SPECIAL SENATE COMMITTEE ON THE
ANTI-TERRORISM ACT

Review of the *Anti-terrorism Act*

Submission by

Canadian Muslim Lawyers Association

May 2, 2005

PREFACE

This submission is made by the **Canadian Muslim Lawyers Association**, which is a national organization of lawyers, articling students and law students. The Association is represented before the Special Senate Committee on the *Anti-terrorism Act* by **Mr. Ziyaad Mia** and **Ms. Faryal Rashid**.

INTRODUCTION

Interest of the Canadian Muslim Lawyers Association

The Canadian Muslim Lawyers Association is a national organization of lawyers, articling students and law students. We have previously prepared written submissions on the *Anti-terrorism Act*[1] and the *Public Safety Act*[2] for the Senate and House of Commons committees examining those pieces of legislation when they were introduced, and have appeared before those committees to share our concerns and offer our advice.[3] Our concerns have not changed and, unfortunately, some of the anticipated adverse consequences for Muslim and Arab Canadians have come to pass.

Restoring the Rule of Law and Human Dignity

While cognizant of the risks posed by terrorism, we maintain that any attempts to manage those risks must be consistent with Canadian values, most notably the rule of law and respect for human dignity. The rule of law and human dignity are fundamental principles that inform the values of a compassionate and just society. Therefore, we emphatically disagree with those who suggest that "security comes at a price" or that we have to "trade human rights and dignity for security". Those approaches deliver only Pyrrhic victories and a false sense of security. History has repeatedly taught this lesson globally and here in our own country. The cost to vulnerable communities who are easily vilified and demonized when a nation is gripped by fear is immeasurable. Canada's sorry record with respect to the treatment of Canadians of Ukrainian and Japanese origin during the two world wars, and of Quebeckers during the October Crisis of 1970 remains a stain on our national conscience.

During the 1980s it seemed that we had learned history's valuable lesson: fear is not a basis for good public policy. That decade was witness to the advent of the *Charter of Rights and*

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[1] S.C. 2001, c. 41
[2] S.C. 2004, c. 15
[3] The Canadian Muslim Lawyers Association prepared written submissions on Bill C-36, the *Anti-terrorism Act* for the Coalition of Muslim Organizations in 2001. Those submissions may be accessed at www.muslimlaw.org

Freedoms[4], the repeal of the *War Measures Act*[5] and subsequent introduction of the *Emergencies Act*[6], and the reform of our national security agencies.[7] All of these appeared to be positive steps fostering respect for the rule of law, human rights and democratic accountability.

Regrettably, since September 11, 2001 Canada's public policy discourse has once again been infected by a culture of fear clothed in the garb of secrecy. Where national security is concerned we have too easily set aside transparency and accountability in exchange for a "trust us" model of governance, which is plainly antithetical to a pluralistic democracy. Time and again our government tells us that we are living in extraordinary times, in which the novel dangers that threaten our very existence require extraordinary responses. Yet we are presented with *ordinary* laws to implement those *extraordinary* responses.[8] This "permanent emergency"[9] framework erodes not only to the human rights and dignity of those Muslim and Arab Canadians who currently bear the brunt of the new powers, but also threatens the long-term vitality of our polity as a just and compassionate society.

The "trust us" model leverages fear and is usually accompanied by an assurance that extraordinary powers will not be abused because this particular government and its agencies are well intentioned. While history is replete with examples of authoritarian regimes that have abused extraordinary powers, the more instructive lesson lies in the fact that even well intentioned governments may, when seized by fear, drift all too readily from their moral moorings. The best defence against both terrorism and the abuse of power is the bright light of scrutiny, accountability and transparency.

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[4] Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c.11, which came into force on April 17, 1982
[5] S.C. 1914, c. 2
[6] R.S.C. 1985 c. 22
[7] See generally, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police: *Freedom and Security Under the Law (Second Report)* (Ottawa: Canadian Government Publishing Centre, 1981) (Chair: Justice D.C. McDonald)
[8] See I. Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy", in R. Daniels, P. Macklem & K. Roach (eds) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill,* (Toronto: University of Toronto Press, 2001).
[9] D. Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?", in R. Daniels, P. Macklem & K. Roach (eds) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill,* (Toronto: University of Toronto Press, 2001).

