmore explains the doctrine, the risk of abuse of the privilege would be too great if its determination were left to "the very official whose interest it may be to shield a wrongdoing under the privilege". The test for disclosure in the old *CEA* and under the traditional doctrine was whether the public interest in disclosure outweighed the specified public interest in non disclosure.

ATA amendments to s. 38 of the *CEA allow* the very evil that Wigmore identifies. First, they give government officials inordinate control over proceedings involving government claims for non disclosure. Second, they give the Attorney General virtually unfettered power to prohibit the disclosure of information, including the power to *override* the decision of a court permitting disclosure.

a) Inordinate Control Over Proceedings - Sections 38 to 38.12 of the Amended CEA

i) The Wide Scope of Interim Prohibitions and the New Duty Imposed on Parties - Sections 38 to 38.05

Section 38 of the *CEA* as it existed before the passage of the *ATA* permitted government officials to object specifically to the disclosure of information in proceedings "on the grounds that ... disclosure *would* be injurious to international relations or national defence or security". Once an objection was made, disclosure was prohibited until, in accordance with the traditional doctrine of public interest immunity, a court

determined whether disclosure would be injurious to these interests, and if injurious, whether the public interest in disclosure outweighed the interest in non disclosure.

Under the amended ss. 38 to 38.05, the obligation not to disclose until a court rules on the matter attaches, *not* to information that "*would* be injurious to international relations, or national defence or security" as in the old s. 38, but merely to "potentially injurious information" and "sensitive information". "Potentially dangerous information" is defined as information that "*could* injure international relations or national defence or national security"(*ATA* s. 38). "Sensitive information" is defined as information "*relating* to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is *of a type that the Government … is taking measures to protect* (*ATA* s.38).

The thresholds for both terms are vague, but the threshold for "sensitive information" has the distinction of being so low that the term could cover almost anything government officials wanted it to cover – from information relating to a Watergate, tainted water, or sponsorship-type scandal, to information relating to delicate relations with a province, to information showing government liability or government financial problems. The definition requires no demonstration of harm in disclosure to the *public* interest and so goes far beyond the traditional public immunity doctrine. Also, since "national security" is defined elsewhere in the *ATA* as including "economic security"(see the definition of "terrorist activity" in s. 2 of the *ATA* adding s. 83.01(b) B to the *Criminal Code*), the scope of information protected under the rubric of "sensitive information" is extremely broad.

Under ss. 38 to 38.05 of the *CEA* as amended by the *ATA*, there are also new requirements on participants in proceedings *to assist the government in protecting information*. This also constitutes a departure from the public immunity doctrine. Under the provisions, participants have a duty to notify the Attorney General in writing if they are "required to disclose, or expect to disclose or cause the disclosure" of information they "believe" is protected information. "Participant" is defined in a way that would include parties, witnesses, third parties, counsel, members of Parliament, and even journalists – anyone involved with the disclosure of information "in connection with a proceeding". Once notice is given by a participant or a government official, no one may disclose the information unless the Attorney General authorizes it. It is unclear what kind of onus the standard of "belief" puts on participants and what sanctions they face if they fail to discharge their obligation. There is an exemption for solicitor-client communications in s. 38.01(6)a, but the provision would apparently create a duty for the accused's counsel to disclose her defense prior to making it in court. This could lead to restrictions on cross-examination and the calling of witnesses, which in many cases would result in a unfair trial. There is no protection for journalists and their sources.

In sum, under the new *CEA* ss.38 to 38.05, the kind of information over which government officials can tie

up a criminal case, public inquiry, or House of Commons committee proceeding has been substantially widened and participants have been given an uncertain and onerous burden to discharge. These factors, along with others discussed below, give government officials inordinate control over the proceedings in which they claim public interest immunity.

It is easy to imagine how this kind of control to suppress information, delay proceedings, and intimidate participants could be easily abused. We have seen, perhaps, the first example of abuse in the supposedly public Arar Inquiry, where the government is preventing the disclosure of a ten page summary of weeks of testimony (the product of over two months of painstaking negotiations by the Inquiry with the government) along with the 55 page decision of Justice O'Connor about disclosure.

The Inquiry, which has a critical and time-sensitive mandate to discharge, is now tied up in the courts for months, if not years.

ii) Internal Inconsistency - Section 38.06

Sections 38 to 38.05 are also inconsistent with the ultimate test for disclosure under s. 38.06 of the *CEA*. Under s. 38.06 (1) an interim prohibition on disclosure cannot be maintained "unless" the court which ultimately hears the matter decides that disclosure "*would* be injurious to international relations, national defence or national security". If the court finds disclosure would be injurious to these interests, it must then decide under s 38.06 (2), in accordance with the public interest immunity doctrine, whether "the public interest in disclosure outweighs in importance the public interest in non disclosure."

One wonders why the government should be able to tie up proceedings on an interim basis over "sensitive" and "potentially injurious information" when the ultimate test for non disclosure that the court applies is whether the information in question "*would* be injurious".

iii) Mandatory Ex Parte Hearings and Secret Court Proceedings and Records - Sections 38.11, 38.02 and 38.12 (2)

Under s. 38.11 of the amended *CEA*, a hearing under s. 38.04(5) or an appeal or review of an order under ss. 38.06(1) to (3) "*shall* be heard in private" at the request of the federal Attorney General or the Minister of Defense, and both "*shall*" have the opportunity to make representations *ex parte* (in the absence of any other party) to the judge hearing the matter. Under s. 38.02, not only the information in question in a hearing, review or appeal and the arguments about it are to be kept secret, but the mere *fact* that a notice has been filed about it, an application made about it, or an agreement struck in respect of it, is also to be kept secret. In the same fashion, under s. 38.12(2) all court records relating to a hearing, appeal or review under s. 38 are to be treated by the court as "confidential".

These provisions contribute to the inordinate control that government officials have over proceedings in which they claim public interest immunity and one can easily imagine the abuses that could take place under them. Their mandatory nature offends the open court principle and is antithetical to the adversarial process in the common law system.

The Supreme Court of Canada "has emphasized on many occasions that the 'open court principle' is 'a hallmark of a democratic society and applies to all judicial proceedings'.[3] As the court stated in the recent case *Vancouver Sun (Re)* 2004 SCC 43, in which it considered the level of secrecy required under the investigative hearing provisions of the *ATA*,

> *Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule law" ... Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.*[4]

Speaking of the open court principle in the context of the constitutional right of the public to receive information, the court concluded:

> *"Consequently, the open court principle, to put it mildly, is not to be lightly interfered with."* [5]

While there may be circumstances in which a judge might decide that an *in camera* hearing or *ex parte* representation by one side is appropriate, the *mandatory* use of these tools on the "say so" of one party — the government in power — is dangerous and, most likely, unconstitutional, in light of the *Oakes* test for s. 1 of the *Charter*. It requires that the means chosen to achieve an objective be the alternative that is least restrictive of *Charter* rights, and that its deleterious effects do not outweigh its salutory effects.

In *Vancouver Sun,* a national security case, the Supreme Court struck down a blanket *in camera* order using this kind of analysis,[6] finding that the order illegitimately made the government's constitutional arguments, and sessions where no secret information was disclosed, secret.

In a recent decision (*Ottawa Citizen Group v. Canada (A-G)*, [204]F.C.J. No. 1303) the Chief Justice of the Federal Court, Allan Lutfy, begged Parliament to consider whether provisions in s. 38 "unnecessarily fetter the open court principle". Referring to the Supreme Court's decision in *Vancouver Sun*, he said that s. 38 was the antithesis of the open court principle.

Section 38.02(1)c, he said, could lead to "unintended , even absurd, consequences". In the case before him, the Federal Court could not acknowledge that an application had been made, even to a person who would have reasonably known this to be so from their participation in the proceeding from which it arose. Chief Justice Lutfy noted that under s. 38.12(2), there had even been,

> "*uncertainty concerning the circulation of section 38 decisions under appeal [to the Supreme Court],[to parties' counsel] and even among the judges [of the Federal Court] designated to conduct [s. 38] proceedings".*

Another judge on the Federal Court has spoken out about the dangerous results that the mandatory *in camera, ex parte* provisions in s. 38.11 will yield in the adversarial process. Speaking of s. 38.11 and similar provisions in the security certificate procedure under the *Immigration and Refugee Protection Act* ("*IRPA*"), Justice Hugessen complained that he (and other judges on the court presumably) were being made into "fig leaf[s]" for the government:

> *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.*[7]

He noted that the *ex parte* provisions in the amended *CEA* and the *IRPA* could not be justified as innocuous by analogy to *ex parte* hearings for search warrants and 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....*[8]

b) The A-G's Unfettered Power to Prohibit Disclosure - Secrecy Certificates under Section 38.13 of the Amended ATA

The new regime of secrecy and arbitrary power set up by the *ATA*'s amendments to the *CEA* is capped by s. 38.13. Under it, the federal Attorney General has virtually unfettered power to prohibit disclosure of

information in connection with a proceeding – abrogating entirely the traditional doctrine of public interest immunity. If a court finds against the government and orders disclosure under ss. 38.06, under s. 38.13 the federal Attorney General can override the court decision. If the federal Attorney General has authorized disclosure or entered into agreement about disclosure that he later thinks better of, he can move to prohibit the disclosure. While historically criminal prosecutions are carried out by provincial Attorney Generals, the federal Attorney General can at any time take over a prosecution by fiat under s. 38.15(1) in order to exercise his power to prohibit disclosure.

The only criteria for the Attorney General's exercise of this extraordinary power is that he act "*for the purpose* of protecting information contained in confidence from, or in relation to, a foreign entity ... or *for the purpose* of protecting national defence or national security."

But, in fact, the question of whether the Attorney General is acting for a proper or improper purpose is not reviewable. No court can inquire into whether the government had an improper purpose in issuing the certificate, or any public purpose at all. Under s. 38.13 (8) "the certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except in accordance with section 38.131".

Under s. 38.131 the only review that can be made of the certificate is by the Federal Court of Appeal on the narrowest possible basis: whether the information in question "*relates* to information obtained in confidence from, or in relation to, a foreign entity ... or to national defence, or national security". It is not clear under s. 38.131 whether the Federal Court of Appeal *will even be allowed to see the actual information in question*, or whether it could be restricted to reviewing a summary of the information. In the Charkoui case under the security certificate procedure of the *IRPA*, CSIS told the judge that it had destroyed notes of critical interviews with Charkoui – interviews CSIS was seeking to rely on in summary form – and, furthermore, that this was a usual practice.

Of course, the fact that information "relates" to one of the three listed topics is no guarantee of there being a reasonable or legitimate reason not to disclose it. For example, under this standard of review, the Canadian government could keep secret the fact that the United States had requested it to incarcerate or deport an individual even though there was no reliable evidence against him; that Canadian officials were cooperating with the United States in the rendition of Canadians to third countries where they were being tortured in interrogation; that the RCMP sent agent provocateurs into a demonstration at a trade summit; or that the RCMP illegally raided Parti Québecois offices.

The power the government has arrogated to itself under s. 38.13 offends a fundamental tenet of the rule of law: that the exercise of power, even discretionary power, must be subject to a standard of rational accountability.

In the criminal law context, the federal Attorney General's power under s. 38.13 also overrides the

fundamental rights of the accused in the justice system: rights which are meant to protect the individual when the overwhelming power of the state is pitted against him. These include the right to a fair trial, the right to full disclosure by the Crown of inculpatory and exculpatory evidence, and the right to make full answer and defence. While some legal scholars have suggested that a court seized with a criminal case could order a stay of proceedings under the *Charter* if it believed an Attorney General's secrecy certificate prevented the fair trial of an accused, this would amount to a "rather bizarre and tortuous dialogue"[9] between the Executive, the Federal Court of Appeal and the court of first instance. And, of course, in order for stays of proceedings to be ordered, courts of first instance will have to have the temerity to play "constitutional chicken" with the Executive.

