

Executive Summary of the Canada Hearing
Ottawa and Toronto
24-26 April 2007

From 24-26 April 2007, the Panel, represented by Justice Arthur Chaskalson and Professor Robert K. Goldman, held a national Hearing on Canada. During two days of public Hearings in Ottawa and Toronto, the Panel heard from lawyers, academics, representatives of national and international human rights organisations, including Muslim and Arab community organisations, and persons directly affected by Canada's counter-terrorism measures since 9/11. While in Ottawa, the members of the Panel also held private meetings with the Minister of Public Safety, the National Security Advisor to the Prime Minister, the Chair of the Commission of Public Complaints against the Royal Canadian Mounted Police (RCMP) and senior officials and advisors to the Government of Canada, including representatives of the RCMP and military and security services.

1. Threat of terrorism and Canada's counter-terrorism strategy

Canada was faced with a serious threat of terrorism during the 1960s and 1970s when Quebec separatist groups such as the *Front de libération du Québec* (Quebec Liberation Front: FLQ) resorted to terrorist tactics such as bombings, kidnappings and killings. It has also experienced the bombing of the Air India Flight 182 in 1985, organised by Sikh separatist movements in India, which killed 329 people, including 280 Canadians. In the past, these incidents were largely dealt with by the use of ordinary criminal law.

Three months after the 9/11 attacks in the United States, however, Canada adopted the Anti-Terrorism Act (ATA) of 2001. The Panel was informed that the ATA, among other things, created a range of new terrorism offences and gave security agencies greater powers of investigation in terrorism-related cases, some of which significantly departed from ordinary rules. Many participants also noted that the ATA and Canadian counter-terrorism strategy post-9/11 had largely been geared toward prevention of terrorist acts, rather than their suppression. Because of the importance of intelligence for identifying terrorist threats and preventing any future terrorist attacks, this preventive approach has resulted in increased intelligence gathering activities, including through international intelligence cooperation and greater reliance on immigration and other administrative measures which are largely based on intelligence information.

During the private meeting with the Panel members, the Minister of Public Safety stressed the seriousness of the terrorist threat to Canada, noting that Canada is among the five countries listed as targets by al Qaeda and is also facing the threat of home-grown terrorism. He also affirmed that Canada has taken care to ensure that counter-terrorism measures were proportionate and justified and that the ATA has been reviewed by the Parliament in 2007.

Many representatives of civil society who gave evidence at the public Hearings recognised that Canada faced risks of terrorist attacks and that it was the right and duty of the State to protect its population against this threat. However, several participants criticised the rapidity with which the ATA had been passed, without careful examination of the adequacy of existing legislation and the impact on civil liberties. Concern was also raised that unlike the Emergencies Act of 1985 which

authorises exceptional measures on a temporary basis, the ATA had created a “permanent emergency” framework making extraordinary measures part of the ordinary legal system.

One of the major issues at the Hearing was secrecy and the lack of due process permeating many of the measures driven by a preventive counter-terrorism strategy. In particular, many expressed concerns that the increased reliance on intelligence-based measures in counter-terrorism was undermining the role of the criminal justice system, which, in their view, constituted the most legitimate and fairest way to deal with those suspected of involvement in terrorist activities. Some participants also highlighted the danger that a preventive security strategy would encourage the police and intelligence agencies to go overboard and resort to unlawful methods, as happened in the past while tackling Quebecois terrorism. While participants expressed divergent opinions regarding the extent of abuses, there was a broad consensus that there were inadequate safeguards against such a risk in respect of many of the Canadian counter-terrorism laws and practices adopted since 2001.

“Since the goals of prevention include the ability to assess, understand, and predict, there will be pressure to discover almost everything there is to know about our potential adversaries. (...) The more preventive our security operations become, the greater will be the risks to civil liberties. Our police and intelligence agencies will rely not only on hard evidence of the past and present, but also on soft speculation about the future. Small wonder that RCMP targets in the past included law-abiding, legitimate dissenters. Many Canadians remember with considerable disquiet, for example, the RCMP surveillance of the Parti Québécois and the Waffle faction of the New Democratic Party – both organisations committed to the democratic processes as their vehicle for change. Such indiscriminate police activity was likely fuelled by the focus on prevention.”
(Written submission by Alan Borovoy, Canadian Civil Liberties Association)

2. Changes in criminal law

The ATA introduced a range of terrorism offences, some of which were criticised as vague and/or overbroad. Many considered that this creates not only a risk of arbitrary and discriminatory application but also has chilling effects on the exercise of rights and freedoms of citizens, even in the absence of its enforcement.

Definition of “terrorist activity”

According to 83.01 (1)(b) of the ATA, the definition of a “terrorist activity” in the Criminal Code consists of three key elements: (a) an act or omission that intentionally causes one of the harms listed; (b) a “political, religious or ideological purpose, objective or cause”; (c) “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 organisation to do or to refrain from doing any act.” Some participants expressed concerns about the breadth of this definition, in particular, the inclusion of acts or omissions causing “serious interference with or serious disruption of an essential service, facility or system, whether public or private” as underlying acts and attempts to compel a “person” to act as the purpose. In their view, this created a risk of application to legitimate acts of protest and demonstration by groups such as anti-globalisation, animal rights and Aboriginal groups, which should not be characterised as terrorism.

Several participants also criticised the inclusion of a “political, religious or ideological purpose, objective or cause”¹ as one of the constitutive elements of a “terrorist activity”, arguing that this had encouraged political and religious profiling. As an example, reference was made to the “Project Thread”, a joint investigation led by the Royal Canadian Mounted Police (RCMP) and the Department of Citizenship and Immigration Canada (CIC), leading to the arrests of 24 South Asian men in August 2003.² While they were publicly identified as suspected terrorists, it soon became clear that the suspicions were based on flimsy evidence and stereotypes and all allegations of terrorism were dropped within two weeks of the arrests. However, the government issued no public disclaimer or apology and prejudicial media reporting referring to them as suspected terrorists continued. Many of them were subsequently deported for immigration violations to Pakistan where some were reportedly subjected to intense interrogation upon arrival and surveillance by the Pakistani authorities. Janet Dench from the Canadian Council for Refugees stressed that this case illustrated how the terrorist label, once applied, tended to remain attached to the persons and could ruin their lives. It was also noted that this type of operation had a broader impact on South Asian, Muslim and Arab communities in Canada, contributing to their heightened sense of vulnerability to discrimination.

Some recognised the value of retaining an element of motivation to distinguish terrorist crimes from other crimes. Others argued that the element of “intention to intimidate the public...” was sufficient, noting the absence of a motivation element in the definitions of terrorist act/activity under universal terrorism conventions and many foreign counter-terrorism laws. It was also argued that the probative value of such evidence was minimal in a world of wide spread political and religious grievances, while its prejudice to the accused, particularly in jury trials, could be significant. Many thus welcomed the October 2006 ruling of the Superior Court of Ontario in the *Khawaja* case, which had struck down the motivation requirement as an unjustified violation of freedom of expression, association and religion under the Canadian Charter of Rights and Freedoms (Canadian Charter).³ As an alternative, some expressed preference for the definition of a “terrorist act” in the International Convention for the Suppression of the Financing of Terrorism.⁴ The Panel was informed that since its endorsement by the Canadian Supreme Court in the *Suresh v. Canada* case in 2002, this definition has been used for interpreting the provisions under immigration law relating to inadmissibility of foreign nationals on the grounds of engagement in “terrorism”.⁵

¹ Section 83.01(1)(b)(i)(A) of the ATA.