Review of the *Anti-terrorism Act*

While these proceedings are required by the *Anti-terrorism Act*, [10] both the Special Senate Committee on the *Anti-terrorism Act* and the House of Commons Subcommittee on Public Safety and National Security studying the legislation have expanded their mandate to include the security certificate regime of the *Immigration and Refugee Protection Act*.[11] A robust and effective review of the *Anti-terrorism Act* requires that all components of Canada's national security regime be assessed. For that reason, the Canadian Muslim Lawyers Association strongly supports the Senate Committee's decision to embark on a wider review of national security measures. In light of the growing national security leviathan[12] in Canada and its increasing appetite for enhanced budgets and stronger powers, this broader approach will not only contribute to identifying and avoiding existing and potential human rights abuses, but it will also help to identify inefficiencies, gaps and bureaucratic inertia in our national security operations and policy.[13] A holistic review protects human rights while ensuring that Canadians are made truly safer.

This submission is not intended to be an exhaustive review of the *Anti-terrorism Act* or Canada's national security regime. Rather, it employs a thematic approach to highlight and tie together some of the fundamental flaws in our national security policy and legislation in order to demonstrate how the rule of law and respect for human dignity has been diminished in Canada. The latter part of this submission makes recommendations for reform of our national security regime that would begin to restore respect for the rule of law and human dignity while also

[10] s. 145
[11] S.C. 2001, c. 27
[12] M. Shephard, "Security agencies mushrooming", Toronto Star, April 2, 2005 – accessed at www.thestar.com
[13] In fact, some commentators suggested that the *Anti-terrorism Act* was not a necessary measure in order to respond to the events of September 11, 2001. They point to the existing criminal law as well as the *Emergencies Act* as adequate tools that could have addressed the bulk of the government's purported objectives under the new legislation. The *Emergencies Act* was designed to balance the legitimate needs for greater powers in the event of emergencies while also preserving democratic accountability. In addition, the *Emergencies Act* is a temporary measure, which appreciates that extraordinary events and responses are by their very nature exceptional and hence not permanent. By suggesting that our existing law was inadequate to deal with novel threats because it is "too late when the terrorists get on the plane" the government ignored the fact that the *Criminal Code* prohibits a number of prepatory offences such as aiding, abetting, attempts and conspiracy. See Part XIII and ss. 21-24 of the *Criminal Code*. See K. Roach, "The New Terrorism Offences and the Criminal Law", in R. Daniels, P. Macklem & K. Roach (eds) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill,* (Toronto: University of Toronto Press, 2001). See also, submissions of the Canadian Muslim Lawyers Association on Bill C-36 the *Anti-terrorism Act* and Canadian Bar Association, *Submission on Bill C-36 Anti-terrorism Act*, October 2001. See generally, K. Roach, *Septermber 11: Consequences for Canada* (Montreal & Kingston: McGill-Queens University Press, 2003).

ensuring that all Canadians are truly safer from terrorism. This submission does not attempt to canvass the human impact of Canada's national security regime. We expect that you will hear about this in more detail from organisations such as the Canadian Council on American Islamic Relations and the Canadian Arab Federation who are well placed to apprise you of those matters.[14]

FUNDAMENTAL FLAWS

Shrouded in Secrecy

Secrecy is an essential aspect of the *Anti-terrorism Act*, the security certificate regime under the *Immigration and Refugee Protection Act* and the *Charities Registration (Security Information) Act*.[15] All follow a similar structure in order to determine whether a person or organization is a terrorist or involved in terrorist activities.[16] This structure, which mandates the use of secret proceedings and secret evidence, offends basic principles of due process that are fundamental to our adversarial system of justice. As a result, there is no real assessment of terrorism allegations to determine whether they are based on objective credible threats or subjective political predilections.

