

Canadian National Security Policy and Canadian Muslim Communities

Kent Roach*

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Abstract

This paper will outline the major components of Canada's evolving post 9/11 national security policy with an emphasis on its effects upon Muslims living in Canada. Topics to be examined will include Canada's 2001 *Anti-terrorism Act*, the use of Canadian immigration law and in particular security certificates to detain and deport suspected terrorists, the inquiry in Canada into the actions of Canadian officials in relation to the United States's extraordinary rendition of Maher Arar to Syria, and Canada's 2004 national security policy "Securing an Open Society", including the creation of a cross-cultural roundtable on national security.

Introduction

Canada has a somewhat better reputation as a welcoming place for Muslims and respect for civil liberties than the United States or many western European countries such as the United Kingdom or France. After the terrorist attacks of September 11, 2001, Canada did not derogate from its constitutional bill of right, the Canadian Charter of Rights and Freedoms, as the United Kingdom did. Unlike the United States, it had a relatively robust political debate about the contours of its legislative response and Muslim voices were heard during that debate. Canada has demonstrated official concern for the treatment received by its citizens abroad who are suspected of terrorism by calling an expensive and unprecedented public inquiry to examine the actions of Canadian officials relating to the extraordinary rendition of Maher Arar, a Syrian-born Canadian citizen, from the United States to Syria. It has created a new cross-cultural roundtable on national security issues and has committed itself to independent review of the Royal Canadian Mounted Police's national security activities. Canada's reputation is also affected by the sometimes harsh criticism it has received for its "liberal" immigration policies and its refusal to join the invasion of Iraq.

In this paper, I will critically examine Canada's post 9/11 national security policy with special attention to its effects on Canadian Muslims and their engagement in its development. I will suggest that while in some respect's Canada's reputation for respect for civil liberties and a welcoming multiculturalism is deserved, especially in comparative perspective, Canada could and should do more to ensure respect for equality, multiculturalism, international law and democracy in its anti-terrorism activities and that such improvements not only result in moral and normative gains, but also in instrumental gains in combating terrorism. Better relations between Canadian governments and the Muslim minority, a strong condemnation of racial and religious profiling, outreach to Muslim communities, the deletion of the religious or political motive requirement from Canada's definition of terrorism, better review of Canada's national security activities and the adoption of an all-risk national security policy may actually help make Canada more secure from terrorism.

Canada's Muslim Communities

Between 1991 and 2001, Canada's Muslim population doubled. It grew from 1 to 2% of Canada's total population. In the 2001 census, 579,640 Muslims were identified in Canada, up from 253,000 in 1991 and 98,165 in 1981.¹ The Muslim minority in Canada is larger than other non-Christian religions including the Jewish, Hindu, Buddhist and Sikh communities.² The Muslim minority will likely continue to grow both because of high fertility rates and continued immigration.³ At the same time, it remains a small and vulnerable minority in the larger Canadian context. Canada's Muslim community is also heavily urbanized with large numbers in Toronto, Ottawa and Montreal and there are 10 federal ridings in those cities with a Muslim population of over 10% of the riding. Especially after 9/11, there are some signs of a growing political awareness and activism with the Canadian Islamic Congress preparing report cards for all federal Members of Parliament and urging engagement on a variety of public issues.⁴

An important feature of the Canadian Muslim minority is its diversity with large numbers of immigrants coming from Southeast Asia as well as the Middle East. The majority of Canadian Muslims are Sunni, but there is also a significant representation of Shia, Ismailis and Ahmad sects. Even within sects, there are important differences of nationality, with some mosques focusing on populations from Southeast Asia and others on Muslims from Arabia, Africa or Bosnia. The diversity of the Canadian Muslim community in terms of national origin, sect and political and religious orientation may affect its political engagement in Canada. There are a number of different groups that compete to represent Muslims in Canadian political life.⁵ In any event, the overall small numbers of Muslims in Canada (2% of total population) and the newness and diversity of the community will adversely affect its political strength.

The Anti-Terrorism Act, 2001

Canada's main initial response to 9/11 was the introduction of a massive new anti-terrorism bill on October 15, 2001 called Bill C-36. The bill defined crimes based on the commission of a terrorist activity for the first time in Canada's Criminal Code, as well as providing for increased police powers of preventive arrests, listing of terrorist groups and individuals by the executive, enhanced provisions for protecting national security information and a new procedure for the deregistration of charities.

The political engagement of Muslims in Canada against the anti-terrorism bill may in some respects be as important as its legal details. Representations against the bill were made by various Muslim groups including the Council on American-Islamic Relations, the Muslim Lawyers Association and the Canadian Muslim Civil Liberties Association. Riad Saloojee, the executive director of the Canadian branch of the Council on American-Islamic Relations, has commented that "the public advocacy of Canadian Muslims against Bill C-36 represented a departure from previous insularity regarding public policy and marked a re-

* Professor of Law and Political Science, University of Toronto. I thank Anver Emon and Ziyaad Mia for helpful comments on an earlier draft and Malcolm Katz for research assistance. Errors and misunderstandings are my responsibility.

¹ Statistics Canada at http://142.206.72.67/02/02a/02a_008_e.htm

² Statistics Canada at <http://www40.statcan.ca/101/cst01/demo30a.htm>

³ Statistics Canada at <http://www.statcan.ca/Daily/English/031222/d031222c.htm>

⁴ Canadian Islamic Congress *Towards Informed and Committed Voting* April 2004 at <http://www.canadianislamiccongress.com/democracy/index.php>

⁵ "Muslims Search for a Common Voice" *Ottawa Citizen* Aug 14, 2005.

assertion of their agency in a climate where they were victims of anti-Muslim hate.”⁶ The lobby against Bill C-36 was also striking as it saw a broad alliance of civil society groups including civil liberties groups, groups of lawyers including the Canadian Bar Association, Aboriginal groups, unions, the refugee community, charities, faith communities and elements of the anti-globalization who each for their own reasons feared aspects of the bill.⁷