If they fail to do so, many innocent people could be wrongfully convicted and incarcerated, and we will have in s. 38.13 of the *CEA* what amounts to a replication of the infamous security certificate proceedings under the *Immigration and Refugee Protection Act*.

Even if courts of first instance are willing to "take on" the Executive, it will be very difficult for them to play a protective role since they will know little about the nature of the information the government is keeping secret, not being entitled to see it, and they will be criticized for letting potentially serious criminals go free. A corollary to this danger is that, because it is the Federal Court of Appeal and not the criminal trial court or the accused that is allowed to see the information that is subject to a certificate, miscarriages of justice could go entirely undetected or covered up. The report that the criminal court is allowed to submit to the Federal Court of Appeal under s. 38.05 of the *CEA* as amended by the *ATA* is hardly a remedy for this, since the criminal court can only comment blindly on the effect of the certificate.

The potential for abuse under s. 38.13 is enormous. The government may say "trust us, we will use this power that allows us to operate outside the rule of law responsibly, for good causes". But to believe that we can have a power like this "on the books" and depend on governments to use it only for "good" purposes and never "bad" ones, is naive. The legislation is permanent. The power applies across the spectrum of legal proceedings in this country. The purposes to which it may be put in the future by this or some other government cannot be known now or controlled. Under this provision, any federal government *could easily* keep secret from Parliament, provincial assemblies, courts, administrative tribunals, and public inquiries like the Arar Inquiry, important information about a miscarriage of justice, a controversial defence program, a political scandal, an operational fiasco, a fraudulent vote, a serious food or environmental threat, or a government wrongdoing. Under s. 38.13(9), a certificate does not expire until 15 years after its issuance, and then it may be reissued.

Recommendation:

Repeal *ATA* amendments to the *Canada Evidence Act.* In particular:

- **repeal the new *CEA* categories of "potentially injurious information" and "sensitive information"**
- **repeal the new *CEA* provisions placing obligations on participants to notify the federal**

Attorney General about protected information

- **repeal *CEA* s. 39.11 requiring mandatory *in camera* and *ex parte* hearings**
- **repeal *CEA* s. 38.02 which makes the fact of a notice, application, appeal, review or agreement with respect to information the government wants to keep secret, secret**
- **repeal *CEA* s. 38.12(2) which makes all court records relating to a hearing, appeal or review confidential**
- **repeal *CEA* s. 38.13 giving the federal Attorney General unfettered power to issues secrecy certificates**
- **repeal *CEA* s. 38.15 giving the federal Attorney General power to take over prosecutions initiated by the provincial Attorney Generals**

2. ATA Sections 87, 103 and 104 Suspending the Application and Oversight of the ATIA, Privacy Act, and PIPEDA in respect of A-G Secrecy Certificates

ATA ss. 87, 103, and 104 are part of the secrecy certificate regime discussed above, since they complete the removal of the Attorney General's power to issue certificates from the rule of law. These provisions remove, entirely, the application of the *Access to Information Act* ("*ATIA*"), the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") when the Attorney General issues a certificate.

The *ATIA*, the *Privacy Act* and *PIPEDA* provide an important framework for the protection and disclosure of public and personal information in Canada. The *ATIA* gives Canadians the right to know what their government is doing. The *Privacy Act* protects the personal information that the federal government collects about us, ensuring that it is used for proper purposes and giving us rights of access, correction and remedy. *PIPEDA* protects the personal information that is collected in commercial activities and ensures that we consent to its collection, that it is used for proper purposes, and that we have rights of access, correction, and remedy.

Under *ATA* ss. 87, 103 and 104, all of these rights and protections are eliminated. So, too, are the oversight of the Privacy Commissioner and Information Commissioner. The *ATIA*, the *Privacy Act*, and *PIPEDA*, all contain provisions that prevent access to, or disclosure of, information that would harm security, defence, and international relations. But these tests have been overridden by the *ATA* in order to allow the government to hide information under s. 38.13 of the amended *CEA* when no harm to the public interest in these categories would result in its disclosure.

Security scholar, Wesley Wark, has called *ATA* ss. 87, 103 and 104 and the secrecy certificate regime under s. 38.13 of the amended *CEA* "unnecessary and unwise":

> *Unnecessary because the government already possesses more than sufficient powers to protect information – a fact widely recognized in the intelligence community. Unwise because the application of an Attorney General certificate ... might have the effect of encouraging undue skepticism about government motives in regard to the protection of information, and thereby undermine the public legitimacy of the keepers of secrets, the agencies of the intelligence community.*[10]

***Recommendation*:**

Repeal *ATA* ss. 87, 103 and 104 which remove the application of the *ATIA*, the *Privacy Act* and *PIPEDA* when the federal Attorney General exercises his new power under s. 38.13 of the *CEA*.

3. Publication Bans

ATA s. 16(2) amends s. 486 (4.1) of the *Criminal Code* by providing that in criminal trials concerning "terrorism offenses" a judge or justice may order a publication ban regarding the identity of "justice system participants". It is another example of the spread of secrecy through our legal system brought about by the *ATA*.

As the Canadian Bar Association has stated, the *Criminal Code* and the common law already[11] provided adequate protection for witnesses, victims, and informants before this amendment. Each of these categories of persons could seek a publication ban of their identity during a criminal proceeding. *ATA* s. 16(2) extends the reach of publication bans to all "justice system participants". *ATA* s. 2(2) amending s. 2 of the *Criminal Code* defines "justice system participants" as members of the Senate, of the House of Commons, of a legislative assembly or municipal council, the Solicitor General (read Minister of Public Safety, who replaces the Solicitor General under Bill C-6), a Minister responsible for policing in a province, a prosecutor, lawyer, notary, or officer of the court, a judge, justice, peace officer, employee of Canada Customs and Revenue Agency (now subsumed into the Department of Public Safety), an employee of a correctional service or the National Parole Board, and others.

This kind of publication ban is also available for trials involving criminal organization offenses but their effect in that context is less Kafkaesque than in the "terrorism" context. Under the *ATA* we will see, in "terrorism" trials, people convicted by secret accusers, with secret evidence, secret arguments, secret hearings, and secret court records (under s. 38 of the *CEA* as amended by the *ATA* - see above),

combined with justice being administered by anonymous officials, and actions being taken by anonymous Ministers and other officials.

This is an unwarranted incursion on freedom of the press, open government, and the open court principle (discussed above).

***Recommendation*:**

Repeal *ATA* s. 16(2) amending s. 486(4.1) of the *Criminal Code* to allow publication bans on all "justice system participants" in "terrorism" trials.

4. Deregistration of Charities Using Secret Evidence

Part 6 of the *ATA* is yet another example of the *ATA*'s proliferation of measures invoking secrecy and arbitrary power. It creates a secrecy regime in respect of charities that is very like the security certificate procedure used in the immigration context.

ATA Part 6 enacts the new *Charities Registration (Security Information) Act* ("*CRSIA*") and consequential amendments to the federal *Income Tax Act ("ITA")*. It allows the Solicitor General (Minister of Public Safety) and Minister of National Revenue to sign a certificate on the basis of secret reports, denying or revoking an organization's charitable status, where they have "reasonable grounds to believe" that the organization has made, makes, or will make "any resources" available "directly or indirectly" to an entity that engages or will engage in "terrorist activities", or activities "in support of" terrorism (*CRSIA*, s. 4).

While we will discuss other aspects of the *CRSIA* later in these submissions, here we would like to focus on the secrecy of the proceedings and the arbitrary nature of the Ministers' powers.

Under s. 6(1) of the *CRSIA*, a judge of the Federal Court is to review the certificate, but only on the grounds of whether it is "reasonable" (s. 6(1) d). The security or criminal intelligence reports on which the certificate is based and any other evidence or information presented by the Ministers is heard "in private", and "in the absence" of the applicant for charitable status, or the registered charity and its counsel if the judge decides that disclosure "would injure national security or endanger the life of any person"(s. 6(1)a). The Ministers can also present information "in private" that "was obtained in confidence from a government, an institution or an agency of a foreign state, from an international organization of states or from an institution or agency of an international organization of states" (s. 8).

The ordinary rules of evidence are waived (s. 7). The organization only receives a "summary" of the information available to the judge absent any injurious information (s. 6(1) b).

The organization's ordinary right of appeal from the Federal Court decision under the *ITA* is taken away (s. 115 of the *ATA*, amending s. 172 of the *ITA*).

Under these provisions, Canadian charities valuably working in desperately conflicted regions around the world can be easily stripped of charitable status on the basis of hearsay or spurious allegations made by foreign governments or agencies hostile to their aims, religious affiliations, or even their non partisan stances. In violation of due process, the charity is precluded from testing the quality or credibility of the information against it, and in many cases will not even know what information or sources are being used against it.

***Recommendation*:**

For these and other reasons that we discuss below, repeal Part 6 of the *ATA* enacting the *CRSIA* and making consequential amendments to the *ITA*.

5. Listing of Individuals and Groups Using Secret Evidence

Section 4 of the *ATA*, adding ss. 83.05 to 83.07 to the *Criminal Code*, is one more case of the *ATA*'s spread of secrecy and arbitrary power through our legal system. Like the *CRSIA*, it sets up a regime of secrecy in respect of the listing of individuals and groups as "terrorist" that is very like the notorious security certificate procedure in the immigration context.

Under s. 83.05 the Solicitor General (Minister of Public Safety) may recommend, and the Governor in Council may list, an entity (defined in s. 83.01 as a person, group, trust, partnership or fund, or an unincorporated association or organization) if they have "reasonable grounds to believe" that the entity "has knowingly" engaged in terrorist activity or is knowingly acting "on behalf of an entity knowingly engaged in terrorist activity". In violation of due process no notice or hearing is given to the entity before the listing takes place. After the fact of listing, the entity may make an application for judicial review but the judge is to examine any the criminal intelligence reports about the entity in private and to hear the evidence of the Solicitor General (Minister of Public Safety) *ex parte* if, in the judge's opinion, disclosure "would injure national security or endanger the safety of any person". The entity only gets a "summary" of the evidence against him, her or it, minus the information that "would injure national security or endanger the safety of any person". There is a waiver of the rules of evidence. 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".

Under s. 83.01, a "listed entity" is also a "terrorist group". This presumably means that an individual can be a "terrorist group". Incredibly, it seems also to mean that a person or group that is listed by the Solicitor General (Minister of Public Safety) and Governor in Council, is *presumptively* a "terrorist group" *for the purposes of the new terrorism offences*. The Crown's burden of proving beyond a reasonable doubt that a person is a terrorist, or that a group is terrorist, as an element of a terrorist offense can, therefore, be replaced by a Minister's "say so" that they are terrorist! This is gross violation of due process and fundamental justice.

Thus, if the Minister of Public Safety says that Greenpeace is a terrorist group or Maher Arar is a terrorist, everyone who has financially supported them, counselled them, or worked with them or for their benefit, becomes guilty of a number of the terrorist offences described below and the only thing the Crown has to prove to win its case is the fact of financial support, counselling or work. No one will be able to challenge the "terrorist" label since under ss. 83.05 to 83.07 of the *Criminal Code* as amended by the *ATA*, the evidence that pertains to the label will remain secret.

Recommendation:

Repeal *ATA*, s. 4 adding ss. 83.05 to 83.07 of the *Criminal Code* creating a regime whereby individuals and groups can be branded as "terrorists" on the basis of secret evidence.

III. FIRST THEY CAME FOR THE COMMUNISTS, THEN THEY CAME FOR ME ...

First they came for the Communists

and I did not object for I was not a Communist

Then they came for the Socialists

And I did not object for I was not a Socialist

Then they came for the Labour leaders

and I did not object for I was not a Labour leader

Then they came for the Jews

and I did not object for I was not a Jew

Then they came for me

and there was no one left to object.