List of Terrorists

The "listing process" is a cornerstone of the *Anti-terrorism Act* because it gives a single Minister[17] the power to declare that a person or organization is a "listed entity" or more accurately a terrorist or terrorist group. The consequences of being listed include significant criminal and civil penalties. Listing is intended ostensibly to be a tool for disrupting terrorist activities by ostracizing individuals or organizations from the wider community. Take for example the new criminal offence of "participating in the activity of a terrorist group",[18] which criminalizes a variety of acts done in conjunction with listed entities. Among the factors that may be considered in assessing culpability is whether the accused "frequently associates with

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[14] See www.caircan.ca and www.caf.ca for more information about these organisations.
[15] 2001, c. 41, s. 113. This legislation was introduced as part of the *Anti-terrorism Act* in 2001.
[16] See ss. 83.05 – 83.07 *Criminal Code*, ss. 76-81 *Immigration and Refugee Protection Act*, and ss. 5-8 *Charities Registration (Security of Information) Act*.
[17] Solicitor General of Canada.

any of the persons who constitute a terrorist group".[19] While this approach comes dangerously close to being a prohibition of association, our concern is compounded by the fact that the process for determining who or what is a terrorist group is fundamentally flawed.[20]

In part, our concern stems from the fact that the "evidence" used to determine whether a person or organization ought to be listed consists of untested intelligence information, including information obtained from foreign governments and their security agencies. This information would likely not meet the standards of evidence required by Canadian law, but the *Anti-terrorism Act* allows judges reviewing executive listing decisions to accept "anything" as evidence "even if it would not otherwise be admissible under Canadian law".[21]

Coupled with the inherent biases and politicized nature of such "evidence" is the fact that the government's allegations are reviewed in secret or *ex parte* proceedings, which exclude not only the public but also the listed party and counsel. While the reviewing judge has the ostensible authority to find that parts of the secret evidence should be disclosed in a summarized form to the listed party the Minister holds a *de facto* veto over the judge's decision in order to prevent disclosure in any form.[22] Ultimately, Canadians may be deemed to be terrorists and have their lives turned upside down without ever knowing the evidence against them.

Security Certificates

The *Immigration and Refugee Protection Act* grants two members of the executive the power to deem non-citizens to be terrorists by issuing a certificate alleging that an individual is a security risk to Canada. The consequences of this "security certificate" include indefinite detention

[18] s. 83.18 *Criminal Code*
[19] s. 83.18 (4) (b) *Criminal Code*
[20] The Canadian Muslim Lawyers Association is also particularly concerned about the impact of ss. 83.18 (3) (b) and 83.18 (4) (c) of the *Criminal Code*, which criminalize acts where a terrorist group is provided with a "skill" and where an individual "receives a benefit from the terrorist group". Clearly, these provisions may unjustifiably diminish the right to counsel by criminalizing the acts of lawyers. One can imagine how a lawyer providing legitimate services to a listed entity and receiving fees in return may be caught by this definition. This erodes the adversarial process because it creates a chill in the legal community and further ostracizes those alleged to be terrorists.
[21] s. 83.05(6.1) *Criminal Code*
[22] s. 83.06(2) *Criminal Code*

without trial and the possibility of being deported to face torture abroad.[23] Secret "evidence" and proceedings similar to those used in the listing process are used to determine the reasonableness of the security certificate. Again, the reality is that information from foreign sources may implicate people as terrorists without giving them the ability to challenge that information effectively because the substance of the proceedings is secret.[24] This is a fundamentally unfair process because it offends the very essence of the adversarial process and denies people the right to full answer and defence against serious allegations made by the State.

Foreign intelligence information is problematic because it is politicized and usually reflects only the statist interests of the *status quo* while ignoring the complexities of social and political transformations taking place abroad. In light of this, accepting the national security claims of foreign states with questionable human rights records at face value is not only simplistic, but also fails to make Canadians safer. Take for example the role of liberation movements or human rights advocacy groups working under dictatorships or authoritarian regimes. While those organizations may engage in a variety of legitimate activities – both violent and non-violent – one can be certain that incumbent regimes will do anything to preserve their power, even if it means labelling their opponents as terrorists. Therefore, the use of untested foreign intelligence in secret proceedings to label people in Canada as terrorists may only serve to keep authoritarian regimes safe from the rule of law and make our government a subcontractor to persecution.