² The operation was labelled a “Project Thread” because the men were seen to be connected by a common thread: all bore the name “Mohammed” in one form or another, were under 30, had previously been, or were studying in the same business school in Toronto, and except for one man, came from Punjab in Pakistan, considered as a “hotbed of extremism and Talibanisation” by the RCMP.

³ Ontario Superior Court, *R. v. Khawaja* [2006] O.J. No 4245.

⁴ Article 2 (1) of the International Convention for the Suppression of the Financing of Terrorism criminalizes financing of: “(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

⁵ The Supreme Court in *Suresh* stated that: “While there is no authoritative definition of the term “terrorism” as found in s. 19 of the Immigration Act, it is sufficiently settled to permit legal adjudication. Following the International Convention for the Suppression of the Financing of Terrorism, “terrorism” in s. 19 of the Act includes any act intended to cause death or bodily injury to

"Members of our organisation as well as others in the Muslim and Arab communities report that security agencies and police routinely inquire into the private religious practice, devotional habits and political convictions of those under investigation. (...) Religious motive also contributes to an insidious creep of profiling against Muslims and Arabs in Canada. (...) If faith is a prerequisite for criminal offences, law enforcement agencies may easily slip into the habit of using faith as a proxy for suspicion of criminality. Very simply, profiling is lazy policing because it substitutes bias and prejudice for sophisticated investigations and objective evidence-based risk assessments. Not only are there devastating consequences for those subject to profiling, but also in the final analysis, valuable resources intended to enhance the safety of Canadians are wasted on wild goose chases."

(Oral testimony by Ziyaad Mia, Canadian Muslim Lawyers Association)

Ancillary terrorism offences

The ATA also created a number of new offences, including participating in or contributing to an activity of a "terrorist group" to enhance the ability of a "terrorist group" to facilitate or carry out a "terrorist activity", recruiting a person to receive training, facilitating a "terrorist activity", instructing a person to carry out such activities, and acting for the benefit of or at the direction of a "terrorist group". Concern was expressed that charities could unwittingly commit the offence of "facilitating a terrorist activity"⁶ without intending to directly or indirectly support any terrorist activity, for instance, through supporting humanitarian activities in conflict areas. Several participants argued that even in the absence of its enforcement, the law has had a chilling impact on charitable activities in Canada.

Investigative hearings and recognizance with conditions

The ATA introduced two special procedures for investigation and prevention of terrorist offences: "investigative hearings" to compel a person to provide information on a terrorist offence⁷ and "recognizance with conditions", allowing arrest and detention up to 72 hours without judicial warrant for the purpose of preventing a terrorist activity.⁸ The Panel was informed that these two powers,

a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act." See, *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1.

⁶ Section 83.19 provides the offence of facilitation as follows:

"(1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this Part, a terrorist activity is facilitated whether or not

(a) the facilitator knows that a particular terrorist activity is facilitated;

(b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or

(c) any terrorist activity was actually carried out."

⁷ "Investigative hearings" allowed a peace officer to apply to a judge for an order requiring a person to provide information, or anything in his or her possession, in relation to a terrorism offence that has been, or may be, committed. His or her statements may not be used in any criminal proceeding against him or her, except for a prosecution for perjury or giving false evidence. Section 83.28-29 of the ATA.

⁸ "Recognizance with conditions" (more commonly called preventative arrests), allowed a peace officer to make an arrest where he or she believes on reasonable grounds that a terrorist activity will be carried out; and (b) suspects on reasonable grounds that the imposition of a "recognizance with conditions" on a person, or the arrest of a person, is necessary to prevent the carrying out of the

widely considered as a significant departure from the ordinary system, were rarely or never used. Many participants welcomed the fact that in February 2007, the House of Commons voted against the renewal of these powers, leaving them to lapse pursuant to the 5-year sunset clause.

3. Protection of classified information

Many participants argued that because of the importance attached to intelligence and the reliance of Canada on foreign States to obtain intelligence, often on condition of confidentiality, Canadian counter-terrorism laws and policies have been characterised by what one participant called an “obsession with secrecy”.

As an example, reference was made to the amendments to the Canada Evidence Act (CEA) which regulates the rules of evidence applicable to all criminal, civil and other proceedings under federal jurisdiction, introducing new and broader categories of information that could be withheld from disclosure to the party concerned. These included: “potentially injurious information,” which is defined as information that, if disclosed, “could injure international relations or national defence or national security”; and “sensitive information,” 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 of Canada is taking measures to safeguard.”⁹ Some participants criticised these definitions as too broad, noting that they could encompass cases where the government seeks to avoid revelations about human rights violations by Canada or foreign States.

The amendments also provided a complex appeal mechanism regarding the non-disclosure of evidence. The party in possession of sensitive information may first apply for its non-disclosure before the Chief Justice of the Federal Court or a designated judge, who would examine whether the information falls within one of the above categories and whether “the public interest in disclosure outweighs in importance the public interest in non-disclosure.”¹⁰ Even if the court orders the disclosure, however, the Attorney General may issue certificates that would override such court orders for the purpose of “protecting information obtained in confidence from, or in relation to, a foreign entity (...) or for the purpose of protecting national defence or national security.”¹¹ While the certificate may then be challenged before the Federal Court of Appeal, the judge determines that all of the information subject to the certificate indeed relates to information “obtained in confidence from, or in relation to a foreign entity (...) or to national defence or security”, the certificate must be confirmed regardless of the level of the public interest in its disclosure.¹²

Once the certificate is confirmed, civil proceedings would have to proceed without the withheld information. In the case of criminal proceedings, it falls on the presiding trial judge to decide whether to proceed with or stay the proceedings in

terrorist activity. If satisfied by the evidence supporting the suspicion, the judge may impose certain conditions on the person, such as having no contact or communication with specified persons, for a maximum period of 12 months. Section 83.3.

⁹ Section 38 of the ATA.

¹⁰ Section 38.06 of the ATA.

¹¹ Section 38.13 of the ATA.

¹² Section 38.131 (10) of the ATA.

light of the accused's right to a fair trial.¹³ Some participants, however, expressed doubts as to the effectiveness of this safeguard in ensuring a fair trial because trial judges who have not seen the information in question would have difficulty in assessing its importance to the defence. It was suggested that instead of having a hearing before a different court, trial judges, who are familiar with the case in question, should be allowed to balance and reconcile competing interests concerning disclosure. It was argued that this would also avoid disruption of trials by having separate hearings on disclosure before federal courts.