- Martin Niemoller

1. "Terrorism" - A License to Politically Target

Like secrecy and arbitrary power in the hands of the Executive, another hallmark of draconian laws is that they place enormous discretionary power into the hands of law enforcement and other state agents – discretionary power that can easily be exercised politically and used to broadly target certain groups in society.

This kind of discretion is built into the heart of the *ATA* through its incorporation of a definition for "terrorist activity" and its use of this term as a key to many other provisions, particularly the new terrorist offences it adds to the *Criminal Code*. By criminalizing the *indefinable* – "terrorism" – the government has dangerously overreached, "lengthen[ing] the long reach of the criminal law in a manner that is complex, unclear and unrestrained".[12] We will know who among us is a terrorist by the way law enforcement, influenced by the political climate of the day or by their own prejudices, choose to target us.

While the term "terrorism", used in the popular sense to describe violent acts directed at civilians for political and other ends, may be unobjectionable (and we have used it in these submissions in this sense for the sake of convenient reference), its use as a *legal term* is highly problematic since it defies precise definition and consistent application.

The U.N. has debated the meaning of "terrorism" for decades and though it has made several statements condemning "terrorist" acts, "there has never been a meaning for the term accepted by all or even a majority of the member states".[13] In 1996, India's proposal that the international community create a comprehensive treaty on "terrorism", "was met with a distinct lack of political will in the General Assembly".[14] None of the statutes setting up the *ad hoc* international criminal courts (for Yugoslavia, Rwanda and Sierra Leone) use the term "terrorism" and a proposal to include it as one of the crimes within the jurisdiction of the new International Criminal Court was rejected because of the impossibility of defining the term.

"Terrorism" is impossible to define precisely because to say that some crimes are terrorist acts and some

not is to make a judgment about the motive behind a crime. And that judgment will necessarily depend on the social, racial, religious, political or historical perspective of the people making the judgment. It will, therefore, never be possible to create a definition of "terrorism" that is not either over-inclusive or under-inclusive — over-inclusive in that it captures ordinary crimes, civil disobedience, or the justified use of force against oppressive governments and occupations; under-inclusive in that it excludes serious crimes and attacks against civilians that ought logically to be included, but are not, on purely political grounds. As one scholar has pointed out, for example, the Bush Administration's terrorist list excludes the IRA and individuals operating for Israeli and Palestine groups, not because they do not fit "terrorist" criteria, but "for reasons of political comity and expediency".[15]

This is not to say that serious crimes, or attacks on civilians, or crimes against humanity cannot be defined, identified and punished. Kofi Annan, the Secretary General of the U.N. and Mary Robinson, the former head of the U.N. Human Rights Commission, both called the attacks of September 11, 2001 "crimes against humanity" and so, most international law scholars would agree, they were. If committed in war, they also would have been war crimes. They were also domestic crimes. These kinds of acts are abhorrent and the perpetrators of them should be brought to justice. However, to inject an essentially political concept like "terrorism" into this important legal framework is to ensure that politics, not law, determines culpability. If we are truly interested in condemning and prosecuting these crimes, it must be the act, not the motive that is determinative.

Motive, used as an essential element for a crime, is foreign to criminal law, humanitarian law, and the law regarding crimes against humanity. While a hate motive may be an aggravating factor at sentencing,[16] in the traditional criminal law motive neither establishes or excuses a crime.[17] Under the *Geneva Conventions* and customary humanitarian law, motive neither establishes nor excuses war crimes.

Under the statute of the International Criminal Court, motive, including the motive that one was following orders, neither establishes or excuses a crime. In the customary international law concerned with crimes against humanity, motive neither establishes nor excuses a crime if it fits into the general pattern of crimes against humanity.[18]

To date, then, the international approach has been to establish a series of conventions targeting *specific criminal acts* associated with the phenomenon popularly known as "terrorism" without trying to create or apply a legal definition of "terrorism". These conventions seek to condemn the acts in question and to ensure that states have universal jurisdiction to prosecute and punish these crimes, either as a codification, or as an extension of, the universal jurisdiction states already have in customary international law over piracy and crimes against humanity. Prior to the *ATA*, Canada implemented eight of these conventions[19] in Canadian law, making the acts they describe crimes for which Canada has universal jurisdiction under s. 7 of the *Criminal Code*. "Terrorist" motive or intent was not an element of any of these crimes. The term "terrorism" or "terrorist activity" was never included in the *Criminal Code* and has never been defined in

any Canadian statute until the *ATA*.[20]

2. Terrorist Offences" and "Terrorist Activity" under the ATA

Under s. 2(2) of the *ATA* amending s. 2 of the *Criminal Code*, "terrorism offence" means the new Financing of Terrorism offences added in ss. 83.02 to 83.04 of the *Criminal Code*; the new Participating, Facilitating, Instructing and Harbouring offences added in ss. 83.18 to 83.23 of the *Code*; an indictable offence at the direction of, or in association with, a "terrorist group"; an indictable offence that also constitutes "terrorist activity"; and a conspiracy, attempt or threat to commit, or being an accessory after the fact, or counselling, in relation to any of the offenses above.

"Terrorist activity" is the key definition in this framework. Under s. 83.01(1)(a) of the *Criminal Code* as amended by the *ATA*, "terrorist activity" means the crimes in s. 7 of the *Criminal Code* that implement the eight international "terrorism"conventions mentioned earlier, and two more such conventions that the government has implemented through other *ATA* amendments to the *Criminal Code*, specifically, the *International Convention for the Suppression of Terrorist Bombing*, and the *International Convention for the Suppression of the Financing of Terrorism*. Under s. 83.01(b) "terrorist activity" also means the following:

> an act or omission, in or outside Canada,
>
> (i) that is committed
>
> A) in whole or part for a political, religious or ideological purpose, objective or cause; and
>
> B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act whether the public or the person, government or organization is inside or outside Canada, and
>
> (ii) that intentionally
>
> A) causes death or serious bodily harm to a person by the use of violence,
>
> B) endangers a person's life,
>
> C) causes serious risk to the health or safety of the public or any segment of the public,
>
> D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
>
> E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage

of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)).

a) Motive-Based Crime

In the "terrorism" framework that the *ATA* has injected into the *Criminal Code*, s.83.01(b)i(A) has the effect of making motive *an element* of every "terrorist offense',[21] that is, something that the Crown must prove beyond a reasonable doubt if it is to win its case. In this, the Canadian act goes beyond the U.S. *Patriot Act* (a piece of legislation hardly known for its restraint), which does not include motive as an element of "terrorist" offenses.

The inclusion of motive not only increases the risk of acquittal if the state cannot prove a political, religious, or ideological motive behind an act: it ensures that the politics and religion of suspects become the fundamental issue in every Canadian "terrorism" trial.[22] This is a prospect that one would think any liberal, democratic, multicultural society would want to avoid since it could have damaging effects on peaceful pluralism.

But even more important, perhaps, is the effect that motive-based crime will have on police investigations. As one criminal law scholar has expressed it:

> *The police now have a legal duty to collect evidence about the political and religious beliefs of those they suspect will commit crimes related to terrorism. If they do not do so, they will not be doing their job of collecting evidence that the prosecution will need to establish a crime of terrorism. [The danger of this is that] the police are not experts in politics or religion. They may not understand unconventional political beliefs or the religious beliefs of minorities. They may blur the line between terrorism and radical political or religious dissent. The police may target those whose politics and religion they find to be extreme or those associated with terrorism by means of widely held stereotypes.*[23]

b) Economic Security and Protection for Corporations

Section 83.01(b)i(B) above requires prosecutors also to prove as an element of a terrorist offence that the acts in question were committed "with the intention of intimidating the public with regard to its security ... or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act whether the public or the person, government or organization is inside or outside Canada".

"Security" is defined in this provision as "including economic security" and under Canadian law, the term "person" includes corporations. The provision therefore expands the concept of national security – which to date has always been concerned with the protection of the public and public order – to include economic security and a concern for the well-being of corporations. This is especially disturbing when one compares the provision to parallel provisions in the British *Terrorism Act* and American *Patriot Act* which do no such thing.[24]

c) Crimeless Crime

Alarmingly, under s. 83.01(1) b, read as a whole, *one does not even have to commit a crime* to be guilty of "terrorist activity".

If a group is engaged in a political demonstration aimed at making a corporation or government do something, it is enough under s. 83.01(1) ii(B) and (C)) if that demonstration, or some omission in the planning of it, is seen to deliberately "endanger life" (including the protesters' lives) or to "pose a serious risk to the health and safety of the public", for the demonstration to constitute "terrorist activity".

In this way, a picket line, a road block, a Greenpeace action, or an anti globalization demonstration could easily be caught under the term.

Under s. 83.01(b)ii(D) a group or individual does not even have to be found to be deliberately endangering life or risking health and safety for their activity to constitute "terrorist activity". The standard here is not intention, but whether the activity "is likely to result" in endangerment to life or risk to health and safety. And it does not take account of the actions of the corporation's agents or the police in these situations as the offense of criminal negligence might.

Any political action that results in damage to corporate or public property (the threshold for applying s.83.01(b)ii(D)), therefore, can *very* easily be caught as "terrorist activity".

Under s. 83.01(b) ii(E), there must be some deliberate endangerment of life or risk to the health and safety of the public again, but this provision could, still, easily catch a nurses' or firepersons' strike, a telephone workers' strike, or a farmers' tractor cavalcade as "terrorist activity".

Any group having "terrorist activity" as one of its purposes is deemed to be a "terrorist group" under s. 83.01(1), with all the implications that designation has for liability under the "terrorism offenses."

3. The New "Participation" Offenses and Piling Incomplete Offenses on Top of Incomplete Offences

The implications of the kind of normal political activity described above (normal even where it may include some unlawful activity) being labelled "terrorist activity" become fully alarming when one considers the new "participation" terrorist offences that the *ATA* has added to the *Criminal Code* and how these vague, incomplete offenses are piled on top of the incomplete offences already included in the definition of "terrorist activity" and "terrorism offenses".

a) The New Participation Offenses

While neither the U.S. *Patriot Act* nor the British *Terrorism Act* create new criminal code offenses, tying their definitions of "terrorism" to existing criminal code provisions instead, the *ATA* boldly creates a number of new offenses.[25]

Section 83.18(1) of the *Criminal Code* as amended by the *ATA* provides:

> Everyone who knowingly *participates* in or *contributes* to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Under s. 83.18(2) the offence may be committed "whether or not the terrorist group actually facilitates or carries out a terrorist activity" and "whether the accused knows the specific nature of any terrorist activity that may be facilitated or carried out". Under s.83.18(3) the offence includes "providing or offering to provide a skill or an expertise for the benefit of, at the direction of, or in association with a terrorist group".

Under these provisions, then, volunteering, working for, or presumably giving money to an environmental group, a union, or an aboriginal group could constitute an offence. Members of the Canadian labour movement which contributed to the efforts of the ANC and the South African Congress of Trade Unions for so many years in their fight against apartheid would be guilty of this terrorist offence. Defence lawyers

and doctors providing professional services to such groups would also be guilty.[26]

Section 83.19 of the *Criminal Code* as amended by the *ATA* provides:

> Everyone who knowingly *facilitates* a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Under s. 83.19(2) a terrorist activity is facilitated whether or not "the facilitator knows that a particular terrorist activity is facilitated ... any particular terrorist activity was foreseen or planned; or ... actually carried out". Anyone hosting or organizing a demonstration could be caught under this provision.

Section 83.22 of the *Criminal Code* as amended by the *ATA* provides:

> Everyone who knowingly *instructs*, directly or indirectly, any person to carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for life.

Under s. 83.22(2) the offence is committed whether or not "the accused instructs a particular person .. or knows the identity of the person".

As a result, any activist giving instructions to demonstrators or strikers about a protest or picket line, or even to a general population about civil disobedience, could be liable to a life sentence.

