

## Submission to ICJ Eminent Jurists Panel on Canadian Anti-Terrorism Law

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Although Canada's criminal anti-terrorism law is more restrained than those of many other countries including the United Kingdom and Australia, this should not be taken as a sign that there is no room for improvement. It should also not be assumed that improvements to the law will increase rights and freedoms at the expense of security. Indeed some of improvements to Canadian law suggested below could assist the state in focusing on the most serious threats to our security. Some could also help prevent the wrongful conviction or detention of those who are not terrorists, something that may allow the guilty to go free while ensuring that Canada's response to terrorism is properly focused and proportionate.

### 1. Tighten the Definition of Terrorist Activities

The task of defining terrorism is notoriously difficult and it is far from clear that there cannot be improvements to the long and complex definition of terrorist activities in s.83.01 of the Criminal Code. This definition, which is incorporated in many of the offences and investigative powers in the Code, is the controversial core of the Anti-Terrorism Act. The Supreme Court in *Suresh v. Canada*<sup>1</sup> choose to read in a much narrower definition of terrorism into the undefined reference to terrorism in the *Immigration Refugee and Protection Act*<sup>2</sup> while also recognizing that Parliament was free to use other definitions. Nevertheless, there is much to be said for the Court's definition which focuses on intentional death and bodily injury and is quite close to the best efforts that have been made towards an international agreement on a universal definition of terrorism. A definition of terrorism that focuses on violence minimizes the danger of dissenters being investigated as potential terrorists. My concerns are both that rights and freedoms may be threatened if extreme wings of the anti-globalization, animal rights or Aboriginal movements are subject to terrorism investigations, but also that authorities should not displace limited resources from far more serious threats of violence.

There are some minor improvements that can be made to the definition of terrorism even if the government is not prepared to adopt the *Suresh* definition of terrorism. Although laudable attempts were made to respond to criticisms of the astounding breadth of s.83.01(1)(b)(ii)(E) when it was first introduced, the result is still a very broad and complex expansion of the concept of terrorism. Sections 83.01(1) (b) (ii) (B) (C) and (D) seem more than adequate to the task of prohibiting terrorism. They target the endangerment of life, serious risk to health safety and property damage that is likely to cause such harms. The deletion of the idea that harms to essential public and private services can constitute terrorism should also be accompanied by deletion of the reference in s.83.01(1)(b)(i)(B) to disruptions of economic security and attempts to compel persons including corporations to act. Most anti-terrorism laws focus on attempts to compel

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<sup>1</sup> [2002] 1 S.C.R. 3

<sup>2</sup> S.C. 2001 c. 27.

governments and international organizations to act and to intimidate populations. This more restrained approach avoids the dangers of the Canadian law in creating a risk that anti-globalization protests against corporations will be targeted as terrorism.

Requiring proof of an intention to intimidate the public or compelling governments and international organizations to act adequately distinguishes terrorism from ordinary crime. Parliament should thus delete the controversial requirement in s.83.01(1)(b)(i)(A) that the Crown prove that a terrorist is acting for a political, religious or ideological purpose. This provision requires police to collect and prosecutors to lead evidence of political and religious motive and has recently been held to be an unjustified violation of freedom of expression, association and religion under the Canadian Charter by a trial judge.<sup>3</sup> The probative value of such evidence is minimal in a world of wide spread political and religious grievances, and its prejudice to the accused may be great in jury trials where there may be a willingness to conclude that someone with similar political and religious motives as some terrorists may have been more likely to commit acts of terrorism. So long as the law requires proof of political and religious motive as an essential element of crimes of terrorism, however, judges will be mandated by law to admit such evidence and police will be required to collect the evidence. The fears of many that their politics and religions are being targeted as associated with terrorism have not been assuaged by the attempt in s.83.01(1.1) to provide that the expression of political, religious or ideological thought will not normally constitute terrorism. The requirement of proof of religious and political motive and the targeting of crimes committed for political or religious objectives under s.3(a) of the *Security of Information Act* is unnecessary and unprincipled. The proper principle in the criminal law is that no motive, including political and religious motives, excuses any crime.