Charities Deregistration

The *Anti-terrorism Act* also introduced the *Charities Registration (Security Information) Act*, which uses a secret process similar to that used in the listing and security certificate processes to deregister existing charities and refuse applications for charitable status. The ostensible purpose of the legislation is laudable in that it claims to prevent the abuse of charitable resources by terrorist organizations. However, the legislative scheme designed to achieve this purpose may result in a chill on legitimate charitable giving and humanitarian aid work.

[23] Deportation to torture offends not only human dignity and justice but also runs contrary to Canada's obligations under international humanitarian and refugee law. Arguably, where the security certificate results in *refoulement* Canada will be in violation of the *Convention Against Torture* as well as customary international law.

Echoing the security certificate and listing processes, an executive decision[25] begins a Kafkaesque procedure whereby a certificate is issued alleging that a charity has made or may make resources directly or indirectly available to an individual or organization deemed by the Solicitor General to be terrorist.[26] The judicial consideration of the certificate takes place in secret, with anything passing as "evidence", and is accompanied by a *de facto* executive veto over any information that the judge declares should be disclosed to the charity. The ability to effectively respond to the charges is neutered and all of the problems associated with secret proceedings canvassed above are replicated.

Eroding the Role of the Judiciary

The absence of the adversarial process in secret proceedings involving terrorism calls into doubt the likelihood of just outcomes. The adversarial process is a keystone in our legal system because it is based on the plain principles of fairness and justice, which ultimately serve us well in the search for truth. And, judges play a crucial role in that search.

In our system of governance judges have a constitutionally mandated responsibility to check executive and legislative power. This responsibility becomes even more important in light of Canada's fast growing national security bureaucracy and the associated expansion of executive power.[27] However, the judicial role in this separation of powers balance is eroded by the fact that the certificates issued by the executive under the *Anti-terrorism Act* and the *Immigration and Refugee Protection Act* are effectively legal determinations. For example, the issuance of a security certificate by the Minister results in the indefinite detention of a non-citizen. Judicial oversight is *ex post facto* and restricted to considering reasonableness rather than assessing the

[24] similar executive veto over evidence – allows govt to put info before judge and influence decision but then have the ability to pull it if the judge determines that it can be disclosed.
[25] The Minister of National Revenue and the Solicitor General sign the certificate.
[26] As listed by s. 83.01(1) *Criminal Code*
[27] The *Public Safety Act* also contributes to a significant concentration of executive power without adequate Parliamentary or judicial oversight as do a plethora of regulatory edicts and other non-legislative "arrangements", which implement security measures in conjunction with foreign governments. The details of these arrangements are not usually subject to democratic or judicial review or oversight.

merits of the matter or determining guilt or innocence; the Minister carries out those important judicial tasks.[28]

Secret proceedings and evidence rob judges of their constitutional duty and place them in an unusual role for which they are not suited. Justice Hugessen of the Federal Court suggested that the *ex parte* proceedings used in the review of security certificates made him feel like a "fig leaf", lending legitimacy to an unjust process. His sentiments and insights are worthy of repeating:

> All national security functions which are laid on the Federal Court have this in common: they involve at one stage or another and sometimes throughout the piece a judge of the Court sitting alone in what are called hearings, but they are held in the absence of one of the parties…**This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function**…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.
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> If there is one thing that I learned in my practice at the Bar, and I have managed to retain it through all these years, it is that good cross-examination requires really careful preparation and a good knowledge of your case. And by definition, judges do not do that. **We do not get to prepare our cases because we do not have a case and we do not have any knowledge except what is given to us and when it is only given to us by one party we are not well suited to test the materials that are put before us.** We hate hearing only one party. We hate having to decide what, if any, sensitive material can or should be conveyed to the other party. We hate, or I certainly do, I am not sure that everybody feels the same about this, sitting in a bunker, in a sealed windowless courtroom deep in the bowels of a building in Ottawa where the air is terrible, the only thing that is good is the coffee, but we hate it. I do not think it makes us do our job particularly well. **We greatly miss, in short, our security blanket which is the adversary system … the real warranty that the outcome of what we do is going to be fair and just** … I sometimes feel a little bit like a fig leaf.[29]

[28] In addition, the *de facto* executive veto power over judicial summary disclosure decisions also robs judges of their fundamental role to make final evidentiary determinations. As the legislation stands, the ostensible judicial authority to disclose some information is simply window dressing for absolute executive power over an essential part of the process.