"(...) The more critical point, however, is whether even if the powers of the state could be restrained in some acceptable way, the changes to the CEA will, over the long run, result in a normalisation of a deeper shift in our thinking about privilege. (...) if it becomes acceptable to build into the law so many protections for state secrets – and to make it easier to assert privilege over something as nebulous as 'national security' (a term not defined in any federal legislation), at what point will the principle of holding a full trial in open court cease to mean anything? Even if charges were stayed more frequently in this context, in many cases the cloud of suspicion would linger over the wrongfully accused indefinitely – and with no recourse."

(Written submission by Robert Diab, University of British Columbia)

4. Increased intelligence gathering

Several participants raised concerns about the increased surveillance and other intelligence gathering activities, without adequate oversight and accountability mechanisms.

The Panel was informed that security intelligence gathering had been part of the mandate of the RCMP until 1984 when the Canadian Security Intelligence Service (CSIS), a civilian intelligence agency, was created in 1984 pursuant to the recommendation of a judicial inquiry that there be a clear separation between the powers of law enforcement and intelligence agencies. However, the expansion of intelligence gathering powers under the ATA and intelligence-led law enforcement strategy adopted since 2001 have blurred the distinction between the two agencies. For example, the ATA authorised the police to employ wiretaps and electronic bugs for a number of terrorism-related offences for a period of one year, in contrast with 60 days for many other offences.¹⁴ This was criticised for effectively reducing judicial supervision of one of the most intrusive investigatory techniques.

It was also noted that while similar activities by the CSIS are subject to independent oversight by the Security Intelligence Review Committee (SIRC), there are no equivalent mechanisms in respect of the police to safeguard against abuses. As an example, Bob Stevenson from the Canadian Unitarians for Social Justice noted that the RCMP and local police forces had engaged in surveillance through videotaping at public rallies, which he considered was a form of intimidation against lawful protestors. It was also argued that the RCMP's lack of expertise in collecting and analysing security intelligence had led to improper choice of targets and conclusions.

Ziyaad Mia from the Canadian Muslim Lawyers Association also pointed to the emergence of a pattern of "soft abuse" of terrorism powers by law enforcement and

¹³ Section 38.14 of the ATA

¹⁴ Section 186.1. of the Criminal Code as amended by the ATA

intelligence agents to collect information. He argued that many immigrants or residents have been questioned and forced into cooperation by the police or intelligence agents, without being fully apprised of the exact scope of their rights and the agents' powers under terrorism legislation. It was noted that most victims of this "soft abuse" tended to refrain from speaking about their experiences, due to the fear of reprisals, the social stigma of being associated with "terrorism" or lack of confidence in the official complaints system. The Panel heard that such practices had largely taken place outside the purview of official statistics concerning national security activities, contributing to the culture of impunity in the security apparatus.

5. Increased intelligence cooperation and the risk of abuses

One of the major issues at the Hearing was increased intelligence cooperation in counter-terrorism between Canada and foreign States, including those known for systematic violations of human rights. In particular, many participants raised serious concerns that this trend had led Canada to become complicit in serious human rights violations in various instances.

The Panel heard details of one emblematic case, that of Maher Arar, from his lawyer, Lorne Waldman. Mr. Arar is a telecommunications engineer with dual Canadian-Syrian citizenship. The Project A-O, an investigative unit of the RCMP created in the aftermath of the 9/11 attacks,¹⁵ wished to interview him as a "person of interest", due to his associations with some suspected members of al Qaeda. Following his refusal to be interviewed without a lawyer, the Project requested the US authorities to place Mr. Arar on a border watch list, describing him as an Islamic extremist suspected of having links to al Qaeda, despite the lack of evidence supporting such allegations.

While passing through J.F.K. Airport in New York on his way back to Montreal from Zurich, Arar was arrested and detained for 12 days by the US authorities. Despite his expressed fear of torture, he was then deported to Syria, reportedly on the basis of diplomatic assurances by Syria that he would not be ill-treated. During the first two weeks of detention by the Syrian Military Intelligence (SMI), he was held *incommunicado*, and subjected to physical beatings, as a result of which he "confessed" to having connections to al Qaeda. He was detained for nearly a year before released back to Canada. After the revelations, the Canadian Government launched an official commission of inquiry into the case, headed by Justice Dennis O'Connor. The inquiry found no evidence linking Arar to terrorist activities and concluded that the RCMP provided the US authorities with inaccurate and inflammatory information, which is very likely to have formed the basis of the US decision to remove Arar to Syria.¹⁶

¹⁵ Project A-O Canada was the investigative unit of the RCMP that conducted the investigation that in time involved Maher Arar. Created in the aftermath of the September 11, 2001 terrorist attacks, the Project was directed to carry out an investigation, centred in Ottawa, into the activities of Abdullah Almalki, a person suspected of being associated with al-Qaeda. The Project was also charged with investigating any leads about the threat of a second wave of attacks after the events of 9/11. In the months that followed, the scope of the Project's investigation expanded to include new information that it received about other individuals and activities.

¹⁶ Commission of Inquiry into the Acts of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (hereinafter: Arar Inquiry report), September 2006. Arar subsequently received official apologies from the Prime Minister and financial compensation from the Canadian government. Office of the Prime Minister, Letter of apology to Maher Arar and his family by the Prime Minister of Canada Stephen Harper, 26 January 2007.

Amnesty International also highlighted the fact that there had been other cases where Canadians suspected of terrorism links had been detained and tortured abroad with alleged complicity of Canadian authorities. For example, the Panel was informed that three other Canadian citizens, Abdullah Almalki, Ahmed El Maati and Muayyed Nureddin, were all detained and tortured in the same detention centre in Syria where Arar was held in and around the same time period.¹⁷ It was alleged that there were indications of significant Canadian involvement in each of these cases. The Panel learnt that such allegations had led the Canadian authorities to launch in December 2006 another commission of inquiry, overseen by the former Supreme Court Chief Justice Frank Iacobucci, to examine the role of Canadian officials in these three cases.¹⁸

Several participants also raised serious concerns that Canadian security agencies were turning a blind eye to torture committed by foreign agencies and receiving information obtained by such abuses. For example, Paul Copeland, a lawyer who has represented Abdullah Almalki and Ahmed El Maati as well as Mohamed Harkat, and Mahmoud Jaballah, two subjects of “security certificates” (the regime of immigration detention on security grounds as discussed further below), stated that part of the evidence against Harkat provided by the CSIS was a testimony from Abu Zubaida, allegedly detained in a secret detention facility in Syria, which is known to systematically practice torture. He pointed out that in the course of the Harkat’s bail hearing, CSIS agents appearing as government witnesses had admitted that they had taken no steps to ascertain whether information provided by foreign agencies had been obtained by torture. Furthermore, despite many reports of widespread and systemic use of torture in Syria and Egypt, they refused to acknowledge that Syrian and Egyptian officials use torture.