Under s. 83.21 of the *Criminal Code* as amended by the *ATA*:

> Every person who knowingly *instructs*, directly or indirectly, any person to carry out *any activity* for the benefit of, at the direction of, or in association with a terrorist group, *for the purpose of enhancing the ability* of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Under this provision, the caterers working for a anti globalization group, or the boat makers working for

Greenpeace, could be liable to life imprisonment.

Under s. 83.23 of the *Criminal Code* as amended by the *ATA*:

> Every one who knowingly *harbours* or *conceals* any person whom he or she knows to be a person who has carried out or 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.

Anybody billeting an anti globalization activist, or any parent with a Greenpeace protester living with them, could be caught under this section.

b) Piling Incomplete Offenses on Incomplete Offences

The new offenses described above are alarming not only for their vagueness and their ability to catch democratic activities the *Criminal Code* has never criminalized, or never criminalized as serious offenses before. They are also alarming because as incomplete offences, they are piled on top of other incomplete offenses incorporated into the definition of "terrorist activity" in s. 83.01(1)b and into the definition of "terrorism offenses" in s. 2 of the *Criminal Code* as amended by the *ATA*.

Incomplete offences criminalize the preparatory and after-the-fact acts to crimes and include attempts, conspiracies, threats, and being an accessory after-the-fact. As criminal law scholar Kent Roach has put it,

> "*Under the [pre]existing criminal law, courts have largely managed to avoid monstrosities such as attempting attempts, attempting conspiracies, and counselling counselling, but they may have difficulties doing so under [the ATA]*".[27]

In s. 83.01(b) of the *Criminal Code* as amended by the *ATA*, "terrorist activity" includes "a conspiracy, attempt or threat to commit any act or omission [in s. 83.01 (1)(b)A-E], or being an accessory after the fact or counselling in relation to any such act or omission ...". In the definition of "terrorism offenses" in s. 2 of the *Criminal Code* as amended by the *ATA*, the same incomplete offenses are listed. Then there are the new terrorism offenses described above. With these three cross-referencing layers of incomplete offences, it is possible under the *ATA* amendments to the *Criminal Code* for police to charge people with mind-benders like "attempted instruction", "conspiracy to facilitate", "threats to contribute", and possibly

even triple combinations like “conspiring to be an accessory after the fact of contribution”.

Again, as Kent Roach has said,

> *“[t]he result of all these combinations is difficult to anticipate but it could extend the chain of criminal liability to an unprecedented degree. ... in unforeseen, complex and undesirable ways*”.[28]

4. The New Financing Terrorism Offenses

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*[29] which they are supposed to implement.[30] That *Convention* only requires states to criminalize the provision or collection of funds,[31] 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.

Under s. 83.14(5) an order for the forfeiture of accused's property can be obtained where a judge is satisfied on a "balance of probabilities" that property is "owned or controlled by or on behalf of a terrorist group" or "has been or will be used to facilitate or carry out a terrorist activity". This is a departure from the pre existing standard in the *Criminal Code* which required a conviction or proof beyond a reasonable doubt that property was related to a crime before forfeiture could be ordered. [32]

5. "Terrorist Activity" and the Deregistration of Charities under the CRSIA

The problematic "terrorist" framework that has been inserted into the *Criminal Code*, has also been inserted, by Part 6 of the *ATA*, into the new *Charities Registration (Security Information) Act* ("*CRSIA*"). Section 4(1) of the *CRSIA* provides that the Solicitor General (Minister of Public Safety) and Minister of National Revenue may sign a certificate denying or revoking the charitable status of an organization, where they have reasonable grounds to believe that the organization "has made", "makes", or "will make" "available any resources "directly or indirectly" to a listed entity as defined in the *Criminal Code*, or to an entity that was engaged in, is engaged in, or will engage in "terrorist activities" as defined in the *Criminal Code*, "or activities in support of them".

These provisions put a huge burden on charities operating in the conflict zones of the world, where the labelling of some groups and not others as "terrorist" is really a political, rather than a principled exercise, since the results are never logically consistent. Moreover, for organizations working on the ground in these zones, it is extremely difficult to avoid coming into contact with dissident or armed groups, or to guarantee that aid does not fall into the hands of, or benefit indirectly, such groups. The provisions cover future actions, inviting speculation about what entities might or might not do. The term "activities in support of terrorist activities" is extremely vague. Finally, there is no *mens rea* requirement -- the legislation creates an "absolute liability" offense for charities.

The burden seems both misplaced and unnecessary. As one charity law scholar has argued, charities should simply be informed of the Canadian government's concerns regarding their operations and given a reasonable opportunity to change their practices before their charitable status is denied or revoked.[33] If there is proof of criminal intent to conspire in, or to aid and abet crimes, a charity's directors can be prosecuted. The charity's status could also be denied or revoked under provisions already in the *ITA*, which require that an organization must devote "*all* of its resources" to charitable activities and operate "*exclusively*" for charitable purposes in order to obtain or maintain charitable status.

6. Ethnic and Religious Profiling

We are all familiar with the famous poem by Martin Neimoller, quoted previously, that hangs over the entrance of the Holocaust Museum in Jerusalem: "First they came for the Communists ... then they came for the Jews, then they came for me and there was no one left to object."

Draconian laws which are as broad and vague and manipulable as the "terrorist activity" and "terrorist offences" laws described above give the state enormous discretion, and therefore enormous power, to target groups in society.

Based on the experience since September 11, 2001, we know that this kind of targeting has already started to happen in Canada and elsewhere and that it is Muslims who have been the first group to be targeted. In the U.S. hundreds of Muslims were herded up after September 11, 2001 and detained without charges for months until their release. Under the American NSEERS program over 80,000 males from countries of Muslim origins were registered and fingerprinted and over 13,000 were subsequently deported from the United States. CAUT members with origins in Muslim countries were harassed, insulted and even detained in the U.S. under this program.

In Canada, the Muslim community has been visited wholesale by CSIS agents and told that if they do not cooperate with the agency, the extraordinary powers of the *ATA*'s investigative hearing provisions may be used against them. Senator Jaffer told the Senate only last year that her husband had been visited on his university campus and had experienced all the fear and stigma that such a visit would provoke. Muslims are routinely being singled out at airports for security checks and worse. Novelist Rohinton Mistry was harassed so routinely in airports that he cancelled a book tour. Similar harassment is being experienced by CAUT members with origins in Muslim countries in airports around the world. One of our members was detained while flying through the U.K. Stories like Maher Arar's, about Muslims being picked up around the world and rendered to countries where they have faced torture and arbitrary detention, are becoming common in the news.

While the Canadian and other governments would deny that they allow their agents to practice ethnic or religious profiling, the fact is that the *ATA* and other anti-terrorism measures are *designed* to give the state dragnet powers over the population; they are *designed* for heavy-handed enforcement. They *allow* state agents to act on stereotypes about Muslims or to simply ethnically and religiously profile the Muslim population on the premise that it is "better to be safe to sorry" – *"better them than us*".

7. And Then They Came for Me ...

Oren Gross, a professor at the Tel Aviv University Faculty of Law has observed that:

> *Counter-terrorism measures and emergency powers are often considered to be directed against a clear enemy of 'others' namely the terrorists. The contours of the conflict are drawn around groups and communities rather than individuals. The clearer the distinction between 'us' and 'them' and the greater the threat 'they' pose to 'us' the greater in scope may be the powers assumed by government (with the cooperation of the legislature and frequent acquiescence of the courts) and tolerated by the public. A bright-line separation of 'us' and 'them' allows for the piercing of the veil of ignorance [a reference to John Rawls' famous Theory of Justice[34] in which he posits that the principles of justice can be divined from what kind of rules and distributions a hypothetical society would agree on if all of its members did not know in advance what their situation or natural abilities would be in that society.) We allow for more repressive emergency measures when we believe that we possess the key to peek beyond the veil and ascertain that such powers will not be turned against us.*

Of course, the notion that there is a "them" and an "us" is "misguided and dangerous".[35] It leads us to think that we need not care about what happens to "the other", when in fact the other's well-being is integral to our own. The treatment that the Muslim community around the world is receiving under current terrorism measures, including the *ATA*, will turn those communities away from law enforcement and from the rest of us, undermining constructive pluralism in our societies. It may also serve to increase extremism, especially among youth.

But the notion is also misguided and dangerous because the line between "them" and "us" is always permeable. Today draconian powers are being used against the Muslims among us. Tomorrow – as our submission's analysis of the *ATA*'s amendments to the *Criminal Code* above shows – they could easily be turned against anti-abortion advocates, separatists, aboriginal rights proponents, environmental activists, anti globalization protestors, trade unionists, defence lawyers, critics of the government in power, and even critical insiders. Even now, there are concerns that draconian laws have begun to chill freedom of speech, freedom of religion, freedom of association, and therefore, democratic life in Canada.

8. The Pre Existing Criminal Law was Adequate

Criminal law scholars have criticized the trend over the last decade whereby numerous offenses have been added to the *Criminal Code* in an *ad hoc*, political way to respond to tragic or highly publicized events, not because the *Code* could not capture such conduct within its existing principles, but because politicians felt a need to make a symbolic gesture condemning the conduct. These additions have unnecessarily complicated the *Code* and, in some cases, have undermined the principled application of the criminal law. The new "terrorism offenses" and definition of "terrorist activity" that the *ATA* introduces into the *Criminal Code* fall into both these categories.

a) More than Enough Offenses

The Canadian criminal law was up to the task of capturing all, or virtually all of the wrongdoing related to the phenomenon called "terrorism" long before the passage of the *ATA*.

The *Criminal Code* contained, and still contains, the criminal offences of murder (s. 230), hijacking, endangering safety or having an offensive weapon on an aircraft (ss. 76 - 78), administering poisons or noxious substances (s. 245), offences in relation to explosives (ss. 81 and 82), offences in relation to nuclear materials (ss. 7(3.2 - 3.6), treason and sedition (ss. 46, 61), sabotage (s. 52), intimidation of legislatures or people (ss. 51 and 423), uttering threats (s.264.1), unlawfully causing bodily harm or death (ss. 269 and 222), kidnapping and hostage taking (ss. 279 and 279.1), conveying false messages to alarm (s. 372), various offences related to forged passports, citizenship and naturalization certifications and other false documents (ss. 57-58, 366-369), offences relating to threatening international persons or their residences (ss. 423.1, 424, 431), impersonation (s. 403), criminal negligence (s. 219) , and mischief to property (s. 430). There is an offence of hate propaganda (s. 319) and a provision that aggravates a sentence when a hate motive is proven (s. 718.2(a)i). There are tough criminal organization offenses (ss.467.1, 467.11- 467.13) and a provision that aggravates the sentence when there is evidence that the offence was committed at the direction of, or in association with a criminal organization (s. 718.2(a)iv). Section 7 gives Canada universal jurisdiction over hijacking, attacks on airports, ships and fixed platforms, acts against international persons, hostage taking, the unlawful use of nuclear material, and piracy offences.

There are also offenses of conspiracy (s. 465), attempt (s. 24), counselling (s. 22 and 464), aiding and abetting (s. 21(1), and being an accessory after the fact (s. 23) for all of the offenses listed above, including the universal jurisdiction offenses.