[29] J.K. Hugessen, "Watching the Watchers: Democratic Oversight", in D. Daubney, *et al*. eds, *Terrorism, Law & Democracy: How is Canada changing following September 11?* (Montreal: Canadian Institute for the Administration of Justice, 2002) at 384-386. (emphasis added)

Justice Hugessen offers a rare glimpse into a secret world. Otherwise, we can only wonder what transpires in secret review proceedings, but we may hazard a guess that even judges, with their training and expertise, are overwhelmed by the culture of secrecy, suspicion and fear that imbues the national security bureaucracy. A variety of intelligence information is probably proffered as evidence and accompanied by subjective risk assessments that are significantly influenced by domestic and foreign political considerations. Entirely absent from this process is a robust review of the evidence through cross-examination or the presentation of alternative assessments of facts, evidence and risks. Under this scenario it is difficult to imagine how anyone, including a judge, could find the decision of the Minister to be unreasonable. Therefore, the culture of fear results in a self-perpetuating cycle where fear begets secrecy and allegations based on secrecy beget greater fear.

Profiling and Discrimination

Dangers of a Motive-based Definition of Terrorism

The *Anti-terrorism Act* defines terrorism as violent acts that are carried out "for a political, religious or ideological purpose, objective or cause".[30] Introducing a motive requirement into the definition of terrorism is problematic for a number of reasons.

Traditional criminal law in Canada and other common law jurisdictions attaches responsibility based on the presence of *mens rea* and *actus reus* – quite simply, requiring intent to commit a prohibited act and actually carrying out the act.[31] A motive requirement adds an unprecedented third element to the mix, which may make convictions more difficult to obtain.

Proving motive also introduces a troubling aspect to investigations of terrorism crimes. One can imagine what types of inappropriate questions might be asked by investigators seeking to prove a religious motive. Members of our organization 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.

[30] S. 83.01 (1) *Criminal Code*
[31] With exceptions for planning, conspiracy and other preparation offences.

Religious motive also contributes to an insidious creep of profiling against Muslims and Arabs in Canada. Given the contemporary *zeitgeist* of an existential "Islamist" threat, which is fuelled by rhetoric from governments and self-styled think tanks that thrive on the terrorism industry's culture of fear, it is easy to see how religious motive may send a signal to security agencies and law enforcement that Muslims and Arabs are the targets.[32] 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.

The Prevalence of Profiling – Looking Under the Tip of the Iceberg

The motive-based definition of terrorism coupled with the contemporary vilification of Islam has resulted in the prevalence of profiling, which uses faith and ethnicity as a proxy for criminality. However, it is difficult to find evidence of profiling if one examines only the official data and proclamations by the government.

On the other hand, a closer look reveals the "soft use" of national security powers has been thriving with many hundreds of "informal" interviews and investigations taking place without formal charges being laid. These interviews and investigations are more than likely intended to intimidate individuals or co-opt them into spying on their communities, friends, neighbours or colleagues. The prevalence of this "soft use" of authority contributes to a climate of suspicion within and between communities, while at the same time, breeding a culture of impunity within the security and law enforcement bureaucracies because most of this activity takes place outside the purview of statistical officialdom. Hence, there is plausible deniability.

[32] Another example is *the Public Safety Act's* data collection and analysis of travel patterns. Because of secrecy it is not clear what patterns will be deemed suspicious and what types of information will be shared with foreign governments. However, one may assume that those travelling to the Muslim world would be subject to scrutiny and their travel records would be retained and shared with foreign governments.