A Coalition of Muslim Organizations comprised of more than 140 Muslim Organizations in Canada made lengthy submissions to both Parliamentary committees that reviewed Bill C-36. The Coalition argued that the bill violated the Canadian Charter of Rights and Freedom and made use of legal analysis offered by the mainstream Canadian Bar Association.⁸ At the same time, the Coalition argued from the experience of Canadian Muslims that “xenophobia, fear and a general state of tension , coupled with the vague and overly broad powers in the Bill will contribute to many innocent Canadians being subject to unwarranted invasions of privacy, humiliating investigations and possible loss of liberty and privacy... Those who will be wrongfully charged, arrested and imprisoned may be vindicated in the fullness of time, but at incalculable cost: the stigma, shame and humiliation that will have devastating effects on families, reputations, friendships, businesses and jobs.”⁹ The broad based opposition to the bill in civil society caused the government to amend the bill in November, 2001. The amendments included a five year renewable sunset for new police powers of preventive arrest and detention for up to 72 hours on the basis of reasonable suspicion and for investigative hearings that allow judges to require those with information about terrorism to answer questions and produce documents without regard to the right against self-incrimination. In addition, annual reports are now statutorily required on the use of these two new investigative powers. Other important amendments introduced in November, 2001 include judicial review of executive certificates designed to protect national security information, the deletion of a requirement that protests and strikes must be lawful to be exempted from the definition of terrorism, and a statement that the expression of religious or political opinion or belief will not normally in itself be considered a terrorist activity. The amendments also included a requirement that both the law and its operation be subject to a three year review by a Parliamentary committee. This Parliamentary review is ongoing in Canada and will provide an opportunity for a re-mobilization of the civil society coalitions that initially opposed the bill.

The amendments made to the Anti-Terrorism act improved the bill from both a normative and an instrumental perspective. It is important for a democracy that the public be informed of the extent to which extraordinary police powers are used. Although some, including some Muslim groups, argued in favour of a sunset for the entire bill, both the sunset provisions and the three year review allow some opportunity for reflection about both the necessity of the law and its impact on specific communities. The expanded exemption for even unlawful protests and strikes from the act’s broad definition of terrorism recognizes the important role that protests and strikes, including civil disobedience, can play in a

⁶ Riad Saloojee “Life for Canadian Muslims The Morning After: A 911 Wake-Up Call” presented at Seventh Annual Metropolis Conference, September 9-11th Oslo, Norway.

⁷ For an account of the contributions made by all these groups see Roach *September 11: Consequences for Canada* (2003) ch. 3.

⁸ For an article based on the Coalition of Muslim Lawyers argument that the Bill violated various Charter rights see Ziyaad Mia “Terrorizing the Rule of Law” (2002) 16 N.J.C.L.

⁹ Coalition of Muslim Organizations Submission on Bill C-36 to Standing Committee on Justice and Human Rights, Nov. 8, 2001 at 25-26.

democracy. It can also be defended in instrumental terms; police and security intelligence should not devote limited resources for terrorist investigations to the activities of even radical wings of the labour, Aboriginal, animal rights or anti-globalization movements.

Despite the amendments after the bill was introduced it still contains several features that may have harmful effects on Muslims in Canada. Terrorism is still defined very broadly in the law to include a large variety of activities committed both inside and outside of Canada. Section 83.01(b) of Canada's Criminal Code as amended by the 2001 Anti-Terrorism Act now defines a terrorist activity as:

an act or omission, in or outside Canada,

i) that is committed

A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization inside or outside Canada, and

ii) that intentionally

A) causes death or serious bodily harm to a person by the use of violence

B) endangers a person's life

C) causes a serious risk to the health or safety of the public or any segment of the public

D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses A) to C) or,

E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses A) to C).

and includes a conspiracy, attempt, or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

1.1 For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition 'terrorist activity' in subsection 1 unless it constitutes an act or omission that satisfies the criteria of that paragraph.

One problematic aspect of this definition is that terrorism is defined in part by reference to the commission of acts with a religious or political motive. In this respect Canada followed the British as opposed to the American example. This requirement was opposed by various Muslim groups, as well as civil liberties groups, on the basis that it would require the police to collect evidence about a terrorist suspect's religion and politics and could encourage a process of guilt by association based on religion and politics. There have indeed been complaints subsequent to the enactment of the law that police and security intelligence officials have asked Canadian Muslims questions such as the frequency of the prayer and their opinions about bin Laden. Evidence of religious and political motive relating to support for Sikh independence and opposition to India was allowed in Canada's Air India trial under the regular criminal law relating to murder¹⁰, but the trial judge ultimately held that many others in the community would have similar motives to commit acts of terrorism against Indian targets in 1985. In this respect, evidence of motive did not substantially advance the Crown's case. There is, however, a danger that police, prosecutors and juries might have given political and religious motive evidence a disproportionate

¹⁰ *R. v. Malik and Bagri* 2005 BCSC 350 at paras 222-224, 303, 309, 348-353, 445-454, 529, 595-596

weight.¹¹ In addition, the political or religious motive requirement can be seen as a denunciation of political and religious extremism that especially after 9/11 is often associated in the west with Islam. It is significant in this regard that Indonesia and Pakistan both specifically rejected the political and religious motive requirement in their new anti-terrorism laws.¹²

Another practical problem with the political and religious motive requirement is that it makes it more difficult to gain convictions. Both the United Nations and the Commonwealth Secretariat have expressed reservations about the political and religious motive requirement on the basis that it may make it more difficult to obtain convictions. Ziyaad Mia, a lawyer representing the Coalition of Muslim Organizations, put the point well when in November, 2001 he argued that the motive requirements “do nothing to further the government’s objective and will only result in targeting vulnerable communities and individuals...If people fly a plane into BCE Place in downtown Toronto simply because they are crazy, they will receive a lesser criminal sanction than if they do it in the name of God or Buddha Why is that distinction made?”¹³ Mia returned to these themes when during the three year review he told the same committee that the motive requirement needs to be removed “because it is inefficient in terms of prosecutions and because it feeds profiling.”¹⁴