As Kent Roach has outlined, these last incomplete offenses are very broad in Canadian law:

> *[A conspiracy is an agreement between two or more people to commit a crime and is] generally punishable with the same maximum penalty as the completed offense (s. 465). The agreement necessary for a conspiracy conviction can be implicit or trans national and 'there may be changes in methods of operation, personnel, or victims without bringing the conspiracy to an end'.*[36] *[An accused] can be guilty of conspiracy or agreement to commit a crime [without even preparing] to commit the offence.*[37] *... An attempt occurs when a person with the intent to commit the completed offence does any act beyond mere preparation to commit the crime ..... the Supreme Court has indicated that an attempt can occur even though there might be a 'considerable period of time' between the act ... and the completed offence.*[38] *... A person who counsels, solicits, incites or instructs another person to commit a crime is guilty of the crime of counselling a crime that is not committed, even if the person counselled immediately rejects the idea (s. 464). If the person counselled goes on to commit the crime, the counsellor can be guilty as a party to that crime even though the crime is committed in a different manner than was counselled (s. 22(1)). The counsellor is also guilty of any offences that he or she knew or ought to have known were likely to be committed in consequence of the counselling (s. 22(2)). A person who intentionally assists, aids, or encourages the commission of a crime is guilty of that crime as a party who aids or abets the crime (s. 21(1)). Passive acquiescence is not enough to be a party to an offence, but a broad range of acts of encouragement and assistance will suffice. Once an unlawful purpose has been formed with another person, the accused is also guilty of crimes that he or she knew or ought to have known would occur*[39] *from carrying out the common unlawful purpose (s. 21(2)). Finally, a person who receives, comforts or assists a person for the purpose of enabling that person to escape is guilty of the separate offence of being an accessory after the fact (s. 23).*

In addition to being captured under the *Criminal Code*, "terrorism" was also captured before the passage of the *ATA* by the *Crimes against Humanity and War Crimes Act.* It gave and still gives Canada universal and retroactive jurisdiction to prosecute crimes against humanity, war crimes and genocide. In it, crimes against humanity are defined as:

> murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against a civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

The primary conventional law, the ICC statute defines “crimes against humanity” as specified crimes directed against any civilian population committed as part of a widespread or systematic attack, with knowledge of the attack”. “An attack directed against a civilian population is defined in the statute as “a course of conduct involving the multiple commission of specified acts ... against any civilian population, pursuant to, or in furtherance of, a State or organizational policy to commit such an attack.”

b) One Potential Jurisdictional Gap

It is difficult to think of any aspect of the September 11 attacks or the Madrid bombings that would not be criminal and subject to universal jurisdiction under Canadian laws so that all persons connected to these acts would have been punishable under the criminal law as it existed before the *ATA*. The only thing lacking in respect of the Madrid bombings *might* be jurisdiction to prosecute the perpetrators if the crimes, committed wholly outside Canada, were not found to constitute a crime against humanity, which arguably they *would* be. Sections 3(2) and 13 of the *ATA* creating s. 7 (3.72) and s. 431.2 in the *Criminal Code* fill this gap by making serious explosive and noxious substance offenses against public places, facilities, transportation and infrastructure subject to Canada’s universal jurisdiction. By ensuring jurisdiction, they also implement the *International Convention for the Suppression of Terrorist Bombings*.

One wonders whether ss. 83.02 to 83.04 of the *ATA* creating the new financing of terrorism offenses are needed, however. The *International Convention for the Suppression of the Financing of Terrorism* requires state parties to criminalize and establish universal jurisdiction over the offenses in Art. 2 of the *Convention*. The offenses in Art. 2 are:

(1) wilfully providing or collecting funds with the intention that they be used to carry out a) an offense under the other “terrorism” conventions, or b) any other act intended to cause death or serious bodily injury to a civilian when the purpose of the act is to intimidate a population or compel a government or international organization to do something;

(4) attempting to do (1);

(5)(a) being an accomplice to (1) or (4)

(5)(b) organizing (1) or (4);

(5)(c) contributing to (1) or (4) with i) the aim of furthering the criminal activity of the group, or ii) knowledge of the group’s intention to commit a criminal offense listed in (1).

Along the same lines, but with a narrower jurisdictional requirement, *Security Council Resolution 1373* asks states to:

> "criminalize the willful provision or collection of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used in order to carry out terrorist acts ..."

The Canadian criminal law as it existed before the passage of the ATA arguably captured all that the *Convention for the Suppression of the Financing of Terrorism* and *Security Council Resolution 1373* require in the provisions described above. Anyone providing or collecting funds to further the commission of a crime would have been guilty of aiding and abetting under the *Criminal Code* pre *ATA* and the incomplete offenses of attempt, conspiracy, counselling and being an accessory after the fact were available too. Further, if the crime involved an offense set out under one of the terrorist conventions (arguably representing the only international definition of "terrorist acts" that there is any broad consensus on), such as hijacking, use of nuclear material, hostage taking or attack on an airport, ship, or fixed platform, Canada would have had universal jurisdiction under s. 7 of the *Criminal Code* and potentially under the *Crimes Against Humanity Act* . The only addition that might have been needed in the pre existing framework would have been the addition of s. 7 (3.72) and s. 431.2 to the *Criminal Code* in order to provide universal jurisdiction in respect of incomplete offenses relating to a bombing or noxious substance attack that did not constitute a crime against humanity.

c) Sentencing

The government might argue that stiff sentences for terrorists were missing in the *Criminal Code* as it was before the passage of the *ATA* and point to *Security Council Resolution 1373* and the international terrorism conventions which require states to ensure that punishment duly reflects the seriousness of terrorist acts. Here, one would think that s. 718.2(a)i which provides for stiffer sentences when a crime is committed with a hate motive or in association with a criminal organization; s. 231 which provides that murder shall be in the first degree when it occurs during the commission or attempt to commit a hijacking, kidnapping or hostage taking offence (ss. 4) or an explosive offense in association with a criminal organization; s. 417.14 which provides for criminal organization offenses to be served consecutively; and s. 718(1) which provides that sentences must be proportionate to the gravity of the offense and the degree of responsibility of the offender, would suffice to ensure appropriate sentences are meted out.

The sentences provided for in the *ATA* combined with the overbreadth of the definition of "terrorist activity" are, in fact, cause for real concern as they could easily result in disproportionate punishment. Section 83.27 of the *Criminal Code* as amended by the *ATA* provides for a general enhancement of

maximum penalties up to life for all existing indictable offenses "where the offense also constitutes a terrorist activity".

Section 83.2 provides that everyone who commits an indictable offense for the benefit of, at the direction of, or in association with a terrorist group" is liable to life imprisonment. Here, there is no requirement that the indictable offence itself be a "terrorist activity" or that the accused know the group is a "terrorist group".

Under s. 83.26, anyone found guilty of the new financing terrorism offenses or of the new participating, facilitating, instructing or harbouring offenses, "shall serve" their sentences, except for life imprisonment, "consecutively". This last provision tracks s. 467.14 in the *Criminal Code*, the organized crime provision for consecutive sentences, however, due to the breadth of the term 'terrorist activity" could result in extremely unjust sentences for normal political activity.

9. The National Security Role of the RCMP

In addition to the very serious problems of the *ATA* amendments to the *Criminal Code* described above and the fact that they are almost all unnecessary additions to the *Code*, another important point to consider is their institutional effect.

Before 1984, the RCMP was the primary federal agency responsible for the gathering and dissemination of national security intelligence. [40] This function was seriously reviewed in the mid 1960s by the MacKenzie Commission under the Pearson government. That Commission concluded that it was inappropriate for police with their coercive powers to hold a mandate for the collection of security intelligence; that the Security Service within the RCMP lacked the necessary levels of sophistication and powers of analysis to perform the security intelligence function competently; and that security intelligence work would be better undertaken by a civilian agency with direct accountability to the government.

The Trudeau government decided not to implement the Mackenzie Commission recommendations and during the 1970s the folly of this decision became manifest. In Québec in the early 1970s, the Mounties, without a warrant, broke into the premises of a Montreal press agency perceived to be left-wing to steal and destroy files; broke into private premises to steal computer tapes containing membership lists of the Parti Québecois; issued a fake communiqué urging FLQ extremists to continue on a course of revolutionary action; and burned down a barn to prevent a meeting taking place between what were perceived to be militant Québec Nationalists and American radicals. While many of what became known as the RCMP's "dirty tricks" were directed at national sentiment in Québec, they were not restricted to that province. Many improper activities were also directed at "left-wing" groups throughout Canada.[41]

These and a long list of other illustrations of a police force run amok in the area of national security were documented by the McDonald Commission set up to review the national security role of the RCMP in 1977. Its conclusions echoed those of the earlier MacKenzie Commission, and it recommended that a new civilian agency, separate from law enforcement, be set up to deal with domestic national security intelligence . The government of the day followed this recommendation, tabling the *Canadian Security Intelligence Service Act* which gave the security intelligence function to the new civilian agency, CSIS, in 1984.

During this period, similar developments were occurring in the U.S.:

> *[a] similar tightening of control occurred at about the same time in the United States – after President Nixon tried to use national security to justify the Watergate break-in, and after it was revealed by the Church Commission[42] that the FBI was targeting such groups as labour unions, universities, and civil rights organizations. Martin Luther King Jr., for example, was one of the FBI's targets.* [43]

After CSIS came into being, the RCMP retained some jurisdiction over national security by virtue of s. 6 of the *Security Offenses Act*, but only "to perform *the duties that are assigned to police officers*" in relation to offences that arise "out of conduct constituting a threat to the security of Canada within the meaning of the *[CSIS] Act*." Prior to the *ATA*, this would have meant responsibility for ordinary *Criminal Code* offences, since the *Code* made no reference to "terrorism".

As criminal law expert Martin Friedland has observed, with the passage of the *ATA*, much of what was accomplished in the 1980s in terms of controlling excesses by police in the area of national security was reversed. [44] The loose, motive-based definition of "terrorist activity" and the new terrorism offenses the *ATA* adds to the *Criminal Code*, along with new provisions for wiretapping and preventative arrests based on reasonable suspicion (described below), and its further amendments to the *Official Secrets Act* (now the *Security of Information Act*) and the *Proceeds of Crime (Money Laundering) Act* (now the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act)* – put the RCMP back, centre stage, in the national security business. And this development is accompanied by an intelligence-led approach to law enforcement which the RCMP adopted in the late 1980's that makes its national security intelligence role as great as ever. According to the Arar Inquiry, the RCMP's intelligence activities in respect of national security now include:

> *collection, maintenance and analysis of national security related information and intelligence; sharing of such information and intelligence with other agencies both domestic and foreign;*

preparation of analyses, threat assessments and other methods of support for internal and external purposes; ... and investigations and activities aimed at preventing the commission of national security crimes (countering).[45]

The Martin government has asked Justice O'Connor of the Arar Inquiry to make a recommendation about a new oversight mechanism for the RCMP's new security role. But, with respect, the oversight issue is a bit of a "red herring", since it is the *scope* of the RCMP's functions that are the real problem. If one is to prevent police excesses in the area of national security, the *Criminal Code* and other offences that the RCMP is charged with enforcing, and the powers the RCMP is given to use, must be defined with restraint and clarity, and without terms like "terrorism" and "national security".

The "terrorist activity" definition and "terrorism offenses" which have been injected into the whole law enforcement framework by the *ATA* fail spectacularly to do this.

Recommendation:

Repeal all *ATA* amendments injecting a "terrorism" framework into the *Criminal Code.* Re-enact those amendments that create s. 7(3.72) and s. 431.2 of the *Criminal Code,* but without any reference to "terrorist activity" or "terrorism" – that is, in the same way that hijacking and other s. 7 offenses relating to the phenomenon popularly called "terrorism" were enacted in the past.

Repeal Part 6 of the *ATA* enacting the *CRSIA* and making consequential amendments to the *ITA,* which create a regime for the deregistration of charities on the basis of secret evidence.

IV. EXTRAORDINARY INVESTIGATIVE POWERS - THE SLIPPERY SLOPE TO BECOMING A POLICE STATE AND A SURVEILLANCE SOCIETY

ROPER: *So now you'd give the Devil the benefit of the law!*

MORE: *Yes. What would you do? Cut a great road through the law to get after the devil?*

ROPER *I'd cut down every law in England to do that!*

MORE: *Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – Man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's*

sake.