Nehal Bhuta from Human Rights Watch also discussed the case of Omar Khadr, a Canadian national detained at the detention facility in Guantánamo Bay without trial since he was captured in Afghanistan at the age of 15 in 2002. Mr. Khadr had no access to a lawyer for two years, was not segregated from older detainees, and was allegedly subjected to torture and other ill-treatment. He has been charged with war crimes before a US military commission in connection with acts committed as a minor, despite the fact that international standards call for social reintegration, rather than punishment, of child soldiers.¹⁹ Mr. Bhuta criticized the fact that unlike the UK and Australian governments vis-à-vis their nationals detained at Guantánamo Bay, Canada had failed to take serious steps to ensure that Khadr’s

¹⁷ Ahmed El Maati was also sent on to Egypt, where he continued to face torture and other human rights violations.

¹⁸ The report of this inquiry was released subsequent to the Hearing in October 2008. According to the report, it is reasonable to infer that action by the Canadian RCMP had resulted indirectly in maltreatment amounting to torture of Almalki by Syrian officials. It also found in respect of El Maati and Nureddin that actions of Canadian officials, including the sharing of information by the CSIS and/or RCMP with foreign intelligence services, have indirectly resulted in their detention and/or mistreatment amounting to torture in Egypt and/or Syria. See *Public Report of the Internal Inquiry into the actions of Canadian Officials in Relation to Abdulla, Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin*, the Honourable Frank Iacobucci, Q.C. 21 October 2008. pp. 35-39.

¹⁹ Article 6(3) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict provides: “States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” The Protocol has been ratified by both the US and Canada.

rights be respected by the US, and to have him return to Canada, if appropriate, for a trial. He pointed out that in March 2003 Canada had even sent CSIS officials to interrogate Mr. Khadr in Guantánamo Bay. The interrogation took place after he was allegedly ill-treated by the US authorities.

During the private meeting with the Panel members, the National Security Advisor to the Prime Minister pointed to the dilemma of Canada being a “net importer” of intelligence and argued that the reality requires that Canada deal with countries with questionable human rights records. While many participants at the Hearing recognised the importance of intelligence cooperation, they expressed concerns regarding the lack of transparency and inadequate safeguards against abuses. It was pointed out that the agreements on information sharing are usually not subject to public scrutiny and are not vetted by the legislature. It was noted, for example, that the 2004 Smart Borders Agreement between the US and Canada provided the basis for information sharing that led to Mr. Arar’s ordeal.

Many participants thus stressed that, as recommended by the Arar Commission, there must be clear and transparent rules and regulations as well as independent and effective oversight mechanisms governing international intelligence cooperation.²⁰ This is important not only to prevent unlawful access, retention and use of personal information but also to prevent Canada from becoming complicit in human rights violations by other States. Some participants thus regretted that the Canadian Government has not taken concrete action to implement the recommendations by the Arar Commission on these issues.

“(One) lesson from the Arar experience is the need for oversight. The reality of this world is that the intelligence agencies are going to operate and they are going to operate to a large extent in the shadows. Most of us are not gonna be aware of what they are doing. What really terrifies me about Arar’s experience is that the intelligence apparatus are making a whole series of human rights decisions on behalf of our society without any consultation or debate. (...) When you look at what happened in Arar, they (CSIS agents) had no problem receiving the statements from the Syrian military intelligence which they ought to have known or they knew were obtained under torture and then relying on them. They are making these types of decisions as to what type of information they will share, whom they share it with, without really having debate on whether it is appropriate or not. To the extent that much of what happens in the intelligence world happens in the shadows, it is vital that there be independent, robust oversight mechanism that holds the intelligence agencies accountable.”

(Oral testimony by Lorne Waldman, Barrister and Solicitor, Canadian Bar Association)

6. Reliance on immigration measures

The Panel was told that Canada leans heavily toward deportation as a strategy to deal with individuals perceived to be a security threat because immigration proceedings are governed by lower substantive and procedural standards. Many participants at the Hearing questioned the legitimacy of such a strategy and expressed serious concerns, in particular regarding inadequate due process and the discriminatory and disproportionate impact on non-citizens.

“Security certificates”

²⁰ See Chapter IV of the Arar Inquiry report.

The “security certificates” regime was a subject of extensive discussion at the Panel’s Hearing. The regime, in place in various forms since 1976, allows detention without charge or trial of non-citizens, including permanent residents, pending deportation on broad security grounds. The present regime was established under the Immigration and Refugee Protection Act (IRPA), adopted shortly before 9/11. It has been used against six individuals since 2001 until the 2007 Supreme Court decision in the *Charkaoui* case which found several aspects of the regime unconstitutional and gave the Parliament one year to modify the regime.²¹

Under the IRPA, two federal ministers can issue a certificate declaring that a foreign national or permanent resident is inadmissible on the ground of security. Inadmissibility to Canada on security grounds is established where there are reasonable grounds to believe that the person engages, has engaged or will engage in acts of terrorism. The certificate is then referred to a designated judge of the trial division of the Federal Court, who determines whether the certificate is reasonable. In the meantime, foreign nationals (non-permanent residents) named in the certificate are subject to mandatory detention while detention of permanent residents may be detained on the basis of a warrant issued by two Ministers. Until the *Charkaoui* decision, foreign nationals were not entitled to review of detention for six months after the determination of reasonableness, in contrast with permanent residents who were entitled to periodic reviews of detention.

Many participants criticised various aspects of this regime. Firstly, while the IRPA on its face contemplates temporary detention pending deportation, there is no legal limit on the maximum period of detention. This effectively allowed indefinite detention of non-citizens where they could not be deported to their country of origin because of the risk of torture upon return. This was indeed the case for most of the six subjects of “security certificates” since 2001. Secondly, while the reasonableness of the certificate and the grounds for detention are subject to judicial review, the process is characterized by the use of secret evidence and *ex parte* hearings.²² It was argued that judges would be unable to assess the strength of government information in the absence of an effective adversarial challenge.

Many thus welcomed the Supreme Court decision in the *Charkaoui* case, which found the regime in violation of the Canadian Charter on the grounds that it failed to give the detainees an effective opportunity to rebut the allegations against them and that it prevented judicial review of detention in respect of a foreign national for six months. Following the ruling, most of the individuals who had been detained on the basis of “security certificates” were released, albeit with strict conditions and limitations on their freedoms.

At the public Hearing in Ottawa, the Panel received a direct testimony from the

²¹ Supreme Court of Canada, *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, 23 February 2007. Following the Hearing, on 14 February 2008, the Canadian Parliament adopted Bill C-3 amending the IRPA to introduce more safeguards and due process, just before the deadline of one year given by the Court.