## **2. Do Not Criminalize More Speech Associated with Terrorism**

As it considers amendments arising from the three year review, the federal government will be under pressure to enact new offences against the incitement of terrorism as requested by Resolution 1624 of the United Nations Security Council adopted on September 14, 2005. In a May, 2006 report to the UN Counter Terrorism Committee, Canada concluded that it already complied with Resolution 1624 given that the definition of terrorist activities in the Criminal Code already included counselling and threats to commit acts of terrorism and because it had a broad range of offences relating to participation in the activities of a terrorist group and instructing activities of a terrorist group, as well as laws against the promotion of hatred.<sup>4</sup> Unfortunately, a House of Commons in March, 2007 has recommended that the Criminal Code “be amended to make it an offence to glorify terrorist activity for the purpose of emulation.”<sup>5</sup> If enacted, such a provision would constitute a vague and overbroad restriction on freedom of expression.

The state bears a high burden in criminalizing speech associated with terrorism. The government of Canada should resist the overbroad British attempt to criminalize speech associated with terrorism. The inclusion of counseling and threats in s.83.01 of Canada’s existing definition of terrorist activities already criminalizes speech that is most closely

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<sup>3</sup> *R. v. Khawaja* [2006] O.J. no 24

<sup>4</sup> Canada submission S/2006/185 at pp 14-17.

<sup>5</sup> *Rights, Limits and Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues* March 2007 Recommendation 2

associated with terrorism and a new offence of incitement is not necessary or wise. Speech prosecutions will be a divisive strategy that could confirm fears that anti-terrorism efforts are based on hostility to Islam as opposed to a condemnation of violence. They may also distract police and prosecutors from far more immediate threats.

### **3. Eliminate Overbroad Offences**

One of the strategies behind many anti-terrorism acts is to criminalize many acts of preparation for terrorism. In the aftermath of 9/11, the United Nations placed special emphasis on laws criminalizing various forms of terrorism financing and ss.83.02 to s.83.17 of the Criminal Code were enacted in large part to ensure that Canada complied with its obligation under the United Nations Convention on the Suppression of Terrorism Financing. There are some financing offences that go beyond what are required by the Convention and present a risk of overbreadth and should be repealed. For example s.83.03(b) criminalizes without qualification the provision of property or financial or other related services to a known terrorist group without regard to any proximity to a terrorist activity. Section 83.1 places a duty on every person in Canada and every Canadian outside Canada to inform both the Commissioner of the RCMP and the Director of CSIS of any property in their possession or control that they know is owned or controlled by a terrorist group. These broad offences are not required by the Convention and raise unnecessary issues about solicitor client privilege.

The revamped *Official Secrets Act* also contains some extremely broad concepts and offences. Section 3 of the *Security of Information Act* defines the concept of prejudice to Canada's safety or interests about as broadly as is humanly possible. Any offence subject to two years or more that is committed for religious or political reasons is deemed prejudicial to Canada's interest, as is interfering with services in a manner "that has significant adverse impact on health, safety, security or economic or financial well-being of the people of Canada"<sup>6</sup> Section 20 makes it a offence punishable by life imprisonment to attempt to induce a person "by threat, accusation, menace or violence" to do anything for the purpose of increasing the ability of a foreign entity or terrorist group to harm Canadian interests as broadly defined in section 3. In addition, these offences are extended by the criminalization of a broad range of preparatory acts in s. 22 even though the normal inchoate offences are already incorporated in s.23.

### **4. Remove Deeming Provisions**

There are provisions in ss.83.18(2)(3), 83.19(2), 83.21(2) and 83.22(2) of the Criminal Code that seem to be based on a distrust of ability of the judiciary to interpret the offences in the *Anti-Terrorism Act* in a sensible and purposive fashion. Often with appropriate subheading of "prosecution", these sections seek to tell judges that they should interpret the underlying offences in the broadest possible manner. The *Anti-Terrorism Act* would become simpler and sounder if all these deeming provisions were repealed.

Section 83.19(2) is particularly in need of repeal because it qualifies the fault requirement of knowing facilitation. Although it is has been upheld from Charter challenge in one case,<sup>7</sup> it still qualifies the fault requirement of guilty knowledge. A more proportionate response to the difficulties of prosecuting cell based terrorism is found in other sections which state that is not necessary for the accused to know the specific

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<sup>6</sup> *Security of Information Act* s.3(1)(d).