– Robert Bolt, "A Man for All Seasons"

In addition to giving secrecy and unreviewable power to the Executive, and enormous discretionary power to law enforcement, draconian laws give state agents extraordinary powers of investigation and surveillance. These powers lay flat the legal protections that have been developed over centuries in democratic societies to protect the individual from the state. The result is a fundamental change in the relationship between individual and state.

The theory behind liberal democratic government is that the state's power is only legitimate when based on the sovereign will of the people. The state is answerable to the people and to the individual. There are strong checks, therefore, on the state's ability to wield powerful tools of social control. There are limits on the state's power to intrude into the private sphere of the individual. There is a right against self incrimination and a right to be treated as innocent until proven guilty. There is no duty on the part of individuals to assist police in investigations. There are checks on how personal information is accessed, used and disseminated. In a police state or surveillance society this relationship is turned on its head: the individual is answerable to the state, and the rights and protections just listed are subordinated to the state's interest.

Like the false belief that we can rely on governments to use arbitrary power for "good" purposes and not "bad", and that we can separate with an impermeable line "them" from "us", it is a false belief to think that we can separate measures that will be used against "them" and not against "us".

1. Investigative Hearing Powers for Police

Under s. 83.28 of the *Criminal Code* as amended by the *ATA*, a person can be ordered to appear before a judge to give evidence in an "investigative hearing" where the judge is satisfied that there are "reasonable grounds to believe" that a "terrorism offence has been committed" or "will be committed" and that the person summoned has information about the offense or the whereabouts of the perpetrator(s). Under s. 83.29 failure to comply with the order can result in arrest and imprisonment.

While there are many instances in our legal system where a person can be compelled to give evidence under oath, the investigative hearing procedure differs in that it allows evidence to be compelled *before* proceedings are commenced and *before* an offence has even been committed.

This is a departure from the rule in our criminal law system that there can be no trials *in absentia*, that is, in the absence of the accused, so that he may be present to protect his rights in the criminal process. It is also a departure from the role judges play in our common law system since it puts them into an inquisitorial role, participating in an investigation. It also departs from the rule that everyone has a right to remain silent in the investigative stage of the criminal process.

While the witness is supposedly protected from self incrimination under s. 83.28 in that no evidence he gives in the investigative hearing can be admitted or used against him in subsequent proceedings except for the purposes of proving he is guilty of perjury (s. 132 of the *Criminal Code*) or contradictory evidence (s. 136 of the *Criminal Code*), one wonders what will stop the police from using his evidence to follow secondary leads that can incriminate him. Also, he remains subject to being swept off the street to assist police in their investigations in a way that we only associate with police states.

There are no exemptions in s. 83. 28 for solicitor-client confidentiality, solicitor-client privilege, or for journalists and their sources. Solicitor-client confidentiality and solicitor-client privilege (the evidentiary rule) are, as the Canadian Bar Association has said, "essential to the proper functioning of our legal system":

> *Lawyers cannot properly advise clients who do not feel comfortable telling them the whole story. Clients will only be forthcoming if they know the information the communicate will remain in the lawyer's confidence. Diminishing protection for solicitor-client confidentiality provides clients with an incentive to withhold information from their lawyers. This does not serve the client, the legal system or, ultimately, the public.*[46]

As for the protection of journalists's sources, the European Court of Human Rights has held that this is one of the basic conditions of press freedom.[47] Again, as the Canadian Bar Association has observed:

> *[c]ourts have recognized that an individual performing a journalistic function is in a special position, and should not be required to testify at a legal proceeding or public inquiry unless the questions sought to be answered are relevant, pivotal, proper, and necessary in the course of justice, and there is no other way to obtain the information sought. These protections exist to facilitate the flow of information essential for citizens to make informed decisions, not for the benefit of journalists.*

Despite the fact that the consent of the Attorney General is required before police can apply for an investigative hearing, and that there is some oversight by the courts in the granting of a hearing, the investigative hearing procedure is open to abuse since the thresholds for the use of this extraordinary power are the same "terrorist activity" and "terrorism offenses" definitions that we have criticized earlier in these submissions for their overbreadth and convoluted drafting. As a result, the power could well be approved for use by law enforcement to target normal political activity and dissent.

It should also be considered whether such powers in the hands of the police and the Justice Department might actually jeopardize CSIS investigations and operations on the ground, through lack of coordination or shared aims.

Recommendation:

Repeal the investigative hearing provisions in ss. 83.28 and 83.29 of the *Criminal Code* as amended by the *ATA*.

2. Preventative Arrest Powers for Police

Under s. 83.3(4) of the *Criminal Code* as amended by the *ATA*, a police officer can arrest a person without a warrant if she suspects on reasonable grounds that the detention of the person "is necessary in order to prevent a terrorist activity".

Prior to this provision being added to the *Code*, arrest before the commission of an offense was only permitted on the basis of a "reasonable belief" that a person was "about to commit an offense" (under s. 495(1)a). Section 83.3(4) lowers the standard to reasonable *suspicion*, contains no requirement about the imminence of the offence being committed, and does not even require an offence but only "terrorist activity", which, as described earlier, could capture lawful activity and normal political activity.

The person arrested without a warrant can be held beyond the maximum 24 hours normally allowed in the *Criminal Code* until a provincial judge is available. One wonders why this would be necessary except if some kind of leeway for abuse were intended. If a judge can be found within 24 hours for other criminal offenses, why not for a "terrorism" offence? Again, warrantless arrests without reasonable grounds to believe a person is about to commit an offense, and detention without immediate appearance before a judge, is something that we usually associate with police states. Indeed, it is a feature in the draconian security laws of places like Singapore and Indonesia.

If the judge decides the police officer has reasonable grounds for "suspicion", she can impose conditions in a recognizance for up to twelve months. This is like the peace bond that can be issued under s. 810 of the *Code* where reasonable grounds exist to fear a person will commit a criminal organization offence. But "reasonable grounds for suspicion" is a lower standard than "reasonable grounds to fear".

The threshold for the use of this extraordinary power is again the problematic definition of "terrorist activity" so that preventative arrests could be used in respect of lawful activity and normal political dissent.

And again, one wonders whether such powers in the hands of the police and the Justice Department might jeopardize CSIS investigations and operations in some cases.

Recommendation:

Repeal the preventative arrest provisions in ss. 83.3 to 83.32 of the *Criminal Code* as amended by the *ATA*.

3. New Surveillance Powers and Capacities

It is important to view the expansion of the state's surveillance powers under the *ATA* within the larger context of what is happening in the "war on terror" in Canada. Currently, Canada is involved in many initiatives in the name of this "war" that are drawing us closer and closer to becoming a surveillance society and part of a global surveillance infrastructure. The personal information of Canadians will very soon be collected, stored, linked, data mined, monitored and shared with other countries like never before. While it is not within the scope of these submissions to describe all of these developments in detail, they include:

- the establishment of a National Risk Assessment Centre that receives, stores for 6 years, and "risk scores" the personal information of passengers on all incoming flights to Canada;

- the planned creation of a similar Risk Assessment Centre under the *Public Safety Act* in respect of domestic and outgoing flights, and talk by the Minister of Public Safety of expanding this to all transportation systems;

- the establishment of a "no fly" list under the *Public Safety Act* with which Canadians' travel will be monitored and controlled;

- Canada's sharing of passenger information with foreign countries under Bill C-44 amendments to the *Aeronautics Act*, which exempt Canadian air carriers from *PIPEDA* so that they can give the personal information of their passengers to any foreign agency that requests it;

- the creation of a biometric passport system through which Canadians' personal information can be registered and linked biometrically both at home and in foreign countries such as the U.S. (which is amassing vast databases of personal information on individuals around the world and developing the technology to data mine them for "risk" indicators);

- the close cooperation and information sharing with the U.S. that is taking place pursuant to the *Smart Border Agreement*; and

- the plan to exponentially increase state agents' surveillance capacity under Lawful Access amendments to the *Criminal Code.* These will require all computer service providers (public and private) to design their systems so that state agents have direct, real-time, cost-free access to all our email, internet browsing, and electronic records, documents and transactions. The amendments may also require the storage of information for mandatory periods, and the sharing of information with foreign countries in respect of activities that do not even constitute crimes in Canada.

a) Expanded Wiretapping Powers for Police

Section 6 of the *ATA* adds to the trend described above by expanding the surveillance powers of the police in amendments to the wiretapping provisions of the *Criminal Code*. It provides the same exemptions for "terrorism offenses" that exist for criminal organization offenses. The amendments eliminate the requirement for police to show "other investigative procedures have been tried and have failed" or are "unlikely to succeed". They extend the period of wiretaps with judicial approval from 60 days to one year, and they allow a judge to extend the period before notice is given to the subject of the surveillance to three years.

It could be argued that these extraordinary powers are redundant to the powers in respect of criminal organizations. Certainly, the threshold for their use, the problematic definitions of "terrorist activity" and "terrorism offenses", make their abuse likely.

Recommendation:

Repeal *ATA* s. 6 amendments to the wiretapping provisions of the *Criminal Code*.

b) Duties Imposed on Every Person to Disclose Property and Transactions and on Certain Institutions to Report to State Agents - Sections 83.1 and 83.11 of the Criminal Code and amendments to the Proceeds of Crime (Money Laundering) Act

The *ATA* exponentially expands the state's surveillance powers by adding disclosure and reporting duties under ss. 83.1 and 83.11 to the *Criminal Code* and by adding other reporting duties to the *Proceeds of Crime (Money Laundering) Act*. These new duties turn businesses, financial institutions, individuals, and social organizations in Canada into the eyes and ears of the state in the ill-defined "war on terrorism".

As mentioned earlier, under s. 83.1 of the *Criminal Code* as amended by the *ATA*, "every person in Canada" must disclose forthwith to the Commissioner of the RCMP and to the Director of CSIS the existence of any property in their possession or control that they know is owned or controlled by a "terrorist group," and any transaction or proposed transactions in respect of such property. Under s. 83.11 of the *Criminal Code* as amended by the *ATA*, financial institutions, insurance companies, fraternal benefit societies and others must "determine on a continuing basis whether they are in possession or control of property owned or controlled by, or on behalf of a listed entity" and must report monthly or as specified by regulation, to their regulatory bodies.

Under *ATA* s. 52, amending s. 7 of the *Money Laundering Act*, all persons and entities with reporting duties under the *Act* must report every transaction to FINTRAC for which "reasonable grounds [exist] to suspect "a terrorist activity financing offence". Under *ATA* s. 54 (2) amending s. 12(3)a of the *Money Laundering Act*, persons in charge of conveyances must also report in prescribed circumstances on the currency and monetary instruments in possession of passengers. All of the information that FINTRAC receives *must* be disclosed to CSIS under *ATA* s. 68 (replacing s. 56 of the *Money Laundering Act* with s. 55.1), where "reasonable grounds [exist] to suspect ... [it] would be relevant to the security of Canada."

During the McCarthy era, individuals, businesses, unions, social organizations, and others reported "Communists" and "fellow travellers" to state authorities. How much like that era will the current one be with reporting obligations like those described above, for a phenomenon that cannot be precisely defined?

Recommendation:

Repeal *ATA* amendments to ss. 83.1 and 83.11 of the *Criminal Code* and to the *Proceeds of*

***Crime (Money Laundering) Act,* which create new duties for individuals, businesses and social organizations to report "terrorist activity" to authorities and which provide for the mandatory dissemination of information to CSIS.**

c) CSE Authority to Intercept Canadians' Communications without Warrant

ATA s. 102 expands the surveillance powers of the Canadian intelligence community and, indirectly, of the police in Canada by its formal recognition, through amendments to the *National Defense Act*, of the formerly shadowy Communications Security Establishment ("CSE") – Canada's contribution to the Anglo-American intelligence project known as Echelon. Echelon is a program run by Canada, the U.S., the U.K, Australia and New Zealand, through which each country trawls the global information infrastructure for intelligence. Under Echelon, millions of messages and conversations are analyzed daily for key words and traffic patterns. Each centre in the five participating countries supplies dictionaries to the other four of key words, phrases, people, and places to "tag". The tagged intercepts are forwarded straight to the requesting country.[48]

It is believed that in this way, each country has been able to obtain information about its own citizens that it would not have been allowed to obtain under domestic laws.