²² The Minister can withhold information that in his opinion, would be “injurious to national security or endanger the safety of any person if disclosed” and is only required to provide a summary of the information that enables the person to be reasonably informed of the case against him. Moreover, the judge has the discretion and if requested by the Minister, the obligation to hold *ex parte* proceedings if, in the judge’s opinion, the disclosure of information could be injurious to national security or endanger the safety of any person.

claimant of this landmark case, Adil Charkaoui. In May 2003, Mr. Charkaoui, a permanent resident from Morocco, was served with a certificate stating that he was a member of Al-Qaeda, on the basis of which he was detained for 21 months until February 2005. He stated that he was still prevented from leading a normal life because of 24 conditions attached to his release, including the prohibition on leaving his home without designated chaperones and the requirement to wear a GPS bracelet. In order to attend the Panel's Hearing in Ottawa, he was obliged to obtain special permission pursuant to one of such conditions that limits his movement to the Island of Montreal.

He expressed particular frustration at the secrecy surrounding the process. Out of 400-page "public" evidence provided to him, only 14 pages refer to him, most of which does no more than explain how he fits the stereotype of an al Qaeda sleeping agent, i.e. he is Arab, Muslim, educated, married with three children, self-employed, practicing martial arts and having "contacts" at his mosques. According to the investigations conducted by journalists, the testimonies of two witnesses forming part of secret evidence against him might have been obtained by torture in Morocco and have publicly been retracted by those witnesses. In addition, the total of six-hour interviews he gave to the CSIS, which constitute part of the evidence against him, are now deemed secret and he is privy to only a one paragraph summary of the notes taken by CSIS agents. He also noted that it has been revealed that the recordings and notes of two out of five interviews had been destroyed by the CSIS.

"Today I am still free, but under draconian conditions. I wear a GPS tracking bracelet to my right ankle and I have to respect 24 conditions, among others, a curfew, I am not allowed to leave the Island of Montreal without special permission, and I cannot leave my house unless accompanied by my father, my brother or my brother-in-law. The list is long and I am not going to enumerate them all. The list is not only long but also unfair because I have never been a dangerous person, I was never found guilty of any crime, and I was never charged before a tribunal. I think these conditions, that I scrupulously respect, are a grave breach of my human rights. (...) I have been subjected for more than two years to conditions that prevent my family and myself to have a normal and dignified life...."
(Oral testimony by Adil Charkaoui, original in French, translated by the ICJ)

Many representatives of civil society argued that indefinite or prolonged detention of non-citizens without charge or trial was inherently discriminatory and inconsistent with the Canadian Charter and/or international human rights law. Several participants thus expressed disappointment that the Canadian Supreme Court did not find the regime of "security certificates" allowing indefinite detention of non-citizens as such unlawful.²³ They contrasted this decision with the UK House of Lords' decision in 2004, which had struck down a similar scheme under the UK law as discriminatory and disproportionate.²⁴ There was also criticism of the Court's failure to address the lack of the possibility to appeal "reasonableness" decisions by designated judges, the broad grounds for the imposition of "security certificates", and the low evidentiary threshold of "reasonableness". Concern was expressed that, rather than leading to a system favouring a full criminal trial, the *Charkaoui* decision might create a "legal grey hole", where there exists some, but not enough, human

²³ The Court rejected Mr. Charkaoui's claim relating to discrimination on the grounds that "the Charter specifically allows for differential treatment between citizens and non-citizens in deportation matters. *Charkaoui, op.cit.*, para. 129.

²⁴ *A (FC) and others (FC) v. Secretary of State for the Home Department; X (FC) and another (FC) v. Secretary of State for the Home Department*. [2004] UKHL 56.

rights protections.

During the private meeting with the Panel, the National Security Advisor to the Prime Minister admitted that prolonged detention on the basis of intelligence, which is less reliable than criminal evidence, was undesirable. However, she stressed the difficulty in finding the appropriate approach when the Government obtains intelligence indicating a threat posed by certain individuals but that intelligence does not satisfy the evidential standards for criminal trials or comes from confidential sources. She also stressed that the “security certificate” system has been used in only a limited number of cases. Some members of civil society also took the view that the maintenance of the “security certificate” regime with better guarantees of due process was preferable to its complete abolishment.

As regards the methods to improve due process, many participants expressed serious reservations about the proposed introduction of the “special advocate” system similar to that operating in the UK.²⁵ Under this system, a security-cleared lawyer, who would not have an ordinary lawyer-client relationship with the person concerned, would be given access to withheld information and represent their interests in *ex parte* proceedings. While the Supreme Court in *Charkaoui* mentioned this system as one of the possible methods to improve the current regime²⁶, many considered it insufficient to alleviate the unfairness of using secret evidence, particularly because “special advocates” are prevented from communicating with the affected party after seeing the secret evidence. It was argued that there were better approaches to deal with sensitive information that had already been successfully tried in Canada. One option is to disclose all evidence to the individuals’ own lawyers, on condition that they make undertakings not to disclose to their clients, as was done in the trial of the Air India bombings. Another is to appoint an independent counsel who would look at the evidence and then question the affected party on the basis of the information contained in the secret evidence, as was done in the Arar inquiry. Many stressed that to ensure effective representation, any “special advocates” scheme must allow for continued interaction between special advocates and the affected party, which is lacking in the UK system.²⁷

“On the issue of special advocates, I think we have two models in Canada which are better than the British special advocates. First, the model used during the Air India prosecution where there were undertakings by the defence counsels that they would take the first look at the evidence, not disclose it to their clients, and then decide what would be relevant to fully answer. You might add a security clearance for the defence lawyers. But this would allow a person familiar with the case to look at the evidence. Second, the model used in the Arar commission. (...) It was security cleared commission counsels who saw the secret evidence, then sat down with Mr. Arar and his counsel and asked questions without revealing secret, but trying to confirm the evidence. For example they were asking questions like “Where were you in October 1993?”, which doesn’t reveal how Canada obtained the

²⁵ The creation of a “special advocate” system was part of the UK’s response to the 1996 decision of the European Court of Human Rights, which found the UK immigration proceedings in violation of the European Convention on Human Rights. Grand Chamber Judgment of 15 November 1996, *Chahal v. the United Kingdom*, Application No 22414/93, paras. 121-133.

²⁶ *Charkaoui, op.cit.*, para. 80-84.

²⁷ Bill C-3 adopted in February 2008 introduced the system of special advocates under the IRPA. According to Section 85.4 (2), after secret information is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge’s authorization and subject to any conditions that the judge considers appropriate.

information that the person was in a training camp. But if the person answers that he was visiting his aunt, it allows to have doubts about the evidence. Those are better alternatives to the British system."

(Oral testimony by Kent Roach, Professor of Law, University of Toronto)

Deportation of non-citizens on security grounds

In addition to the "security certificates" regime, several participants criticised the regime related to the inadmissibility of non-citizens on security grounds under the IRPA. Persons found inadmissible on security grounds are ineligible to have a claim to refugee status considered, are denied permanent or temporary residence in Canada and lose any such status that they already have, without the right of appeal against such decisions normally available to persons facing a loss of status. The Panel heard that the grounds for inadmissibility were broadly worded, such as being a "threat to the security of Canada" and a "member of an organisation that carries out terrorist acts", including unknowingly associating with someone suspected of being involved in a "terrorist" group.²⁸ Moreover, for a person to be found inadmissible, it is sufficient that there be "reasonable grounds to believe" that the facts on which the inadmissibility is based "have occurred, are occurring or may occur" some day in the future.²⁹ It was argued that such provisions could cover even all past and current members of Nelson Mandela's party, the African National Congress (ANC), as well as any former member of an organisation who left that organisation when it started to use violent methods.