<sup>7</sup> *R. v. Khawaja* [2006] O.J. no. 4245

nature of the terrorist activity as opposed to not knowing that any terrorist activity was actually carried out.

Another deeming provision that should be repealed is the definition of a terrorist group in s.83.01 as a “listed entity”. This could result in the substitution of the Cabinet’s decision to list a terrorist group for proof beyond a reasonable doubt in a criminal trial that the group is in fact a terrorist group.<sup>8</sup> The Cabinet lists terrorist groups without any prior adversarial challenge and on the basis of information that is covered by both Cabinet confidences and national security confidentiality.

Section 83.18(4) invites judges to consider association evidence, the use of words or symbols, the receipt of benefits and acting on instructions as evidence that may be relevant in determining whether a person is guilty of the offence of participating in the activities of a terrorist group. This provision is objectionable as not so subtle hints about what evidence a judge should admit at a terrorism trial. Particularly in a terrorism trial with a jury, a judge should be allowed to consider a delicate balance between probative value and prejudice without the assistance of broad and loud Parliamentary hints about what evidence is relevant.

### **5. Remove Constructive Liability**

The *Public Safety Act*<sup>9</sup> added a new crime of hoaxing terrorism to the terrorism offences contained in the Criminal Code. The new section 83.231 of the Criminal Code only requires that the accused intend “serious interference with the lawful use of operation of property” but then provides that the hoaxer is guilty of an aggravated offences punishable liable to imprisonment for life if death results from the hoax and an aggravated offence punishable by up to 10 years imprisonment.<sup>10</sup> This punishes the person for causing death or causing bodily harm even though he or she may have no subjective or even objective fault in relation to such harms and may only have intended to interfere with the lawful use or operation of property, as a hoaxer by definition almost always will so intend. Although constructive liability based on the harm committed is constitutional for most offences<sup>11</sup> it is not clear that it should be constitutional for terrorism offences which carry a special stigma and penalty and as such are analogous to murder and war crimes.<sup>12</sup> It is thus arguable that there should be a requirement of subjective fault in relation to all the essential elements of offences of terrorism. Thus the aggravated offences should require at least subjective knowledge or willful blindness in relation to the punished harms of death or bodily harm. The fact that the prosecution of terrorism offences requires the prior consent of the Attorney General does not mean that offences should not be carefully tailored to require subjective fault that is proportionate to the crime and the punishment.

### **6. Preventive Detention**

Canada’s preventive arrest provisions have recently expired because of Parliament’s failure to renew them. Should they be revived, one issue that should be addressed is to make clear where a person subject to preventive arrest will be detained. Three days at a

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<sup>8</sup> David Paciocco “Constitutional Casualties of September 11” (2002) 16 S.C.L.R.(2d) 185

<sup>9</sup> S.C. 2004 c. 15.

<sup>10</sup> Criminal Code ss.83.231(3)

<sup>11</sup> *R. v. Creighton* [1993] 3 S.C.R. 3

<sup>12</sup> *R. v. Martineau* [1990] 2 S.C.R. 633 ; *R. v. Finta* [1994] 1 S.C.R. 701

police station may be excessive.<sup>13</sup> Another problem is that a provincial court judge is authorized under s.83.3(7)(C) to order a person detained on “any other just cause” even though the Supreme Court of Canada unanimously decided in 2002 in *R. v. Hall*<sup>14</sup> that this phrase was excessively vague.

One provision that was not subject to the five year sunset and has not expired is s.810.01 of the Criminal Code which allows a provincial court to impose a peace bond or recognizance with conditions if there are reasonable grounds to fear that a person will commit a terrorism offence. The consent of the Attorney General is required for the application. There are other peace bonds provisions in the Criminal Code and they have been held to be consistent with the Charter.

### **7. Reform Section 38 of the Canada Evidence Act**

Section 38 is one of the more controversial parts of the *Anti-Terrorism Act* and there are a number of amendments that can be made to improve it. The amendments would relate to the elimination of mandatory provisions for *in camera* hearings and the repeal of Attorney General certificates under s.38.13 that would override court orders that evidence be disclosed.