While formerly the CSE was prevented from intercepting the private communications of Canadians by Part VI of the *Criminal Code*, [49] the *ATA*'s addition of s. 273.65 and 273.69 to the *Defense Act* appear to give the Minister of Defense the power to *authorize* the CSE to intercept communications that originate or terminate in Canada,[50] as long as "the interception is *directed* at foreign entities located outside Canada". Sections 273.65 (1) and (3) restrict such authorizations to "the sole purpose of obtaining foreign intelligence" and the "sole purpose of protecting the computer systems or networks of the Government of Canada", but there is no express prohibition on the CSE giving information to law enforcement about Canadians.

The CSE's participation in Echelon is troubling if it involves the receipt of information about Canadians and so, too, is its new ability to intercept communications involving Canadians under ss. 273.65 of the *Defense Act* as amended by the ATA. As security and criminal law expert Martin Friedland has asked,

> *"[W]hy is the Federal Court of Canada not approving electronic surveillance involving persons in Canada ...[using the same standard for getting a warrant that CSIS is subject to]?"*.[51]

Recommendation:

Repeal *ATA* s. 102 amendments to the *National Defense Act*, recognizing the Communications Security Establishment and expanding that entity's surveillance of Canadians.

V. THE EXTRAORDINARY MADE NORMAL

The despotism of Augustus prepared the Romans for Tiberius.

– John Stuart Mill, On Liberty

The government has told us that this extraordinary piece of legislation, the *Anti-terrorism Act*, is necessary to meet a new and extraordinary threat we are facing as a society: technologically sophisticated terrorism. And, whether we believe the threat is new and extraordinary or simply a serious ongoing problem, we may be willing to accept extraordinary measures to deal with it if we believe that "they will not become normalized but rather will, somehow, stand outside and not affect" the ordinary set of legal rules and norms in our society.

But the idea that we can isolate draconian laws from the normal background of our society is a false belief, like and related to all of the other false beliefs outlined in this submission: the belief that we can have draconian laws and rely on governments to use them only for "good" purposes and not "bad"; that we can separate "us" from a "them" the laws are initially meant to target; and that we can separate out measures that will be used against "them" and not against "us".

Draconian laws, enacted in a time of crisis, have a way of taking on a life of their own. If enacted as temporary laws or reviewable laws like the *ATA*, they have a way of becoming permanent. Their provisions intensify. They function creep. They become "the new normal" as authorities and the public grow accustomed to their use, paving the way for even more draconian laws to be added in increasing doses over time. And, they introduce what are often lasting structural and institutional changes into systems of government.

Israeli scholar, Oren Gross, has examined each of these tendencies in detail and his observations and case examples are worth noting at length.[52]

On the subject of *the temporary or probationary becoming permanent*, Gross cites the example of U.K. counter terrorism laws. Designed to deal with Northen Ireland and initially enacted for short periods of time, they were repeatedly renewed or extended for many years, until eventually being enacted as

permanent legislation.[53]

On the subject of *intensification*, Gross observes that provisions in draconian laws often expand overtime, while the limitations that were originally attached to them wither away. An example of this is a trend in the U.S. of presidential sidestepping of congressional statutory restrictions incorporated into legislation such as the *International Emergency Economic Powers Act 1977*. Through such side-stepping, the U.S. Executive has gained access to broad grants of statutory authority over time without the original built-in limitations on the use of that authority".[54] In the case of the *Emergency Economic Powers Act*, the Executive has used their new authority to invoke the *Act* many times, with little regard for whether a real emergency existed, in order to pursue policies that Congress failed to approve.[55]

With respect to *function creep*, Gross tells the cautionary tale of measures introduced by the British government into Ireland in 1988 to limit the right to remain silent of suspects and defendants. The measures were introduced five days after a series of massive IRA attacks, including one on a military bus full of British soldiers. The measures limited the right to remain silent both in interrogation and at trial. The explanation given by the government for the proposed deviation from this well-established right in criminal law was that the wide and systematic lack of cooperation by those suspected of involvement in terrorist activities in Northern Ireland was critically hampering police investigations. The public debate, as a result, centred on "terrorist activities" and the general perception was that the measures were necessary to fight paramilitary terrorism in Ireland.

The measures were also supported on the assumption that they were going to target a well-defined group in a specific geographic area. But, as Gross explains,

> *Despite repeated declarations and assurances to the effect that the new limitations were meant to strengthen law enforcement authorities in their war on terrorism, once the Criminal Evidence Order (Northern Ireland) (the 1988 order) was approved, its language was not confined to acts of terrorism. Moreover, the 1988 Order was not enacted within the framework of emergency legislation already existing in Northern Ireland, but rather as part of the ordinary, regular criminal legislation. Thus, the Order's jurisdiction and the limitations set on the right to silence were not limited to those suspected of serious crimes related to terrorism, but were expanded and interpreted as relating to every criminal suspect in Northern Ireland.*[56]

Six years later, the British government moved to expand the law to other parts of the United Kingdom. The *Criminal Justice and Public Order Act* of 1994 reproduced in arts. 34 to 37, almost *verbatim*, the relevant provisions in the *1988 Order*. "Again the claim was made that the new piece of legislation was necessary because terrorists were abusing the right to remain silent."[57] And again, the limitations on the right to silence were incorporated into the regular criminal legislation, and were expanded so as to apply to

every suspected criminal offender.

As Oren Gross has said, “The farther we get from the original situation that precipitated the enactment of [draconian] legislation, the greater are the chances that the norms and rules incorporated therein will be applied in contexts not originally intended.” Thus, Americans should not have been surprised when the *Feed and Forage Act* of 1861 was used to allocate funds for the invasion of Cambodia in 1971.

On the subject of *the extraordinary becoming the “new normal”*, Gross has observed,

> *Governmental conduct during a crisis creates a precedent for future exigencies as well as for ‘normalcy’. Whereas in the ‘original’ crisis the situation and powers of reference were those of normalcy and regularity, [in] any future crisis government takes as its starting point the experience of extraordinary powers and authority during previous emergencies. What might have been seen as sufficient in the past ... may not be so regarded at present. Much like a medication whose dosage must be increased to have the same effect along time, so too with respect to emergency powers the perception may be that new, more extreme, powers are needed to fight developing emergencies. New extraordinary emergency measures confer [an] additional degree of post-facto legitimacy, respectability and normality to previously used, less drastic, emergency measures. What [were] deemed to be exceptional emergency powers in the past may now be regarded [as] normal, routine, and ordinary in light of more recent and more dramatic powers.*[58]

A related phenomenon, Gross observes, is the “piling up” of emergency powers and legislation. In the United States in 1976 for example, there were more than 470 pieces of emergency legislation on the statute books and no less than four declared states of emergency still in force.[59]

Another aspect of the normalization of the exceptional is that government and its agents grow to like to the convenience of draconian powers. “Once they have tasted the taste of operating with less limitations and shackles curbing their actions, they are unlikely to be willing to give it up.”[60] Thus, government officials and agents over time are likely to use draconian powers more and more frequently and to extend their use beyond the original exigency they were designed to meet. In Israel, Gross tells us,

> *the administrative authority to issue emergency regulations under Art. 9(a) of the Law and Administration Ordinance of 1948 was originally used mainly in the context of security issues and in a relatively restrained fashion. During the 1950s, 60s, and early 70s there were few cases in which use was made of the powers accorded under that article. However, this pattern changed dramatically after the Yom Kippur War of 1973. Since 1974 the emergency powers*

under Article 9(a) have been exercised in an almost routine fashion in non-emergency situations relating to labor disputes and monetary issues. Thus, for example, after surveying the history of using Article 9(a) in the context of labor disputes in Israel, one scholar concluded that the emergency-related mechanisms of compulsory work orders had been frequently used in situations where no special urgency was present or when other, less drastic means, were available. Such a relatively easy-to-use mechanism for an imposed solution of labor disputes has had a 'narcotic effect' on government officials, allowing them to by-pass the more burdensome process of negotiations between employers and employees.

Oren Gross concludes his observations about extraordinary, draconian legislation by noting that its enactment often has lasting effects on a society – not only in terms of changes to the society's legal norms and traditions and its culture of respect for the rights and freedom of its people, but also in terms of *structural and institutional changes*.

Gross notes that "[t]here is a direct relation between emergencies and the strengthening of the executive branch of government."[61] In times of crisis this branch enjoys an unparalleled concentration and expansion of powers, usually with the cooperation of the legislative and judicial branch of government. And this structural shift often becomes institutionalized in a way that is difficult, later on, to unravel. We are probably seeing this phenomenon occurring now in the United States. We have also seen it in the past, for example, in the transformation from the Fourth to the Fifth Republic in France, closely linked to the Algerian War, and in the fundamental changes in the government structure of Great Britain during and after the First World War.

The process by which a society changes with the adoption of draconian laws, therefore, is incremental and multi-faceted. It is often difficult, even for people with legal and political experience, to follow all of the threads of change and to vigilantly monitor their implications. When the alarm bells finally go off about what draconian measures have done to a society, it may already be too late to do much about it.

VI. CONCLUSION

Much of the discussion about the *Anti-terrorism Act* when it was first tabled concerned the question of whether it would stand up to *Charter* scrutiny. The government claimed that it would – not on the basis that it did not violate *Charter* rights, but on the basis that courts would save the provisions under the balancing test of s. 1 in the *Charter*, due to the pressing concern of combatting terrorism. Many legal scholars disagree with the government, but indeed the government may be right. Historically, courts have been notoriously weak in holding an independent line when it comes to national security issues. In the

United States and South Africa, for example, their judgments have, in the past, allowed and encouraged government abuses of power.[62] The recent House of Lords decision striking down the British equivalent of Canada's *IRPA* security certificate procedure inspires hope that courts in the present era will be rigorous in their analysis of security measures. But there is no guarantee of this happening.

We have chosen not to deal in any detail with *Charter* arguments in this submission for three reasons. First, we believe that legislators should not pass on to courts their own responsibility for ensuring that measures are warranted and appropriate. Second, we know that only legislators can view the *Anti-terrorism Act* in its entirety and thus fully assess the dangers described in this submission. Third, this assessment must be made today. It cannot wait the 100 or more years it would take courts to chip away at, piecemeal.

Democratic societies look back in shame at periods when civil rights and democratic standards were sacrificed as a means to other ends. We have only to remember the McCarthy era, the internment of Japanese in North America during the Second World War, the days of the Winnipeg General strike and the infamous s. 98 of the *Criminal Code*, the implementation of the *War Measures Act* in Québec in the 1970s, and the incremental stripping away of Jewish citizens' civil rights in 1930s Germany to know that the crossroads Canadians stand at now, on the review of the *Ani Terrorism Act*, is not new.

The need for calm, informed, historical judgment has never been more needed.

When this Committee makes its important deliberations to decide whether it will tell the government to repeal the Canadian *Anti-terrorism Act*, we urge you to view the legislation in its broadest context, and to remember the caution famously attributed to Benjamin Franklin:

> "*Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety*"[63] ….

This time around, Canadians are watching.

ENDNOTES

1. *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of the State for the Home Department (Respondent);* [204] UKHL56. See particularly, Lord Hoffman, para. 97.

2. A procedure in ss. 76 to 85 of the *IRPA* and in earlier immigration legislation that allows the Minister of Immigration to deport or indefinitely detain persons, without laying charges, on the basis of secret and potentially unreliable evidence.