In fact, as personal narratives are increasingly being recounted in the Muslim and Arab communities a pattern of "soft *abuse*" appears to be emerging. We have heard from various sources that some agents and law enforcement officials misrepresent themselves and their authority under the generic label of the "new terrorism laws" – suggesting that they have much more authority than they do in reality. In many cases, those in the community who are not familiar with the limited authority of national security agencies, the intricacies of national security legislation, or their own legal rights have unwittingly "co-operated" in investigations without being fully apprised of their rights.

Most victims of this "soft abuse" do not speak about their terrible experiences for fear of State reprisals and the social stigma of being associated with "terrorism". Non-citizens – permanent residents and especially refugees – harbour the greatest fear in this regard. As for official complaints, many in the Muslim and Arab communities do not have much confidence in the complaints system and its ability to offer them justice and redress. Maher Arar's case aptly illustrates this point. From the outset, it has seemed very likely that Canadian officials were complicit in facilitating Mr. Arar's ordeal. Yet, even while he was being tortured in a Syrian prison, there was nothing but obfuscation, buck-passing and general stonewalling from the Canadian government and its national security agencies. The RCMP complaints process offered nothing of substance in the search for truth. And today, nearly two years since Mr. Arar's release, we are watching a public inquiry that has largely operated out of sight of the public eye.

"Trickle Down" Discrimination in Private Life

The combination of a culture of fear, vilification of Islam and profiling of Muslims and Arabs by State agents has led to a "trickle down" effect where profiling in the public sphere bleeds into garden variety discrimination in the private sphere. There are numerous reports of Muslims and Arabs being discriminated against in matters involving services, employment and accommodation where whispers and hints of terrorism fears have played a role.

This broader social ostracism has been compounded to a large extent by the *Anti-terrorism Act's* attempt to marshal private parties in the lookout for terrorists. For example, the FINTRAC[33]

[33] Financial Transactions and Reports Analysis Centre of Canada.

system analyses and reports on suspicious financial transactions. The system requires financial institutions and others to report on threshold transactions and those deemed suspicious. As a result, financial institutions and others may refuse to deal with individuals and organisations that have been flagged as suspicious for fear of being implicated as participating in or facilitating terrorism. In today's Internet society information travels quickly and along many vectors, and it is not clear how false flags will be reeled back in. One can imagine the devastating "ripple effect" of mistakes made in this scheme of State-sanctioned ostracism. Also absent is any indication that the government will offer redress and compensation to those whose lives and livelihoods are harmed as a result of its mistakes.

RECOMMENDATIONS FOR REFORM

The recommendations in this submission are not intended to be comprehensive. Rather, our objective is to identify a number of key elements for reform of Canada's national security sector.

Oversight and Accountability – A Lifecycle Model

One of the central flaws in the national security regime is the lack of oversight and appropriate checks on the newly expanded powers. While we do not endorse a particular form of oversight in this submission, we believe that certain principles must guide its design. National security matters ought to be managed on a "lifecycle" model, which aims at continuous improvement of the national security system. The current system is based on a simple one-dimensional model of self-governance and self-review. The "lifecycle" approach would add an extra dimension in the form of an independent, non-partisan and centralized oversight body with the following features:

- Jurisdiction over all national security agencies and functions;
- Full access to all national security information;
- Ability to initiate investigations and subpoena witnesses;
- Staffed by full-time civilian experts in national security law, policy and practice;
- Permanent budget funded by Parliament and safe from executive tampering;

- Robust public complaints and redress process including the ability to order remedies, including financial compensation;
- Ability to hear third party complaints;
- Public/civil society participation and input to build confidence and trust; and
- Undertake an annual audit and assessment of Canada's national security sector in order to determine, (i) effectiveness and efficiency, and (ii) impact on the rule of law and human rights.

The institutional competence and capacity of the oversight body would serve as a counterweight to the institutional inertia and bureaucratic self-interest of the security establishment, which currently operates in an institutional vacuum. The central aims of the "lifecycle" model are, (i) to ensure that Canada is made safer, and (ii) to avoid mistakes that result in adverse consequences for innocent people. These aims would be achieved by feeding the knowledge gained through the audit and assessment back into the legislative and institutional design/reform process to continuously improve our national security system.