Concern was raised that the broad scope of inadmissibility also allowed its selective application. Janet Dench from the Canadian Council of Refugees noted that a few years ago, an immigration official informed them that the Government had decided not to apply the security inadmissibility bar to regular members of the Kosovo Liberation Army (KLA), but only to the leaders, on the basis that Kosovar men had little practical choice but to join the KLA. Other people, in objectively similar situations, however, would not receive the same favourable treatment. It was also argued that the risk of arbitrariness was heightened because security inadmissibility is determined by immigration officers on the Immigration and Refugee Board (IRB), who generally have no specialised training in the area of security and who sometimes rely on information from sources of dubious reliability, such as newspaper articles and the Internet.

Several participants also highlighted the fact that as in the proceedings relating to "security certificates", the procedural rules in an admissibility hearing allow the use of secret evidence and *ex parte* proceedings. Mr. Raoul Boulakia, a private lawyer who has been practicing immigration law, affirmed that since 2001 the reliance on secret evidence in these proceedings has become prevalent, making it more difficult

²⁸ Section 34 of the IRPA provides: "(1) A permanent resident or a foreign national is inadmissible on security grounds for: (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c). (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest."

²⁹ Section 33 of the IRPA.

to rebut the allegations brought against non-citizens. He cited, as an example, the case of Ms. Amparo Torres, a trade union activist from Colombia and permanent resident in Canada. Ms. Torres has been found inadmissible based on the allegation that she was a member of the Revolutionary Armed Forces of Colombia (FARC). According to Mr. Boulakia, evidence disclosed to her largely consists of news articles and publications, none of which is relevant to the question of whether she is indeed a member of the FARC. While other evidence is suspected of having been provided by the Colombian security forces, the Canadian Government has refused to disclose it or its sources to her, preventing her from effectively rebutting allegations against her.

It was also pointed out that while security inadmissibility provisions do not lead to automatic detention or imminent deportation as in “security certificate” cases, they affect a much larger group of people in Canada and overseas, forcing them to wait for years in a legal limbo based on unsettled allegations of security concerns.

“It is impossible for a political exile to properly defend against accusations where secret evidence is relied on. She (Ms. Torres), who knows the political and personal context of her accusers, cannot question them or call them into doubt. She cannot properly instruct her lawyer. She cannot help but feel re-victimized by the state that persecuted her, in her supposed country of asylum. (...) It is impossible for an exile community to take part in a democratic nation’s discourse, or to call for peace and human rights in its home, when the long arm of their nation’s repression extends under cover of secrecy, to Canadian prosecutions.”

(Oral testimony Raoul Boulakia, Lawyer of Amparo Torres)

Deportation to torture, including on the basis of “diplomatic assurances”

Many participants expressed strong criticism that due to the reliance on deportation as a major counter-terrorism tool, Canada has adopted law and policies that allow deportation even where there is a real risk of torture or other serious human rights violations upon return, in violation of the absolute principle of *non-refoulement*.

The Panel was informed that the Immigration and Refugee Protection Act (IRPA) provides for an exception to the ban on *refoulement* in respect of persons deemed not deserving of refugee protection, allowing the risk to such persons upon removal to be balanced against the danger to the public or to the security of Canada.³⁰ While these provisions have been challenged before the Canadian Supreme Court, in its 2002 decision in *Suresh v. Canada*³¹ the Court did not exclude the possibility that deportation to face torture might be justified “in exceptional circumstances”.

Many participants also raised serious concerns regarding the Government’s reliance upon “diplomatic assurances” to deport non-citizens to countries where there is an acknowledged risk of torture. Diplomatic assurances are non-binding bilateral

³⁰ Section 113 (d) of the IRPA.

³¹ The Court held: “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified. Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under section 7 of the Charter generally precludes deportation to torture when applied on a case by case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.” *Suresh v. Canada, op.cit.*, para. 78.

agreements whereby the receiving country promises not to torture the person upon return. Many participants took the view that diplomatic assurances are difficult to enforce and incapable of providing adequate protection against ill-treatment on the grounds, *inter alia*: (a) even where they provide for post-monitoring of deportees' conditions, torture is difficult to detect because it is typically practiced in secret and often unreported by the victims for the fear of reprisals³²; (b) neither the sending nor receiving state has any incentive to acknowledge or investigate allegations of torture; (c) there are no mechanisms to hold either the sending or receiving government accountable for a breach of diplomatic assurances. It was pointed out that the Supreme Court in *Suresh* has also expressed serious reservations about the use of diplomatic assurances where there is a risk of torture upon return.³³

Julia Hall from Human Rights Watch also pointed out that the use of "diplomatic assurances" was seeping into ordinary asylum and deportation cases beyond national security cases. Reference was made to the case of Lai Cheong Sing, a Chinese asylum seeker accused by the Chinese authorities of smuggling and bribery. Notwithstanding the fact that co-defendants in his case had already been executed and family members of the co-defendants ill-treated in China, the Canadian Government sought to deport him on the basis of diplomatic assurances provided by the Chinese Government.³⁴

Many participants criticised the fact that Canada has refused to change its law and practice despite the recommendations by the UN treaty bodies, such as the Human Rights Committee and the Committee against Torture (CAT). In the case of Bachan Singh Sogi, an Indian national and alleged member of a Sikh terrorist group, Canada deported him to India in July 2006, in defiance of the request by the CAT to suspend his removal pending its decision on the merits of his case.³⁵ Many participants strongly advocated that Canadian law and practice be changed to fully respect the absolute prohibition on *refoulement*.

Legitimacy of using deportation as a counter-terrorism strategy

During private meetings with the Panel members, the Minister of Public Safety stressed that the Government had a responsibility to prevent Canada from becoming

³² As an example, Human Rights Watch quoted the testimony of Maher Arar regarding the visits he had received by Canadian officials while detained in Syria: "I could not say anything about the torture. I thought if I did, I wouldn't get any more visits or I might be beaten again...The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits, I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there." See Maher's statement to the media on November 4, 2003, available at <http://www.maherarar.ca/mahers%20story.php>

³³ The Court said: "It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable." *Suresh*, *op.cit.*, para. 124.

³⁴ Acknowledging the pervasive practice of torture and the use of the death penalty in China, a federal court halted Lai's imminent deportation in June 2006. Federal Court of Canada, decision of 1 June 2006, *Lai Cheong Sing v. Minister of Citizenship and Immigration*, 2006 FC 672.

³⁵ UN Committee against Torture, Decisions of the Committee of 16 November 2007, *Bachan Singh Sogi v. Canada*, Communication No. 297/2006, CAT/C/39/D/297/2006.

a harbour for terrorists and to ensure the safety and security of its citizens.