Section 38.02 provides a broad and mandatory statutory gag order that prohibits not only the disclosure of sensitive or potentially injurious information, but also the fact that notice with respect to such information has been given to the Attorney General, an agreement made with the Attorney General or that an application has been to the Federal Court.<sup>15</sup> These last three mandatory restrictions on disclosure under s.38.02(1)(b) (c) (d) are contrary to the principles in *Ruby v. Canada*<sup>16</sup> that mandatory as opposed to discretionary *in camera* provisions cannot be justified as a proportionate restriction on freedom of expression. The Federal Court has recently held that some of these mandatory provisions constitute an unjustified violation of freedom of expression.<sup>17</sup>

The heart of s.38 is s.38.06 which directs a judge to balance the public interest in disclosure against the public interest in non-disclosure including injury to international relations, national defence or national security. The Federal Court of Appeal has articulated a three part test under s.38.06 that is quite protective of state secrets even in the context of disclosure to the accused in a criminal trial. The first issue is that the information requested must be relevant to the defence, which the Court noted was “undoubtedly a low threshold.”<sup>18</sup> The second issue is whether the disclosure of the information would be injurious to international relations, national defence or national security. At this stage, the courts will defer to the government with Letourneau J.A. stating for the Court of Appeal:

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<sup>13</sup> Gary Trotter “The Anti-Terrorism Bill and Preventive Restraints on Liberty” in *The Security of Freedom* at 243-244.

<sup>14</sup> [2002] 2 S.C.R. 309.

<sup>15</sup> One commentator has argued that these provisions are “akin to forbidding a media outlet from reporting that it has filed a legal challenge to a publication ban...” Jeremy Patrick-Justice “Section 38 and the Open Courts Principle” (2005) 54 U.N.B.L.J. 218 at 227.

<sup>16</sup> [2002] 4 S.C.R. 3

<sup>17</sup> *Toronto Star v. Canada* [2007] FC 128 reading down mandatory confidentiality provisions in ss. 38.04(4), 38.11(1), and 38.12(2) of the Canada Evidence Act only to apply to ex parte presentation of evidence and not the entire court proceedings.

<sup>18</sup> *R. v. Ribic* 2003 FCA 246 at para 17

It is a given that it is not the role of the judge to second-guess or substitute his opinion for that of the executive... This means that the Attorney General's submission regarding his assessment of the injury to national security, national defence or international relations, because of his special access to special information and expertise, should be given considerable weight by the judge to determine, pursuant to subsection 38.06(1) whether the disclosure of the information would cause the alleged and feared injury.<sup>19</sup>

In the third stage "the party seeking disclosure bears the burden of proving that the public interest scale tipped in its favour."<sup>20</sup> A much stricter standard of relevance applies at this third balancing stage. Letourneau J.A. stated that he was "inclined" to apply the innocence at stake principle in *R. v. Leipert*<sup>21</sup> as requested by the government "at least in respect of matters affecting national security or national defence."<sup>22</sup> He did not have to decide this issue, however, because he upheld an order of non-disclosure on the basis that "the vetted sensitive information is neither necessary (Leipert test) nor crucial (Pereira test)<sup>23</sup> to the defences raised by the appellant."<sup>24</sup> This case suggests that the Federal Court of Appeal is leaning to the stricter innocence at stake rule even in the context of an application by an accused person for disclosure and even though the test before the *Anti-Terrorism Act* amendments was whether the evidence sought to be disclosed will "probably establish a fact crucial to the defence."<sup>25</sup>

The balancing test under s.38.06 is already very sensitive to state interests in national security and national defence and that this makes unnecessary the ability of the Attorney General to overrule disclosure decisions made under s.38.06 by issuing a certificate under s.38.13 in order to protect national security or national defence or to protect information obtained from a foreign entity. A s.38.13 certificate expires 15 years after it is issued but may re-issued and it shall be published in the *Canada Gazette*. In principle, an executive decision such as the issuance of a certificate under s.38.13 should not be able to trump a judicial decision that disclosure is in the public interest.

In response to concerns about the unreviewable power of the Attorney General under s.38.13, a procedure for judicial review of the s.38.13 certificate was added by the 20 November, 2001 amendments to the *Anti-Terrorism Act*. Under section 38.131, a party

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<sup>19</sup> *ibid* at paras 18-19

<sup>20</sup> *Ibid* at para 21.

<sup>21</sup> [1997] 1 S.C.R. 281 at 295

<sup>22</sup> *R. v. Ribic* 2003 FCA 246 at para 27.