In response to criticisms of the religious or political motive requirements from both Muslim, legal and civil liberties groups, the Canadian government added s.83.01 (1.1) as part of the November amendments. It provides that the expression of religious and political belief will not constitute a terrorist activity unless it falls under the other components of Canada’s broad definition of terrorism. The legal effect of this amendment is dubious; indeed it may open the possibility that some expressions of religious and political belief could be defined as a terrorist activity likely on the basis that they constitute threats to commit terrorism which are included as part of the definition of terrorism in s.83.01. Nevertheless, the amendment is also a testament to the Canadian government’s sensitivity to claims that their anti-terrorism efforts were directed against particular religion and this provision is not found in British, Australian or South African anti-terrorism laws which also define terrorism in part as acts committed with religious or political motive.¹⁵

There were also calls during the debates over Bill C-36 for the enactment of anti-discrimination and anti-profiling clauses. Irwin Cotler¹⁶, then a backbencher and now the federal Minister of Justice, called for the enactment of an anti-discrimination provision patterned after the prohibition on detention or internment on racial, religious and other grounds found in s.4(b) of Canada’s *Emergencies Act*.¹⁷ This clause was included in recognition of the injustice suffered by people of Japanese origin interned during World War II, and the mistreatment of people of Ukrainian origin during World War I. Others called for

¹¹ A public opinion poll suggest that 68% of respondents that had an opinion disagreed with the trial judge’s verdict of an acquittal. “Poll finds most in B.C. reject Air-India verdict” *Globe and Mail* 31 March, 2005 A1.

¹² See Kent Roach “Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses” in A. Sajo *Militant Democracy* (2004)

¹³ Senate Special Committee Dec 5, 2001.

¹⁴ *Ibid* May 2, 2005.

¹⁵ Kent Roach “The Post 9-11 Migration of the Terrorism Act, 2000” in S. Choudhry ed. *The Migration of Constitutional Ideas* forthcoming

¹⁶ See Irwin Cotler “Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy” in *The Security of Freedom*

¹⁷ S.C. 1988 c. 29.

more robust restrictions on the use of race or religion to justify a broader range of investigative activities.¹⁸ A private members bill is currently before Parliament and it prohibits the use of stereotypes rather than reasonable suspicion in singling out individuals for greater scrutiny or different treatment.¹⁹ It was introduced by a member of Canada's third social democratic political party, the New Democratic Party, who have been particularly active in matters involving discrimination against Muslims since September 11. Canada's multi-party system which may only become more robust should current Canadian interest in proportionate representation be realized may increase the opportunities for Muslims to find allies and be represented within the Canadian political system. Representation, however, does not guarantee success and it is significant that the government did not amend the anti-terrorism act to include an anti-discrimination or anti-profiling provision despite Cotler's recommendations and attempts to present the bill as not only consistent but also protective of rights. It will be interesting to see if an anti-discrimination or anti-profiling amendment is proposed or adopted as part of the ongoing three year Parliamentary review of the act. At the same time, an anti-discrimination or anti-profiling provision is not a panacea; it would not be self-executing and could prove to be mainly symbolic.

The *Anti-terrorism act* included a new offence of hate motivated mischief against religious property and expanded powers to remove hate literature from the internet. These provisions were defended on the basis of the connection between racial and religious hatred and terrorism and responded to an increase in reported hate crimes in Canada after September 11.²⁰ The Canadian government was prepared to proclaim its commitment to the anti-discrimination principle when it extended the criminal law, but it was not prepared to introduce an anti-discrimination clause that would bind state officials.²¹ This state of affairs also indicates how Muslims in Canada may at the same time be drawn towards the state and the police for protection against hate crimes, but at the same time fearful that the state will target or investigate them as potential terrorists because of their religion and/or ethnicity. It is noteworthy that the Muslim groups who appeared before Parliamentary committees were more concerned with possible state abuse of new powers than the ability of the state to defend them against hate speech and hate crimes.

Another important feature of the *ATA* is that it applies to a broad range of acts committed inside or outside of Canada. People can be prosecuted in Canada for sending financial and other support to struggles fought in foreign lands. In noting the difficulty of defining terrorism, the Supreme Court of Canada has noted that "Nelson Mandela's African National Congress was, during the apartheid era, routinely labeled as a terrorist organization, not only by the South African government but by much of the international community."²²

¹⁸ Sujit Choudhry and Kent Roach "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1; Reem Bahdi "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall L.J. 293.

¹⁹ Bill C-296 First Session Thirty Eighth Parliament Nov. 18, 2004.

²⁰ Over two thirds of reported hate crimes after September 11 were violent in nature and 30% targeted Muslims, 27% targeted Jews, 15% targeted Americans and 13% targeted Arabs.

<http://www.statcan.ca/Daily/English/040601/d040601a.htm>

²¹ Those who advocated such a clause included Irwin Cotler, a noted human rights lawyer, who subsequently was appointed Canada's Minister of Justice. See Irwin Cotler "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in *The Security of Freedom* .

²² *Suresh v. Canada* [2002] 1 S.C.R. 3 at para 95.

The only exemptions from the scope of international terrorism targeted by the law are for armed conflict conducted according to customary or conventional international law or the official activities of a state military force “to the extent that those activities are governed by other rules of international law.”²³ This would not necessarily apply to all the resistance efforts against repressive regimes. The extra-territorial application of various terrorism crimes, including those of financing terrorism, as well as the provision for the deregistration of charities, will have a disproportionate effect on Canada’s Muslim population who have close and recent connections to the Middle East and Southeast Asia and whose faith requires contributions to charities. This was a point made by many Muslim groups in their campaign against the law who argued even before its passage “the charities are suffering. Innocent people in Somalia, Ethiopia, Afghanistan and Chechnya are not getting funds to enable them to feed themselves and keep themselves warm this winter because money is not being sent overseas due to the palpable fear in the community.”²⁴ The extra-territorial nature of the new law help made extra-territorial ties and disputes more salient in Canadian politics.