Abolishing Security Certificates

The security certificate process is clearly unjust and should not remain in Canadian law. The use of secret proceedings, questionable evidence, indefinite detention and possible *refoulement* all speak to this injustice. The House of Lords in the United Kingdom gave wise direction on this matter when it recently assessed that country's security certificate-type process and found it to be contrary to fundamental principles of fairness and justice, most notably the principles of equality and non-discrimination.[34]

The Canadian Muslim Lawyers Association adamantly rejects any proposals to extend detention without trial[35] to citizens in an effort to thwart potential legal challenges to the security certificate process based on the non-discrimination principles enunciated by the Law Lords. These types of proposals fail to appreciate the substance of the Law Lords concerns. And,

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

[35] Including measures such as house arrests or any other forms of restraints on liberty and mobility.

euphemisms like "control orders" will not diminish the fact that this is simply a shameless race to the bottom, which pays lip service to equality while being entirely inconsistent with the rule of law and human dignity.

The better approach is to ensure that the principles of the adversarial process are restored and that individuals have the right to a fair trial based on objective evidence in order that they may defend themselves against serious allegations made by the State. Deportation is not a solution to terrorism for two reasons: (i) it may facilitate torture by getting others to do our extrajudicial "dirty work", and (ii) it does not neutralise genuine terrorist threats because it simply moves people around – it amounts to nothing more than national security procrastination or buck-passing.

Restoring the Rule of Law

As discussed earlier in this submission there are fundamental flaws in our national security legislation that offend the rule of law and human dignity. It is clear that one of the most glaring shortcomings is the prevalence of secrecy and the absence of the adversarial process. Therefore, we recommend:

- Preserving open processes and proceedings as much as possible;
- Using trained security cleared counsel where proceedings are closed;
- Recruiting security cleared counsel from Muslim and Arab communities;
- Developing explicit and objective standards of evidence for all national security information, including information obtained from foreign sources;
- Restoring the ability of judges to determine matters of guilt and innocence based on a comprehensive review of the merits; and
- Removing the *de facto* executive veto over judicial disclosure determinations.

Rejecting the Permanent Emergency Model

While the Canadian Muslim Lawyers Association would welcome the complete repeal of the *Anti-terrorism Act* in order to allow better legislation to be crafted we are also keenly aware of the political realities that may preclude repeal. Therefore, we recommend that in addition to particular amendments that this Committee may suggest in its report on the *Anti-terrorism Act*

review, this Committee consider a full and complete sunset of the legislation in December 2006. This approach appreciates that there may be a need for extraordinary law in some cases but ensures that we do not inadvertently slip into entrenching a "permanent emergency" as a precedent in our legal system. The consequences of such a precedent for human rights, democratic accountability and the rule of law would be devastating.

Indeed, the Supreme Court cautioned that the *Anti-terrorism Act* should not viewed as broader national security legislation, the Court warned that:

> [such a] characterization has the potential to go too far and would have implications that far outstrip legislative intent…**courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm…Notably, the Canadian government opted to enact specific criminal law and procedure legislation and did not make use of exceptional powers**, for example under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter*.[36]

While the counsel of the Supreme Court is reassuring the best way to preserve the rule of law and build a just society is a complete sunset of the *Anti-terrorism Act*. This approach allows for sober second thought and reflection through a robust public debate and comprehensive Parliamentary review to determine if the emergency persists and if so, what extraordinary measures, if any, may be required. It is a reasoned and balanced approach that appreciates the realities of geopolitics and takes seriously the threats facing us while preserving our fidelity to the rule of law and the traditions of our democratic polity.