<sup>23</sup> In reference to the Federal Court of Appeal's decision in *Jose Pereira Hijos v. Canada (A.G.)* 2002 FCA 1658 at paras 17-18 that "whether a question is relevant in the context of a section 37 and 38 determination is not to be viewed in the narrow sense of whether it is relevant to an issue pleaded, but rather to its relative importance in proving the claim or in defending it" and its agreement that the test of importance is whether "the information which the plaintiffs seek to obtain will not establish a fact crucial to the plaintiff's case".

<sup>24</sup> *R. v. Ribic* at para 41

<sup>25</sup> *R. v. Khan* [1996] 2 F.C. 316 at 327-8 (T.D.) citing *Goguen v. Gibson* [1983] 1 F.C. 872 at 906 (T.D.) and *Kevork v. The Queen* [1984] 2 F.C. 735 at 764 (T.D.). For a discussion of the difficulties of obtaining disclosure even under the pre-September 11 jurisprudence see Peter Rosenthal "Disclosure to the Defence After September 11" (2004) 48 C.L.Q. 186 and *Singh v. Canada* (2000) 186 F.T.R. 1 (T.D.) denying access about the APEC demonstration on the basis of the importance of maintaining the confidences of foreign governments.

may apply to a single judge of the Federal Court of Appeal for an order varying or canceling the certificate. The judge who hears the application must make an order varying or canceling the certificate if part or all of the information subject to the certificate does not relate to information obtained in confidence from or in relation to a foreign entity or to national defence or security. However, the judge must make an order to confirm the certificate if all of the information subject to the certificate relates to information contained in confidence from, or in relation to a foreign entity for the purpose of protecting national defence or security. The judge's determination of this matter is final and is not subject to appeal. Unlike, s.38.06, no balancing of the competing interests in disclosure and national security is allowed, although one has been recommended by a recent Senate Committee. The right of judicial review will often be illusory because information will almost always relate to information obtained from foreign entities or to national defence or security.

The ability of the executive to trump a judicial disclosure order under s.38.13 should be abolished. Lack of disclosure have contributed to wrongful convictions in past terrorism cases. Section 38.14 rightfully preserves the ability of criminal trial judges to stay proceedings if a lack of disclosure makes a fair trial impossible. At the same time, the trial judge will be put in the impossible position of making this decision on the basis of evidence that he or she may not have seen because the issue has been taken out of the criminal courts into the supposedly securer confines of the Federal Court and the federal Attorney General's offices. Indeed, the whole s.38 process is apt to delay and disrupt criminal terrorism trials that will already be difficult and long enough without repeated trips to the Federal Court. It would be better to allow trial judges to balance and reconcile competing and legitimate claims to national security confidentiality and fairness to the directly affected party. There is no reason to think that criminal trial judges cannot be trusted with this information and with these decisions. They will be better able to determine the importance of the information to the accused's defence and to resolve these disputes in an efficient and fair manner.

#### **8. Ensure Effective Adversarial Challenges to National Security Confidentiality Claims**

A theme that runs through Canadian anti-terrorism law is the great emphasis that is placed on maintaining secrets and preventing the disclosure of information that if released might injure national security. Section 78(g) of IRPA specifically authorizes judges to consider information in determining whether a Ministerial security certificate is reasonable that is not disclosed to the detainee and not even included in a summary of the information that is provided to the detainee. This can produce a situation in which a decision to deport a person from Canada is made in the absence of any adversarial challenge of the evidence and without even a summary of the information. The Supreme Court of Canada has recently in *Charkaoui*<sup>26</sup> held that the lack of adversarial challenge of the secret evidence violated s.7 of the Charter and gave Parliament 12 months to provide for some form of adversarial challenge. The decision is an important victory for the rule of law. At the same time, it is not the final word. The court recognized the fundamental unfairness of not being able to meet the case against you because you do not know the

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<sup>26</sup> 2007 SCC 9

case. It stressed the importance of allowing adversarial challenge to the evidence that the government presents against suspected terrorists and the government's claim to secrecy.