Despite concerns raised by Muslim groups and others such as trade unions and civil liberties groups, Canada’s use of its new anti-terrorism act has so far been quite sparing. The first and so far only charges under the new law were laid by the RCMP on 31 March, 2004. Charges of knowingly participating in the activities of a terrorist group and facilitating a terrorist activity were laid against Mohammad Momin Khawaja.²⁵ The Canadian born citizen is alleged to have participated in the activities of a terrorist group and facilitated terrorist activity in and around Ottawa, Canada and London, England in late 2003 and early 2004. Officials have linked his arrest with nine men in the London area and the seizure of a large amount of ammonium nitrate stored near Heathrow Airport.²⁶ The fact that Mr. Khawaja is a Canadian citizen precluded the use of immigration law procedures, to be examined below, against him. Khawaja’s father was temporarily detained by Saudi authorities at the same time as his son was arrested and claims that Canadian officials were involved. Media reports subsequent to the arrest focused on the political and religious beliefs of the Khawaja family.²⁷

Annual reports are required with respect to the use of new powers of investigative hearings and preventive arrests and they indicate that these new powers were not used in Canada from the enactment of the law in late 2001 till the end of 2004. An attempt was

²³ ATA 83.01(1)(b)

²⁴ Special Senate Committee Dec 5, 2001 per Mr. Baksh of the Coalition of Muslim Organizations

²⁵ The participation offence provides that “Everyone who knowingly facilitates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.” Criminal Code s.83.18. The facilitation offence provides that: “Everyone who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.” Criminal Code s.83.19. The definition of a terrorist activity includes attempts, conspiracies, counseling and threats to commit a terrorist activity.” The RCMP has issued press releases stressing that their focus is on individuals and not Canada’s large Muslim community. RCMP lay terrorist charges” *Globe and Mail* 31 March 2004; “Ottawa man’s arrest tied to terror raids in Britain” *Globe and Mail* 3 April 2004. See “RCMP lays charges under sections 83.18 and 83.19 of the Criminal Code” www.rcmp-grc.gc.ca/news/n00413-e.htm 5 April 2004

²⁶ Five people in the United Kingdom have been charged with conspiracy to cause an explosion likely to endanger to life or cause serious injury to property, an offence punishable by up to life imprisonment. “British court hears of potential bomb targets” *Globe and Mail* 17 April 2004.

²⁷ “Khawaja family absent from mosque” *Globe and Mail* 3 April, 2004.

made to use an investigative hearing in order to examine a reluctant witness under oath in connection with the Air India trial. The Supreme Court of Canada held that the new procedure was constitutional, but extended immunity provisions in the law to ensure that evidence compelled at an investigative hearing could not be used in subsequent immigration or extradition proceedings and that there be a rebuttable presumption that the hearings be held in open court.²⁸ The investigative hearing was never used in the Air India prosecution and it is doubtful that it would have made a difference to the eventual acquittals in that case given the many credibility problems that the trial judge found with the prosecution's witnesses. It should not be assumed that a tough rights repressive response to terrorism will necessarily produce more convictions or prevent terrorism.

So far 38 groups have been listed by the federal cabinet of elected ministers as terrorist groups. Hamas was listed in late November 2002 but Hezbollah was not listed until December of that year after lobbying and threats of litigation by B'Nai Brith. Lebanon complained about the listing and the National Council on Canada- Arab relations called for some Jewish settler groups to be listed.²⁹ Khane Chai (Kach) described as "right wing, anti Arab Jewish terrorists" was added to the list by the federal Cabinet in June of 2004. In addition, over 450 groups and individuals have been listed as terrorists under regulations enacted under the *United Nations Act*.³⁰ Liban Hussein, an Ottawa Muslim from Somalia who ran a money exchange business, was wrongfully listed as a terrorist. The list was prepared by the United States, but accepted by both Canada and the United Nations. Canada also attempted to extradite Hussein to the United States, before concluding after seven months that an error had been made in listing Hussein as a financier of terrorism.³¹ A civil suit brought by Hussein was subsequently settled out of court and subject to a confidentiality agreement. Hussein's brother, however, was convicted in the United States of running a money transfer business without a license and sentenced to 18 months in jail even though no links to terrorism were proven.³²

The Use of Immigration Law

One of the reasons why Canada has been relatively restrained in its use of the new *Anti-Terrorism Act* is that it has made more extensive use of its immigration laws as anti-terrorism law. Although Canada's *Immigration and Refugee Protection Act* (IRPA) has been subject to criticism both in Canada and the United States that it is too liberal, it contains many powers that are much less restrained than even Canada's enhanced criminal law. For example, under the IRPA "engaging in terrorism", being "a danger to the security of Canada" or "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage" in acts of terrorism are grounds to make a non-citizen inadmissible to Canada on security grounds.³³ Membership in a terrorist organization can be proven under Canadian immigration law on the basis of a bona fide belief in a serious possibility based on credible evidence.³⁴ This requires much less than proof beyond a reasonable doubt. Under Canadian criminal law, membership in a terrorist group is not a

²⁸ *Re Section 83.28 of the Criminal Code*

²⁹ Roach *September 11: Consequences for Canada* (2003) at 37-38.

³⁰ United Nations Suppression of Terrorism Regs SOR 2001-360 Oct 2, 2001

³¹ E. Alexandra Dosman "For the Record: Designating 'Listed Entities' For the Purposes of Terrorist Financing Offences at Canadian Law" (2004) 62 *University of Toronto Faculty Law Review* 1 at 15-19.

³² "The end of the sordid Hussein tale" *Ottawa Citizen* Oct, 2, 2003.

³³ *Immigration and Refugee Protection Act* S.C. 2001 c.27 s.34.