Many participants at the Hearing, however, criticised the use of deportation as a major counter-terrorism strategy on several grounds, *inter alia*: (a) Deporting people who may be a security threat without reference to what will subsequently happen to them does not promote international justice for terrorist crimes and is contradictory to the Government's observations about the globalised nature of terrorism threats; (b) To the extent deportation is based on the assumption that the person would face some kind of process upon return, it constitutes "disguised extradition", designed to circumvent ordinary safeguards built in extradition law; (c) because of the strong stigma attached to deportation on suspicion of terrorism, it has particularly serious impact on individuals' lives, including the risk of torture and death.

Deportation was also considered as a disproportionate measure because there are alternatives to deportation, such as release on conditions and criminal prosecutions on the basis of a wide range of terrorist offences introduced by the ATA. While several participants recognised the difficulty of using security intelligence in the context of criminal trial,³⁶ many participants stressed that criminal prosecution should be the primary means to deal with individuals suspected of terrorist activities.

"To counter the common idea that it should not be a big deal for persons to be returned to their homeland, it must be mentioned that there is a great level of stigma associated with such deportations. Furthermore, there is a risk of torture and even murder upon return, And the country he is going back to knows he has been charged for terrorism or suspicion, so he can be jailed for life, tortured and can die from it. This makes the return home a terrifying prospect." (Oral testimony by Salam Elmenyaw, Muslim Council of Montreal)

7. Listing of terrorist organisations and deregistration of charities

Participants pointed out that the ATA introduced additional measures characterised by the reliance on intelligence and procedures allowing for the use of secret evidence and *ex parte* hearings.

Listing of terrorist entities

The ATA gave the Government a unilateral power – on the recommendation of the Solicitor General – to declare an organisation or an individual as a "listed entity", where there are reasonable grounds to believe that the entity "has carried out, attempted to carry out, participated in or facilitated a terrorist activity" or is "knowingly acting on behalf of, at the direction of or in association with" such an entity.³⁷ While it is not a crime to be listed, it can trigger a wide range of serious consequences, including seizure/restraint and/or forfeiture of property, and criminal liability for those who have various forms of transactions with a listed

³⁶ In this connection, the Panel's attention was drawn to the fact that the Commission of Inquiry into the investigation of the Air India bombings is looking into the question of how to establish a reliable and workable relationship between security intelligence and evidence that can be used in a criminal trial. Terms of Reference of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 at b iii, available at <http://www.majorcomm.ca/en/termsreference/> (last visited on 13 November 2008).

³⁷ Section 38.05(1) of the ATA.

entity.

The Panel heard that as in immigration proceedings, the information used to determine whether a person or organisation ought to be listed as “terrorist” largely consists of intelligence information. While the entity concerned may subsequently challenge the listing in court, the procedural rules are similarly characterised by the use of secret evidence and *ex parte* proceedings, making it difficult to rebut the allegations that form the basis of the listing decision.

It was argued that even before such legal challenge is initiated or completed, significant damage could be caused to the affected individuals. The Panel was given the example of a Canadian citizen of Somalian origin. Once he discovered that he had been placed on Canada’s list of terrorist entities, he had his assets frozen, was arrested and became the subject of an extradition request from the United States. It also became a crime for anyone to have business dealings with him. A few months later, he was suddenly cleared of all suspicion. However, his business was lost and his life destroyed.

It was also pointed out that listing could have a broader impact on the communities associated with the “listed entity”. For example, the Panel heard that since the enactment of the ATA and the listing of the Liberation Tigers of Tamil Eelam (LTTE) as a terrorist group by the Government, discrimination and stereotypical labelling of the Tamil community in Canada as “terrorists” have intensified, both by the media and law enforcement agencies.

“It is presumptively unacceptable and repugnant for the government of a democratic society to be able to wield such awesome power over its citizens and residents. On the basis of unilateral fiat, this measure enables the government to transform one of its citizens into a de facto pariah. For these purposes, it is not necessary that the person be convicted of – or even charged with – a breach of the law. Nor is it even necessary for an independent adjudicator to rule first whether such action is appropriate.”
(Oral testimony by Alan Borovoy, Canadian Civil Liberties Association)

De-registration of charities on the basis of “security certificates”

Some participants also criticised the Charities Registration (Security Information) Act, enacted as part of the ATA, which enables the Government to issue “security certificates” to revoke the charitable status of an existing charity or deny a new charitable status application if there are reasonable grounds to believe that an applicant or registered charity, among other things, “has made, makes or will make available any resources, directly or indirectly” to a terrorist entity.³⁸

It was pointed out that de-registration not only entails a charity losing its ability to enjoy the tax benefits of charitable status, but a possible exposure of its directors to investigation and prosecution under one of the new ancillary terrorism offences such as “facilitation of a terrorist activity”. There is also a strong possibility that it could lead to the freezing or seizure of the charity’s assets, which, in turn, could lead to the bankruptcy, insolvency, or winding up of the charity, exposing the charity’s directors to civil liability at common law for breach of their fiduciary duties by not having adequately protected the assets of the charity. It was also noted that while the

³⁸ Section 4 of the Charities Registration (Security Information) Act.

certificates may be challenged before a court, the process resembles that of immigration measures and listings and is characterised by the use of secret evidence and *ex parte* hearings.

Some participants raised questions regarding the necessity of the power of de-registration on the basis of “security certificates”. It was noted that the Canadian Revenue Agency (CRA) officials acknowledged before a parliamentary committee in 2005 that the CRA had not issued any “security certificates” to date and that the previously existing powers could also be used to address possible cases of charities suspected of supporting terrorist activities. Several participants affirmed, however, that even in the absence of the actual enforcement, this scheme has had and will continue to have a chilling effect upon charitable activities in Canada given the breath of the grounds for de-registration.

“In many instances, the enforcement of the law per se may not be the key issue. The concern may not be what the authorities will do in enforcing anti-terrorism legislation, but rather that they may enforce such legislation. As a result, part of the impact of Canada’s anti-terrorism legislation may have as much to do with coping with a fear of the law as it will with coping with the law itself. This “shadow of the law” effect has already created and will continue to create a chill upon charitable activities in Canada, as charities hesitate to undertake programs that might expose them to violation of anti-terrorism legislation, and with it the possible loss of their charitable status.”
(Written submission by Terrance S. Carter, Carters Professional Corporation)

8. Detainee transfers in Afghanistan

As another example of Canadian complicity in torture, several participants, in particular, Professor Michael Byers from the University of British Columbia, discussed the allegations that detainees in Afghanistan captured by Canadian armed forces have been transferred to the custody of the Afghan authorities despite the risk of torture and ill-treatment. At the time of the Hearing, the issue was receiving intense public attention due to detailed media reports released recently.

It was pointed out that the issue of detainee transfers by Canadian forces in Afghanistan initially arose in January 2002 in respect of transfers to US forces. The Panel was informed that the Canadian Government had been urged to stop such transfers in light of the US policy refusing to apply the Geneva Conventions to those detainees. The transfers to the US forces nevertheless continued until December 2005 when the revelations of detainee abuses by the US at Abu Graib and elsewhere pushed the Canadian Government to announce that it would transfer detainees to Afghan authorities instead of the US forces.