Although holding that the specialized Federal Court that reviews security certificates remained an independent court, Chief Justice Beverley McLachlin expressed skepticism about its ability to decide cases fairly in the absence of full adversarial challenge. She quoted the candid confession of one Federal Court judge that he felt "a little bit like a fig leaf." In an echo of the U.S. Supreme Court's decision on Guantanamo Bay, the court ruled that the denial of judicial review to foreign nationals who were not permanent residents until 120 days after their certificate was upheld (a process itself that takes a year) constituted arbitrary detention and an unjustified denial of habeas corpus. The court rightly rejected the fallacy of the three-wall prison. It rightly recognized that returning to Egypt and Syria was simply not a viable option for the detainees.

The court also approved of the decisions of Federal Court judges to release some of the men under controls. The judges should continue to review the necessity for detention and the proportionality of the strict conditions placed on release.

It is wrong to declare that there is quick fix by simply adding the British system of security-cleared special advocate. The court carefully stated that this was only one example of a less rights invasive approach. It pointed out criticisms that British special advocates, after they had received secret information, could not consult the detainees. Questions such as, "Where were you in August 1998," or, "How do you know person X?" might, in fact, be crucial after the secret evidence has been heard.

We should look to Canadian solutions to the dilemma of reconciling fairness and secrecy. During the Arar Commission hearings, commission counsel met with Maher Arar and his counsel and asked questions that were relevant to, but did not reveal, the secret evidence. A Senate Committee report released a day before the Court's case reached the same conclusion that special advocates were needed but should in the interest of procedural fairness be allowed to meet with the detainee.

Legislation or regulations enacted in response to the decision should, following the Arar Commission and the Senate committee, allow special advocates, perhaps with court approval, to meet with detainees and ask them questions that are necessary for them to defend themselves while also not revealing legitimate secrets.

The decision was not a complete victory for the detainees and their supporters. The court did not join with the House of Lords in its 2004 Belmarsh decision, which held that reliance on indefinite detention of terrorist suspects under immigration law was discriminatory and not rational. The House of Lords rejected the use of immigration law as anti-terrorism law on the basis that the threat of terrorism comes from citizens as well as non-citizens and because deportation under immigration law only exports terrorist, as opposed to punishing and incapacitating them under the criminal law. The court also held that long-term detention under security certificates was not unconstitutional and cruel and unusual punishment so long as there was periodical, and full, adversarial review of the state's case against the detainees. There should be some limit on detention under security certificates and there should be a clearer preference for prosecutions rather than the use of immigration law as the fairest manner in which to resolve allegations of involvement which may be true but may also be based on false and misleading evidence.

Recent Senate and House of Commons Committees have recommended that judges should only consider "reliable and appropriate" evidence in security certificates.

The information that is presented in the judge in this manner may include matters such as eyewitness identification, a jailhouse or other unreliable informer, a false confession and evidence and information filtered through tunnel vision that may led to miscarriages of justice in which the innocent are detained for prolonged periods.<sup>27</sup> These are all wise recommendations in light of the findings of the Arar Commission that Maher Arar was sent to Syria to be tortured likely on the basis of inaccurate intelligence provided by Canada to the United States.

The problematic *ex parte* and *in camera* procedures of security certificates are duplicated in several areas of the ATA. Similar provisions, including the possibility that national security evidence will be considered by a judge but not even summarized for the party challenging the government's actions, are found in ss.83.05 and 83.06 of the *Criminal Code* relating to judicial review of the Cabinet's listing of terrorist groups and ss. 5 and 6 of the *Charities Registration (Security Information) Act*. These provisions do not allow judges the benefit of full adversarial challenges to government claims of secrecy. To be sure parties adverse in interest can make representations to the judge that the evidence ought to be disclosed, but given that they are not allowed to see the evidence, their submissions to the court may well be less than helpful or convincing. They will be arguing in the blind. In contrast, government lawyers can make persuasive arguments that information sharing with other governments may diminish should the evidence be disclosed and that informers may find their lives threatened.

Without effective adversarial challenge, there is a risk that judges will be vulnerable to governmental arguments that public safety and the need to maintain good relations and information sharing with allies requires a very generous definition to national security confidentiality. At the very least, the perception of *in camera* and *ex parte* proceedings may undermine public confidence in the administration of justice which has long depended on adversarial processes.