³⁴ *Chiau v. Canada* [2001] 2 F.C. 207 (C.A.).

crime and participation, instruction or facilitation with regards to terrorism all require proof of various forms of blameworthy intent beyond a reasonable doubt. Although the Supreme Court of Canada has held in a landmark equality rights cases that non-citizens are a ‘discrete and insular minority’ vulnerable to discrimination by the majority³⁵, it has also accepted that non-citizens do not have a right to remain in Canada and can be treated more harshly under immigration law than under the criminal law.³⁶ The IRPA subjects non-citizens to considerably lower standards of adjudicative fairness than under even the enhanced criminal law of the ATA.³⁷ It is in this context that the Canadian government has chosen to rely more on immigration law than the new criminal law to deal with suspected international terrorists. As my colleague Audrey Macklin has suggested “laws that arouse deep concerns about civil liberties when applied to citizens are standard fare in the immigration context.”³⁸ This important observations has important repercussions for newcomer communities such as Muslims.

Project Thread

Procedures used under Canadian immigration law for preventive or investigative detention are more draconian than those available under the ATA. The ATA provides for preventive arrest for a 72 hour period, but with the possibility of peace bonds being imposed for a longer period. In contrast, the IRPA authorizes a much broader form of preventive detention on reasonable grounds that a non-citizen, including a permanent resident, is inadmissible and a danger to the public. As under the ATA, there would be review within 48 hours, but not by a judge but by an official within the Immigration Division. Continued detention can be authorized on the basis that “the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights”.³⁹ This is a form of investigative detention not contemplated under the ATA. There is no limit on this period of detention, but the reasons for the detention must be reviewed every 30 days.⁴⁰

The above powers of investigative detention were used in August, 2003 in Canada with respect to Project Thread in which 21 non-citizens from Pakistan were arrested for typical immigration act violations relating to misleading statements and a fraudulent school being used as a means to obtain student visas. Nevertheless, the arrests were headline news in Canada in large because of a sensational “backgrounder” prepared by a Public Service and Anti-Terrorism Unit, composed of Mounties and immigration officials. The news release stated that the young men were: “from, or have connections to, the Punjab province in Pakistan that is noted for Sunni extremism”. This led an aunt of one of the detained men to comment “Pakistan only has four provinces. I don’t see how being from one of them

³⁵ *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

³⁶ *Canada v. Chiarelli* [1992] 1 S.C.R. 711

³⁷ See generally Ziyaad Mia “The End of Law: Canada’s National Security Legislation and The Principle of Shared Humanity” University of Toronto, LLM thesis, 2005.

³⁸ Audrey Macklin “Borderline Security” in *The Security of Freedom* at 393. See also Reg Whitaker “Refugee Policy after September 11: Not Much New” (2002) 20:4 *Refugee* for an argument that “refugee policies in Canada have long been formulated within a discourse that gives a privileged place, an overriding priority to national security” and that in Canada “military tribunals would be unnecessary, not because Canada is more liberal than the U.S., but because it is more restrictive in the protection of national security information in court.” at 176. In the American context see David Cole *Enemy Aliens* (2003).

³⁹ IRPA s.58 (1) (c).

⁴⁰ IRPA s.57(2).

makes you a terrorist. Whatever happened to innocent until proven guilty? They're holding them because they're from one country and they're Muslim so therefore they have to be terrorists. I'm Canadian-born Pakistani and I never thought something like this would happen in Canada."⁴¹

The backgrounder went on to state that the men arrested "appear to reside in clusters of 4 or 5 young males and appear to change residences in clusters and/or interchange addresses with other clusters...All targets were in Canada prior to September 5, 2001....A confirmed associate of the group...provided an offer of employment from Global Relief Foundation...[which] has been identified by the United Nations as a fundraising group that provides financial support to terrorist groups, including Al Qaeda...One of the targeted apartments is reported to have aeroplane schematics posted on the wall, as well as pictures of guns." And then the allegation that was the lead in the newspapers: "One of the subjects is currently enrolled in flight school to qualify as a multi-engine commercial pilot. His flight path for training purposes flies over the Pickering Nuclear Plant."⁴²

Not surprisingly given the dramatic nature of this extraordinary press release, the initial detention of 19 men (the same number involved in the September 11 attacks) was highly publicized and initially raised many security concerns in Canada. The men were entitled to prompt administrative hearings, but most of them were detained under s.58(1)(C) of IRPA on the grounds that "the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human and international rights".⁴³

The aftermath of these detentions suggest that the front page news about a suspected Al Qaeda cell with designs on a nuclear plant was grossly unfair. Both the RCMP and immigration officials subsequently retracted the claims of a security threat with one officials telling reporters: "I can comfortably say there is no known threat; what is being investigated is a reasonable suspicion. Its taken the spin that it has taken in the media for whatever reason."⁴⁴ One of the reasons for the spin, of course, was the sensational backgrounder prepared by the government.

Many of the men have been released after adjudicators determined that they were not a present security threat and the widely publicized reference to flying over a nuclear plant turned out to be a routine flight path for those learning to fly. The men reported being asked questions about their religious and political beliefs during their detention and some claimed that they were threatened during their periods of detention. Those who have been deported or detained have also been found not to be security threats. Ten of the men are making refugee applications on the basis that the publicity surrounding the case has made them liable to detention under Pakistan's harsh anti-terrorism laws.⁴⁵ One of the men, Muhammad Naeem, subsequently described how his medical studies in Canada had been disrupted by his arrest and detention. He commented "The people try to avoid me. I can no longer sit in social circles. I feel like I live in some sort of a cage. I can't return to Pakistan because I could be arrested and tortured. I can't travel to the United States because I will be under constant suspicion. But if I stay here, I won't be free either. People here no longer

⁴¹ "One man enrolled in flight school" *Toronto Star* Aug 22, 2003.

⁴² Project Thread Backgrounder: Reasons for Detention Pursuant to 58(1)(c) undated

⁴³ IRPA s.58(1)(C)

⁴⁴ "Case of 19 terrorist unraveling" *Globe and Mail* August 30, 2003.