There was strong criticism that unlike the agreements negotiated by other countries such as the UK, the Canada-Afghanistan agreement on detainee transfers did not contain adequate safeguards to ensure humane treatment of detainees, such as the right of Canadian authorities to visit detainees and to veto their subsequent transfer to third countries. Even after the revelations that some detainees transferred had indeed been tortured by the Afghan authorities, the Canadian Government has refused to stop transfers, on the basis of assurances from Afghan officials that detainees would not be tortured. As in the case of diplomatic assurances used in the context of deportation, many participants argued that such assurances were unreliable and inadequate to ensure the physical integrity of detainees, even with

post-monitoring mechanisms. Some thus took the view that pending improved human rights compliance by the Afghan authorities, detainees should be kept in a detention facility run by the Canadian authorities.

9. The way forward

The Hearing revealed the existence of a strong and independent judiciary, parliamentary oversight mechanisms and a vibrant civil society, all of which had played an important role in checking against possible abuses or excesses involved in counter-terrorism efforts adopted in Canada.

Several participants nevertheless expressed serious concerns that the existing safeguards were inadequate to prevent abuses involved in counter-terrorism activities. In particular, it was argued that existing oversight mechanisms, including the Judiciary, the Security Intelligence Review Committee (overseeing the CSIS) and Commission for Public Complaints Against the RCMP, have some serious limitations because of their reliance on complaints by individuals. Firstly, due to the secrecy of measures such as covert surveillance, affected individuals are often unable to identify a wrongdoing and initiate complaints proceedings. Secondly, aggrieved individuals are also often too intimidated to file complaints. At the private meeting with the Panel members, the Chair of the Commission for Public Complaints agreed that the inability to conduct investigations *proprio motu* was the major weakness of the current commission.

Warren Allmand, former Solicitor General, also highlighted the fact there existed a wide range of federal agencies involved directly or indirectly in national security affairs, including the Department of Foreign Affairs and International Trade (DFAIT), the Canadian Border Services Agency (CBSA), the Citizenship and Immigration Canada (CIC), and the Canada Revenue Agency (CRA), some of which were not subjected to independent oversight mechanisms. Moreover, whereas joint operations involving multiple agencies have become increasingly common since 2001, there is a lack of clarity as to which agency would exercise review over such operations. Many participants thus advocated for the prompt establishment of an independent oversight body which would review national security activities of various State agencies.

Many representatives of Muslim organisations also emphasised the importance of involving Muslim and Arab communities in the formulation of national security policy and national security sectors in Canada. They argued that the ATA and its implementation have had a disproportionate impact on Muslim and other minority communities in Canada and that there is a growing sense of alienation and discrimination in these communities. They stressed that greater participation of these communities in national security matters would not only build trust toward the State necessary to obtain their cooperation with counter-terrorism efforts, but also serve to create a more sophisticated and informed national security sector.

10. Information about the Hearing

10.1. [Agenda of the public Hearing \(link\)](#)

10.2. [Press Release at the conclusion of the Hearing \(link\)](#)

10.3. Participants at the public Hearing

- Sharryn Aiken, Professor, Faculty of Law, Queen's University;
- Warren Allmand, International Civil Liberties Monitoring Group;
- Nehal Bhuta, Human Rights Watch;
- Alan Borovoy, General Counsel, Canadian Civil Liberties Association;
- Mohamed Boudjenane, Canadian Arab Federation
- Raoul Boulakia, Lawyer;
- Michael Byers, Professor, University of British Columbia;
- Terrance Carter, Carters Professional Corporation;
- Adil Charkaoui;
- Arthur Cockfield, Professor, Faculty of Law, Queens University;
- Paul Copeland, Lawyer;
- Janet Dench, Canadian Council for Refugees;
- Robert Diab, University of British Columbia;
- Johanne Doyon, Lawyer, *Association Québécoise des Avocats et Avocates en Droit de l'immigration (AQAADI)*;
- David Dyzenhaus, Professor, Faculty of Law, University of Toronto;
- Salam Elmenyawi, Muslim Council of Montreal;
- Martine Eloy, *Ligue des droits et libertés*;
- Lawrence Greenspon, Lawyer;
- Julia Hall, Human Rights Watch;
- Hilary Homes, Amnesty International;
- Valérie Jolicoeur, Lawyer, AQAADI;
- Faisal Kutty, Canadian Council on American Islamic Relations;
- Nicole LaViolette, Professor, Faculty of Law, University of Ottawa;
- Audrey Macklin, Professor, Faculty of Law, University of Toronto;
- D. Mc Dermot, Canadian Unitarians for Social Justice;
- Errol Mendes, Professor, Faculty of Law, University of Ottawa;
- Ziyaad Mia, Canadian Muslim Lawyers Association;
- Dieter Misgeld, Professor Emeritus, University of Toronto;
- Patrick Monahan, Dean, Osgoode Hall Law School, York University;
- Alex Neve, Amnesty International;
- Kent Roach, Professor, Faculty of Law, University of Toronto;
- Philippe Robert de Massy, League of the Rights and Freedoms;
- Nathalie Des Rosiers, Dean, Faculty of Law, University of Ottawa;
- Jean-Louis Roy, Rights and Democracy;
- Craig Scott, Professor, Osgoode Hall Law School, York University;
- Bob Stevenson, President, Canadian Unitarians for Social Justice;
- Hamish Stewart, Professor, Faculty of Law, University of Toronto;
- Lorne Waldman, Lawyer, Canadian Bar Association.

10.4. Government representatives met in private meetings

- Margaret Bloodworth, National Security Advisor to the Prime Minister;
- Doug Breithaupt, Ministry of Justice;
- Stanley Cohen, Ministry of Justice;
- Stockwell Day, Minister of Public Safety;
- Paul Kennedy, Chair, Commission for Public Complaints against the Royal Canadian Mounted Police (RCMP);

- Brooke McNabb, Vice-Chair, Commission for Public Complaints against the RCMP;
- Yvan Roy, Deputy Secretary to the Cabinet (Legislation and House Planning and Machinery of Government) and Counsel to the Clerk, Privy Council Office;
- Daniel Therrien, Ministry of Justice.

10.5.Written submissions

- Amnesty International Canada;
- Raoul Boulakia, Lawyer; Canadian Bar Association;
- Canadian Muslim Lawyers Association; Canadian Unitarians for Social Justice;
- Terrance S. Carter, B.A., LL.B. and Trade-Mark Agent;
- Arthur J. Cockfield, Professor, Faculty of Law, Queen’s University;
- Robert Diab, Faculty of Law, University of British Columbia;
- Nicole LaViolette, Professor, Faculty of Law, University of Ottawa;
- Dieter Misgeld, Professor Emeritus, University of Toronto;
- Kent Roach, Professor, Faculty of Law, University of Toronto;
- Hamish Stewart, Associate Professor, Faculty of Law, University of Toronto.