3. *Vancouver Sun (Re)* 2004 SCC 43 at para. 23, citing *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paras. 21-22; and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 [*Vancouver Sun.*]

4. *Vancouver Sun* at para. 25.

5. *Ibid*. at para. 26.

6. Specifically, the Court applied the *Dagenais/ Mentuck* test for publication bans which adapts the reasoning of *Oakes.*

7. James K. Huggessen, "Watching the Watchers: Democratic Oversight" in David Daubney, ed., *Terrorism, Law and Democracy* (Montreal:Yvon Blais, 2002) 381 at 384.

8. *Ibid.* at 385.

9. Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 McGill L.J. 893 at para. 58.

10. Wesley Wark, "Intelligence Requirements and Anti-terrorism Legislation" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001) 287 at 295 [*The Security of Freedom*].

11. Canada Bar Association Submission to the Commons Committee on Bill C-36, dated October 2001, at 47 [*CBA Submission.*]

12. Kent Roach, "The New Terrorism Offences and the Criminal Law", in *The Security of Freedom, supra* note 10, 151 at 168.

13. *CBA Submission, supra* note 11 at 17.

14. Patrick Macklem, "Canada's Obligations at International Criminal Law?", in *The Security of Freedom, supra* note 10, 353 at 357.

15. Don Stuart, "The Danger of Quick Fix Legislation in the Criminal Law", in *The Security of Freedom, supra* note 10, 205 at 209.

16. *Criminal Code*, s. 718.2(a)i.

17. "... it does not matter to society in its efforts to secure peace and order what an accused's motive was, but only what the accused intended to do." *U.S.A. v. Dynar* (1997),115 C.C.C. (3d) 481 at 509 (S.C.C.); "The mental element of a crime ordinarily involves no reference to motive." *R. v Lewis* (1979), 47 C.C.C. (2d) 24 at 33 (S.C.C.) per Dickson, C.J.; see also, *R. v. Latimer* (2001), 150 C.C.C. (3d) 129, in which the S.C.C. rejected the relevance of motive even for the issue of whether mandatory punishment was cruel and unusual.

18. "A motive is generally irrelevant in criminal law, except at the sentencing stage when it might be relevant to mitigation or aggravation of the sentence. That an accused committed a crime with "purely personal motives or reasons" does not exonerate him from being guilty of a crime against humanity if his act fits into the pattern of crimes against humanity as described above." K. Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 92.

19. Section 7 of the *Criminal Code* implements Canadian obligations under *The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, the *Convention for the Suppression of Unlawful Seizure of Aircraft*, the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, the *Convention on the Physical Protection of Nuclear Material*, the *International Convention against the Taking of Hostages*, the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, the *Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation*, and the *Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*.

20. The term terrorism is used in the *Immigration and Refugee Protection Act* (see s.34(1)c)) but it has never been defined in immigration legislation.

21. Except, strangely enough, the offenses in s. 7 of the *Criminal Code* that Canada enacted some time before the passage of the *ATA* to implement the eight "terrorism" conventions listed at note 18, which are deemed to be "terrorist activity" and therefore "terrorism offenses" by the *ATA*.

22. Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) at 27.

23. *Ibid.*

24. The *Patriot Act* defines domestic terrorism as "acts dangerous to human life that are a violation of the criminal laws of the United States or any State that "appear to be intended to 1) intimidate or coerce a civilian population"; 2) to influence the policy of a government by intimidation or coercion; or 3) to affect the conduct of government by mass destruction, assassination or kidnapping ..." 18 USC s. 2331 (1) as amended by s. 802 of the *Patriot Act*. Federal crimes of terrorism are defined as a long list of existing offences that are committed with the intent " .. to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct". 18 USC s. 2332 (b) as amended by s. 808 of the *Patriot Act*.

25. Kent Roach, "The New Terrorism Offenses and the Criminal Law" in *The Security of Freedom*, *supra* note 10, 154 at 160.

26. The U.S. *Patriot Act* by contrast, prohibits the provision of material support or resources to terrorists, defined as training, lodging, financial services, weapons, transportation, physical assets (except religious materials and medicine). 18 USC s. 2339A as amended by s. 805 of the *Patriot Act*. The U.K. act makes weapons training, possession of articles that could reasonably be used in terrorism, and the collection of information to be used in terrorism, separate offenses. *Anti-*

terrorism Act, 2000 c.11, ss. 54, 57 and 58.

27. Kent Roach, "The New Terrorism Offences and the Criminal Law", in *the Security of Freedom, supra* note 10, 154 at 160.

28. *Ibid.*

29. Adopted by the General Assembly of the United Nations on December 9, 1999 and signed by Canada on February 10, 2000.

30. When Bill C-36 was first being considered in 2001, then Justice Minister Anne McLellan and her staff asserted that many of the provisions in it were necessary to implement Canada's obligations under the *Financing of Terrorism Convention*. See testimony of Anne McLellan and Mr. Donald Piragoff, Senior General Counsel, Criminal Law and Policy Division, Department of Justice, before the Special Senate Committee on the Subject Matter of Bill C-36, Monday, October 22, 2001.

31. Art. 2.

32. *Criminal Code*, s. 462.37.

33. David G. Duff, "Charitable Status and Terrorist Financing" in *The Security of Freedom*, *supra* note 10, 321 at 331.

34. John Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, 1971).

35. Oren Gross, "Cutting Down Trees", in *The Security of Freedom, supra* note 10, 39 at 45. [*Oren Gross.*]

36. *R. v. Controni* (1979), 45 C.C.C. (3d) 1 at 17 (S.C.C.).

37. *U.S.A. v. Dynar* (1997), 115 C.C.C. (3d) 385 at 401 (S.C.C.).

38. *R. v. Deutsch* (1986), 27 C.C.C. (3d) at 401 (S.C.C.).

39. Except that to be guilty of murder or attempted murder, the murder must have been actually foreseen by the accused who assisted or counselled the crime, *R. v. Logan* (1990), 58 C.C.C. (3d) 391 (S.C.C.).

40. Justice Dennis O'Connor, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Policy Review Consultation Paper, as amended December 14, 2004*, at 6. [*Arar Inquiry Policy Review Consultation Paper*].

41. Martin Friedland, "Police Powers in Bill C-36", in *The Security of Freedom, supra* note 8, 269 at 271. See McDonald Commission Second Report, volumes 1 and 2, *Freedom and Security under the Law*; Third Report, *Certain R.C.M.P. Activities and the Question of Government Knowledge* (Ottawa: 1981). [*Martin Friedland*]

42. Final Report of the U.S. Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, set up in January 1975.

43. *Martin Friedland, supra* note 41 at 271.

44. *Ibid.*

45. *Arar Inquiry Policy Review Consultation Paper*, *supra* note 40 at 6.

46. *CBA Submission*, *supra* note 11 at 29.

47. *Goodwin v. United Kingdom*, unreported, March 27, 1996, case number 16/1994/463/544.

48. Echelon is a secret program but information about it has been exposed in a 1996 book by Nicky Hager, entitled *Secret Power: New Zealand's Role in the International Spy Network* (Nelson, New Zealand: Craig Potton Publishing, 1996). See also, European Parliament, *Report on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI)*, Final A5-0264/2001 PAR 1, July 11, 2001.

49. See the evidence of the Minister of National Defense, Arther Eggleton, to the Special Senate Committee on October 25, 2001; see also s. 273.69 of the *National Defense Act* as amended by the *ATA*.

50. Overriding s. 273.64 (2) a.

51. *Martin Friedland*, *supra* note 41 at 276.

52. *Oren Gross*, *supra* note 35.

53. Specifically, the *Civil Authorities (Special Powers) Act (Northern Ireland)* of 1922 made permanent in 1933, and the *Prevention of Terrorism (Temporary Provisions) Act* of 1974, made permanent in 1989.

54. *Oren Gross*, *supra* note 35 at 48.

55. See Harold H. Koh and John C. Yoo, "Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law", 26 Inter'l Lawyer 715 at 742-46 (1992).

56. *Oren Gross*, *supra* note 35 at 49.

57. *Oren Gross*, *supra* note 35 at 50.

58. *Oren Gross*, *supra* note 35 at 50-51.

59. See "The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability", 52 S. Cal. L. Rev. 1453 at 1453 (1979).

60. *Oren Gross*, *supra* note 35 at 51.

61. *Oren Gross*, *supra* note 35 at 52.

62. See *Korematsu v. United States*, 323 U.S. 214 (1944) (U.S.S.Ct.); A.S. Mathews and R.C. Albino, "The Permanence of the Temporary: an Examination of the 90 and 180 Day Detention Laws", 83 South African Law Journal 16 (1996), examining *Rossouw v. Sachs*, 1964 (2) S.A. 551 (a). See also the South African Truth and Reconciliation Commission's *Final Report* on the role of judges and lawyers in permitting abuse to happen in the apartheid era.

63. A line from the cover page of *An Historical Review of the Constitution and Government of Pennsylvania,* produced under Benjamin Franklin's direction and used as propaganda while Franklin was in England petitioning the King.

VII. SUMMARY OF RECOMMENDATIONS

1. Repeal *ATA* amendments to the *Canada Evidence Act.* In particular:

- **repeal the new *CEA* categories of "potentially injurious information" and "sensitive information"**
- **repeal the new *CEA* provisions placing obligations on participants to notify the federal Attorney General about protected information**
- **repeal *CEA* s. 39.11 requiring mandatory *in camera* and *ex parte* hearings**
- **repeal *CEA* s. 38.02 which makes the fact of a notice, application, appeal, review or agreement with respect to information the government wants to keep secret, secret**
- **repeal *CEA* s. 38.12(2) which makes all court records relating to a hearing, appeal or review confidential**
- **repeal *CEA* s. 38.13 giving the federal Attorney General unfettered power to issues secrecy certificates**
- **repeal *CEA* s. 38.15 giving the federal Attorney General power to take over prosecutions initiated by the provincial Attorney Generals.**

2. Repeal *ATA* ss. 87, 103 and 104 which remove the application of the *ATIA,* the *Privacy Act* and *PIPEDA* when the federal Attorney General exercises his new power under s. 38.13 of the *CEA*.

3. Repeal *ATA* s. 16(2) amending s. 486(4.1) of the *Criminal Code* to allow publication bans on all "justice system participants" in "terrorism" trials.

4. Repeal Part 6 of the *ATA* enacting the *CRSIA* and making consequential amendments to the *ITA,* which create a regime for the deregistration of charities on the basis of secret evidence.

5. Repeal *ATA* s. 4 adding ss. 83.05 to 83.07 to the *Criminal Code* creating a regime whereby individuals and groups can be branded as "terrorists" on the basis of secret evidence.

6. Repeal all *ATA* amendments injecting a "terrorism" framework into the *Criminal Code.* Re-enact those amendments that create s. 7(3.72) and s. 431.2 of the *Criminal Code,* but without any reference to "terrorist activity" or "terrorism" – that is, in the same way that hijacking and other s. 7 offenses relating to the phenomenon popularly called "terrorism" were enacted in the past.

7. Repeal the investigative hearing provisions in ss. 83.28 and 83.29 of the *Criminal Code* as amended by the *ATA.*

8. Repeal the preventative arrest provisions in ss. 83.3 to 83.32 of the *Criminal Code* as amended by the *ATA.*

9. Repeal *ATA* s. 6 amendments to the wiretapping provisions of the *Criminal Code*.

10. Repeal *ATA* amendments to ss. 83.1 and 83.11 of the *Criminal Code* and to the *Proceeds of Crime (Money Laundering) Act,* which create new duties for individuals, businesses and social organizations to report "terrorist activity" to authorities and which provide for the mandatory dissemination of information to CSIS.

11. Repeal *ATA* s. 102 amendments to the *National Defense Act,* recognizing the Communications Security Establishment and expanding that entity's surveillance of Canadians.