⁴⁵ "Detained students seek refugee status" *Toronto Star* 11 Oct. 2003.

trust me. Canada can seem like hell sometimes.”⁴⁶ The body charged with hearing complaints against the RCMP has subsequently complained that their investigation of Project Thread has been hampered by the RCMP’s refusal to disclose to them all of the evidence in the case, including search warrant applications.⁴⁷

The whole incident has caused widespread resentment among Canada’s Muslim communities with some criticizing the apprehension of the men as the actions of a police state and others suggesting that it is an example of profiling that victimizes the innocent. On the other hand, Canada’s leading national newspaper refused to condemn the operation. It argued that the proceedings unlike post 9/11 immigration proceedings in the United States were conducted in public and that “preventive detention may be necessary in some cases” even while it recognized that the case against the men “would be laughed out of a criminal-court bail hearing, smacking of preventive detention and guilt by association.”⁴⁸ These comments raise a recurring theme in post 9/11 security policies: namely how Muslim communities are particularly vulnerable to harsh anti-terrorism laws that are accepted for non-citizens but would not be accepted for citizens.

Security Certificates

Security certificates are an extraordinary procedure introduced in Canadian immigration law in the early 1990’s and confirmed in a 2001 re-draft of the law. The involve two elected Ministers of the Crown, the Ministers of Immigration and the Solicitor General, certifying that a non-citizen is a risk to the security of Canada. So far, security certificates have only been used in 27 cases since their enactment. This procedure pre-empts other immigration procedures including applications for refugee status. Once a security certificate is signed, it is subject to judicial review by one judge of the Federal Court of Canada, a court that specializes in judicial review of immigration and other administrative law matters involving the federal government. The law provides for automatic detention of non-citizens who do not have permanent residence status and provides for reviews of detention often at 6 months intervals.

The procedure for reviewing security certificates is extraordinary because it involves the judge being required to hear the evidence in the absence of the person named in the certificate and their counsel if, in the judge’s opinion, the disclosure of information would be injurious to national security or the safety of any person. Such information can be used by the judge in determining the reasonableness of the certificate, but it cannot even be included in a summary of other evidence that can be provided to the person named.⁴⁹ The Supreme Court of Canada upheld a somewhat similar procedure in 1992, but stressed the importance of providing at least a summary of the evidence to the person named in the certificate.⁵⁰

⁴⁶ “Hope in a land of dreams” *Toronto Star* Nov. 30. 2003.

⁴⁷ Commission for Public Complaints *Annual Report* 2004/2005 at 35.

⁴⁸ “The arguments made in protection’s name” *Globe and Mail* August 29, 2003.

⁴⁹ Section 78 (e) of IRPA provides that at the government’s request “the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person.” Section 78(h) provides that “the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed.”

⁵⁰ *Chiarelli v. Canada* [1992] 1 S.C.R. 711.

In 2004, the Federal Court of Appeal also upheld the constitutionality of security certificates in the case of Adil Charakaoui who had been detained on the basis of a security certificate since May, 2003. The Court of Appeal recognized that security certificates “derogate in a significant way from the adversarial process normally adhered to in criminal and civil matters”⁵¹, but stressed the government’s duty to make full disclosure of the facts in its possession and the judge’s “pro-active role in the interest of ensuring fairness” to make this finding.⁵² The Court of Appeal stressed the state’s interest in national security.

the threat of terrorism or a threat to national security does not represent or reflect a situation of normality, at least not in our country...If we were to accept the appellant’s position that national security cannot justify any derogations from the rules governing adversarial proceedings we would be reading into the Constitution of Canada an abandonment by the community as a whole of its right to survival in the name of a blind absolutism of the individual rights enshrined in that Constitution. We fail to discern any legislative intention along those lines, quite the contrary.⁵³

The Federal Court of Appeal stressed the public’s interest in indefinitely incapacitating non-citizen terrorist suspects over the need to ensure that such suspects receive fair treatment. Key to such fair treatment is the suspects’ right to mount an adversarial challenge to government’s case against them, a case that may be based on faulty intelligence either from Canada’s own security intelligence agency, those of other governments or from terrorists who are being held under extreme conditions.⁵⁴ Miscarriages of justice in past terrorism cases resulted in large part because the state did not disclose all the evidence to the accused.⁵⁵ If such miscarriages can occur in criminal trials and appeals, they can certainly occur under the truncated procedures of the immigration law.⁵⁶ The Federal Court of Appeal also did not engage with the inequality of treatment of non-citizens under security certificates as opposed to citizens who must be charged with criminal offences. The sister of

⁵¹ *Charakaoui v. Canada* 2004 FCA 421 at para 75.

⁵² *ibid* at para 80.

⁵³ *Ibid* at para 84.

⁵⁴ Before 9/11 Ian Leigh commented that: “The danger in using designated judges in conjunction with the *ex parte* hearing provisions is that the judges involved may become over-familiar with and over-respectful of the types of arguments used to justify security decisions. The tendency of intelligence services to make decisions affecting individuals according to quite low levels of probability is one reason the debate over probability and proof “ is important. I Leigh “Secret Proceedings in Canada” (1996) 34 Osgoode Hall L.J.113 at 159.

⁵⁵ See K. Roach and G. Trotter “Miscarriages of Justice in the War Against Terror” (2005) 109 Penn.State L.Rev. 967 for an examination of the Birmingham Six, Guildford Four, Maguire Seven and Judith Ward cases, all involving wrongful convictions for IRA bombings. We also argue that contemporary miscarriages of justice in terrorism cases are probably more likely to occur in immigration proceedings such as the security certificate process than under the criminal law. For example, the Federal Court in *Charakaoui* supra at paras 17-18 indicates that the applicant was recognized in photographs by two terrorists as having been present in training camps in Afghanistan, but no detail is provided on the conditions and methods of identification. On the frailties of eyewitness identification and proper procedures for using multiple photos for identification purposes see Hon. Peter Cory *The Inquiry Regarding Thomas Sophonow* (Winnipeg: Queens Printer, 2001).