#### **9. Ensure Non-Discrimination**

Another theme that runs through post 9/11 Canadian anti-terrorism law is the danger of discrimination against Muslims and those of Arab origin in anti-terrorism efforts. Irwin Cotler argued that a non-discrimination clause should be included in the *Anti-terrorism Act*. At the same time, the clause that he proposed taken from s.4(b) of the *Emergencies Act*<sup>28</sup> was limited because it only protected Canadian citizens and permanent residences from detention, imprisonment and internment whereas modern concerns about profiling apply more generally to disproportionate investigative activities by the state. There have been some recent proposals to add non-discrimination principles to the eight paragraph preamble to the *Anti-Terrorism Act*, but this will only have a limited symbolic effect given the emphasis given to threats to security in the preamble and the diminished legal and political status of preambles.<sup>29</sup>

The government could take the opportunity of the three year review to consider a Criminal Code amendment that would define improper profiling and provide remedies

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<sup>27</sup> On these causes of wrongful convictions see FPT Heads of Prosecution Committee Working Group *Report on the Prevention of Miscarriages of Justice* September, 2004. See also Kent Roach and Gary Trotter "Miscarriages of Justice in the War Against Terrorism" (2005) 109 Penn State L.Rev. 967.

<sup>28</sup> S.C. 1988 c. 29.

<sup>29</sup> Kent Roach "The Uses and Audiences of Preambles to Legislation" (2001) 47 McGill L.J. 129.

and monitoring for these practices.<sup>30</sup> Some will argue that it will add little to s.15 of the Charter, but in my view it could provide a solid statutory framework for protecting equality just as Part VI of the Code supplements Charter protections of privacy with statutory protections of privacy. Agreement and codification of what constitutes improper profiling could be a very useful tool training tool for law enforcement officials.

There is also a need for increased review of various national security activities. The Arar Commission has recommended that the national security activities of the RCMP be subject to self-initiated review by a body with access to all evidence. It has also recommended that the existing review powers over Canada's civilian intelligence agency be extended to the national security activities of border, transport, immigration, foreign affairs and financing agencies.<sup>31</sup> The government has not addressed whether it will implement these recommendations.

#### **10. Abolish the *Suresh* Exception that Allows Torture**

The final and perhaps most important thing that should be done by Canada is to affirm in absolute and unequivocal terms that the government will not seek to deport a non-citizen to face torture even though the Supreme Court in *Suresh v. Canada*<sup>32</sup> regrettably indicated that in some undefined exceptional circumstances deportation to torture might not violate the Charter. Such action would affirm the equal and innate dignity of all human beings and follow an earlier tradition where Parliament and not the Court was the moral leader on issues such as capital punishment.

Abolishing the *Suresh* exception is a practical as well as a moral necessity. Parliament should consider what should be done with terrorist suspects who cannot be deported because they will be tortured by the often repressive regimes that they have fled from. The security certificate process was not intended to provide for indefinite detention and courts should not interpret IRPA to authorize indeterminate detention in the absence of a clear statement by Parliament of such a problematic intent. In any event, as in Britain, indeterminate detention would be both disproportionate and discriminatory to the threat of terrorism.<sup>33</sup> It is discriminatory because the terrorist threat is not limited to non-citizens. It is disproportionate because there are a range of options short of indefinite detention including release on conditions and criminal prosecutions. Criminal prosecutions will often be the most appropriate and fairest way to deal with terrorist suspects.

Abolition of the *Suresh* exception for torture would affirm that Canadian democracy will not sacrifice the most basic of rights because of terrorism. It will also have the practical effect of requiring Parliament to address the difficult issue of the most proportionate treatment of terrorist suspects who cannot be deported. As with many of the above recommendations, it is wrong to assume that respecting rights will inevitably compromise security.

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<sup>30</sup> For some suggestions see Kent Roach "The Three Year Review of Canada's Anti-Terrorism Act: The Need for Greater Restraint and Fairness, Non-Discrimination and Special Advocates" (2005) 54 U.N.B.L.J. 308 at 322-26 on which this section draws. See also Bill C-296 *An act to eliminate racial profiling* 1<sup>st</sup> Sess 38<sup>th</sup> Parl. 2004, (first reading 18 Nov. 2004).

<sup>31</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *A New Review Mechanism for the RCMP's National Security Activities* (2006).

<sup>32</sup> [2002] 1 S.C.R. 3 at para 78.

<sup>33</sup> *A. v. Secretary of State* [2004] UKHL 56