Getting the Facts on Profiling

The debate over profiling will continue as long as the "war on terror" continues, with the government vehemently denying its existence and targeted communities begging to differ. A straightforward way to begin to address this issue may be a requirement that all national security and law enforcement agencies table data each year with Parliament or the central oversight body cataloguing all investigations and interviews conducted in Canada and abroad. In order to protect sensitive information and individual privacy, this information should be stripped of all

[36] *Re Application under section 83.28 of the Criminal Code,*, 2004 SCC 42 at para. 39 (emphasis added)

personal identifiers such as names and addresses. It could simply indicate the number of investigations and interviews conducted in the previous year, and include the following information on each of the subjects:

- Faith;
- Ethnic origin;
- Citizenship status;
- Gender;
- Age;
- Municipality of residence;
- Date(s) of interaction(s); and
- Status of legal proceedings or action taken (if any).

A More Effective Definition of Terrorism

As discussed above, the existing definition of terrorism in the *Criminal Code* is flawed in large part because it includes a motive requirement that involves delving into the religious beliefs and practice of Canadians. One of the dangers is that it encourages profiling of Muslims and Arabs. We recommend that this definition be amended to remove the motive requirement. The Supreme Court of Canada offered a more straightforward and less politicized definition in *Suresh v. Canada (Minister of Citizenship and Immigration)*.[37] Because the *Immigration and Refugee Protection Act* does not have a definition of terrorism the Court read in the following definition:

> any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[38]

While this definition still leaves room for political interference and bias to influence risk assessments it nonetheless avoid the obvious pitfalls of a motive-based definition.

[37] 2002 SCC 1.

Making Canada Safer by Building Community Trust

Many in the Muslim and Arab communities feel that they are out of the loop on national security policy in Canada. Aside from perfunctory consultations and sporadic meetings between communities and the government, there is a growing sense in these communities that their voices are not heard in Ottawa.

Two salient consequences stem from this lack of meaningful participation in the policy process. First, communities are not consulted on important matters that affect their well being and security. And second, the quality of our national security intelligence and risk assessments are questionable at best.

Consider for example the fiasco surrounding the detention of 21 South Asian men as terrorist suspects in the late summer of 2003. It was evident from the outset that the "evidence" raising suspicion for law enforcement and security agencies was nothing more than a blend of unfamiliar cultural habits, student lifestyles and interesting hobbies.[39] Had our security agencies been better staffed, trained and informed, we could have avoided a national security blunder and prevented the lives of 21 people from being irreparably harmed by reckless allegations of terrorism. This habit of "crying wolf" may also serve to make us less safe from genuine terrorist threats because valuable resources are spent chasing shadows.

Meaningful participation begins with the following:

- Include Muslim and Arab communities in the design of national security policy and legislation;

[38] Ibid. at para. 98.

[39] RCMP, "Project Thread Backgrounder: Reasons for Detention pursuant to 58(1)(c)" (19 August 2003). Some of the suspicious activity that so alarmed the RCMP included the students among the group undertaking their studies in a "dilatory manner", exercising poor cooking skills, living in sparse conditions and being from a particular region in South Asia "noted for Sunni extremism". The detentions captured headlines and stoked fears of terrorist sleeper cells amongst us, while entrenching the perception of migrants posing existential threats to Canada. For example, see S. Bell, "Suspected al-Qaida sleeper cell members will remain in custody" *CanWest News Service* (27 August 2003), S. Bell, "Another arrest made in possible Toronto al-Qaida sleeper cell case" *CanWest News Service* (29 August 2003), Canadian Press, "19 people held while feds investigate possible links to terrorism: report" *Canadian Press Newswire* (22 August 2003).

- Build capacity in the national security bureaucracy in order to foster a more sophisticated understanding of the Muslim and Arab world and related geo-political, faith and cultural issues;
- Recruit intelligence personnel, law enforcers, public policy advisors and foreign service staff from the Muslim and Arab communities;
- Educate the intelligence sector on the cultural and faith practices and sensitivities of the Muslim and Arab communities;
- Appoint qualified Muslims and Arabs to the judiciary; and
- Undertake outreach in the Muslim and Arab communities to build networks and foster civic engagement/public participation.

These measures will build trust and diminish the climate of fear in the Muslim and Arab communities. It will also serve to create a more sophisticated national security sector with reliable intelligence and efficient deployment of resources that ultimately creates a safer Canada for all of us that can aspire to be a model of justice and compassion in the world.