⁵⁶ For contrasting views about the ability of designated judges to probe the evidence offered in the security certificate process in the absence of adversarial challenge compare the confidence expressed by the Federal Court of Appeal in *Charakaoui v. Canada* supra at para 80 in the judge’s “pro-active role in the interest of ensuring fairness” with the statements of Judge Hugessen of the Federal Court Trial Division that “we do not like this process of...having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined...If you have a case that is only being presented on one side, you are not going to get a good case...I sometimes feel like a bit of a fig leaf.” J. Hugessen “Watching the Watchers: Democratic Oversight” in D. Daubney et al. *Terrorism, Law and Democracy* (2002) at 384-386.

a 31 year old Moroccan alleged to have received training in an Al Qaeda camp and subject to a security certificate has argued that “all I want for him is to be judge with the same fairness, in open court, as pedophiles and serial killers. They told us Canada was a land of democracy and respect for ethnic minorities. I can’t believe Canada would treat us this way.”⁵⁷

The Federal Court of Appeal’s decision can be unfavourably compared to that made by the House of Lords one week later in its landmark case dealing with the Belmarsh detainees. In an 8: 1 decision, the House of Lords found that derogation of fair trial rights was a disproportionate and arbitrary response to the terrorist threat and one that discriminated against non-citizens. Although non-citizenship has been recognized as a prohibited ground of discrimination under the Canadian constitution, the Canadian courts have not seriously considered the case that security certificates subject non-citizens from departures from fair procedures that would not be tolerated for citizens facing grave consequences.⁵⁸ Canada has also relied on security certificates more than criminal charges with respect to suspected Al Qaeda terrorist suspects even though as the House of Lords noted in the Belmarsh case, the ultimate remedy under immigration law- deportation- may not be the best way to combat international terrorism. The Supreme Court of Canada has recently decided to hear Charkaoui’s appeal of the Federal Court of Appeal’s decision and it will be interesting to see if they are influenced by the House of Lords decision. At the same time, the Supreme Court of Canada has upheld predecessor legislation providing for immigration security certificates.⁵⁹

At present, security certificates are being used against five Muslim men in Canada who are suspected of involvement with terrorism. Mahmoud Jaballah, alleged to have terrorist ties with the Egyptian Al Jihad, has been detained since August, 2001 on a security certificate ordering his deportation to Egypt.⁶⁰ Hassan Almrei, from Syria, has been detained since October 19, 2001. In 2005, he staged a hungry strike of over 60 days in protest of his conditions of confinement. Mohammed Harkat has been detained since December 10, 2002 with allegations that he has ties to the Algerian Islamic Army Group. Mohamad Mahjoub, a 45 year old Egyptian, has been detained the longest. He has been detained since June 26, 2000 and is alleged to have worked for bin laden and to have worked with the Vanguard of Conquest a group that wishes to overthrow the Egyptian government. Adil Charkaoui was detained since May, 2003 but in February of 2005 was released on strict conditions on his fourth detention review. Many prominent Canadians including award winning film maker Denys Arcand came forward to post bail bonds for Charkaoui. The same occurred in June, 2005 when Alexandre Trudeau, a filmmaker and a

⁵⁷ “Case goes to federal court of appeal” *Montreal Gazette* Nov. 7, 2004.

⁵⁸ The accused in a criminal trial can be denied access to national security information but unlike under immigration law, the judge has an explicit right to order any remedy including ending the trial that the judge “considers appropriate in the circumstances to protect the right of the accused to a fair trial.” Canadian Evidence Act s38.14.

⁵⁹ *Chiarelli v. Canada* [1992] 1 S.C.R. 711

⁶⁰ A judge who found an abuse of process because of the Minister’s delay in deciding whether a person subject to a security certificate was at risk if deported made an analogy to detention at Guantanamo Bay. “Judge sorry for delay in terrorist suspect’s case” *National Post* 12 April 2003; *Re Jaballah* 2003 F.C.T. 640. The judge eventually upheld the security certificate without the Minister’s decision but this was overturned by an appeal court. “Detainee granted new hearing” *Toronto Star* 14 July 2004. Mr. Jaballah had previously detained under a security certificate from March to November, 1999 before that certificate was quashed.

son of former Prime Minister Pierre Trudeau, supported an unsuccessful attempt by Hassan Almrei to obtain bail. He argued that he was acting out of patriotism because of his shame that people could be held in Canada without charge, but many articles in the main stream media were skeptical about his support for a person who a judge had already decided was a security threat on the basis of secret evidence. Although “the security certificate five” are not nearly as high profile as Maher Arar, they have received growing support from refugee advocates, civil libertarians and in Canada’s Muslim and Arab community and growing attention from the Canadian media.

One factor in the long term detention of the above suspects on security certificates is uncertainty about whether Canada would deport a person to a risk of torture. In a 2002 case involving a member of the Tamil Tigers, the Supreme Court of Canada ruled that the Canadian Charter of Rights and Freedoms will in most cases prohibit the deportation of a person to a country where there is a substantial risk of torture and that the Charter.⁶¹ Interestingly, however, the Court did not articulate an absolute rule or indicate what exceptional circumstances might justify deportation to torture or address the situation of those who may be subject to continued detention because their removal would not be constitutional. The government is arguing in at least one case that he should be deported to Egypt even if that results in torture or, alternatively, that “the threat to national security is so great that this man can never be released.”⁶² The Canadian courts have also refused to stay deportations to allow United Nations Committees such as the Human Rights Committee and the Committee Against Torture to hear complaints that they will be tortured if deported from Canada.⁶³ Another factor, is that Canadian immigration law places no limits on the time that a person subject to a security certificate may be detained.

The Safe Third Country Agreement

In December 2001, Canada and the United States agreed to implement a “safe third country agreement” as part of a smart border agreements to increase security and ease the flow of goods and people at the border. This agreement will preclude most refugees who reach the United States from making a refugee application to Canada. Unless other measures are taken to increase refugee applications, this may significantly reduce the number of refugees Canada considers in any year. The agreement responds to perceptions that Canada’s refugee policy is too liberal and generous as well as a desire among some in Canada to minimize border irritants between Canada and the United States given Canada’s extremely reliance on trade with the United States.

A poll conducted in Canada in November 2002 indicated that 44% of respondents agreed with the proposition that the government might want to respond to terrorism by “restricting the number of immigrants that come to Canada from Muslim countries.” This

⁶¹ Although a refugee applicant facing the risk of torture is entitled to heightened due process in terms of written reasons from the Minister for the deportation, the Minister’s decisions as to whether a person faces a substantial risk of torture or is a threat to the security of Canada will only be overturned by the courts if they are patently unreasonable.

⁶² “Must deport Jaballah, court told” *Toronto Star* 17 Aug. 2004.

⁶³ *Ahani v. Canada* (2002) 58 O.R.(3d) 107. The United Nations Human Rights Committee subsequently indicated that the deportation of Ahani before it had decided the complaint violated Canada’s obligations under the International Covenant on Civil and Political Rights and reaffirmed the absolute prohibition on torture under international law. *Ahani v. Canada* Communication No.1051/2002: Canada 15/06/2004 CCPR/C/80/D/1051/2002. See generally K. Roach “Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience” (2005) 40 *Texas International Law Journal* 537.

number was only marginally down from 49% who supported such immigration restrictions a year earlier. At the same time an almost equal number of respondents in 2002- 42%-opposed such restrictions.⁶⁴

Reliance on immigration law in an attempt to decrease the risk of terrorists can also be both overinclusive and underinclusive. Policies such as the safe third country agreement will turn away many more legitimate refugees than deflect terrorists. The type of long term and preventive detention that is allowed under Canadian immigration law may be successful in incapacitating suspected terrorists, albeit without a clear finding of guilt and at a cost of creating fear and resentment in newcomer communities. Most of those detained will eventually be deported from Canada. Given the international nature of terrorism, it is not clear that deflection or deportation of suspected terrorists to other countries will actually increase security. It may simply displace the problem of global terrorism. In addition, the immigration law approach that Canada has relied upon cannot be used against terrorist suspects who are Canadian citizens. A failure to use Canada's criminal anti-terrorism laws may result in inexperience that could threaten the ability of Canada to secure convictions in terrorism cases. There was much public disillusionment in Canada over the recent acquittal of two Sikh men charged under the pre 9/11 criminal law with the 1985 bombing on an Air India flight that departed from Canada. There is a danger that police and prosecutors will not be able to live up to the high standards of proof demanded by the criminal law so long as they can rely on the shortcut of using immigration law with its broader liability rules and lower standards of proof.

Maher Arar

One of the more dramatic examples of abuse of immigration law powers and procedures is the practice of extraordinary rendition of non-citizens. In Canada, a major, multi-million dollar public inquiry or royal commission headed by a respected judge is presently being held to examine the actions of Canadian officials in relation to the extraordinary rendition of Maher Arar, a Canadian citizen born in Syria, from the United States to Syria via Jordan. Mr. Arar was returning to Canada when he was detained in the United States and transported to Jordan and then onto to Syria where he detained for almost a year. He says he was tortured and signed a false confession about involvement with terrorism. Arar's treatment at first did not spark wide-spread concern in Canada, but public pressure mounted until the government decided to appoint the inquiry in early 2004. The inquiry has a factual mandate to investigate and report on the actions of Canadian officials in relation to Arar's detention in the United States, his deportation to Syria, his treatment in Syria and his return to Canada. Both the governments of Syria and the United States have declined invitations to participate in the inquiry which many see as extraordinary because of its examination of information concerning national security matters. Large portions of the inquiry have been conducted in camera without Mr. Arar or his lawyers being present because of concerns about national security confidentiality. Some of the same witnesses from the RCMP, CSIS and Canada's department of Foreign Affairs have been called to given public testimony. The very fact that such a large scale inquiry was called suggests an enhanced awareness in Canada of the predicament that Canadians from the Middle East and especially of dual citizenship may face when they travel abroad and when they might have perhaps innocent associations with those who may be the subject of security intelligence and or police investigations relating to national security. At the same time, the inquiry does not

⁶⁴ "Canadian Attitudes on immigration hardening against Muslims" Ottawa Citizen Dec 31, 2002.

have a mandate to examine the actions of Canadian officials with respect to other Canadians who were detained in Syria under suspicion of involvement with terrorism.

The Arar Commission also has a policy mandate to make recommendations on an independent arms-length review mechanism for the national security activities of the Royal Canadian Mounted Police. This aspect of the inquiry recognizes that the RCMP has more tools at hand in the national security area with the enactment of 2001 Anti-terrorism Act and the head of the existing mechanism for review and complaints against the RCMP has publicly stated that she does not have sufficient powers to fulfill this function.⁶⁵ Unlike the *Patriot Act* and subsequent American legislation in relation to national security, Canada's *Anti-terrorism Act* did not enhance review powers over national security activities. One option that will be examined by the Arar Commission is whether a special review agency created in 1984 with broad powers not only to respond to complaints, but to audit the legality of the activities of the agency of a civilian security intelligence⁶⁶ should be extended to the national security activities of the RCMP. Review and audit of national security activities are of particular importance to Canadian Muslim communities who may suspect but perhaps not be aware that they are subject to scrutiny from the state and who may for various reasons relating to employment, social stigma and lack of citizenship be reluctant to complain about the treatment they receive from police or security intelligence agents. Although review of such powers will focus on the propriety of state actions, it may also contribute to a process to determine the efficacy of the state's agent. The targeting of the wrong people not only threatens civil liberties, but also wastes limited resources. Similarly, the alienation of Muslim communities by insensitive or heavy handed tactics that inspire fear and distrust may dry up sources of information and co-operation. As suggested at the outset, the dichotomy between rights and security is often based on false premises and state tactics such as racial and religious profiling offends equality values and is counterproductive to the task of identifying potential terrorist plots.

Omar Khadr

Although Maher Arar has become a public figure and an object of considerable public sympathy in Canada, the same cannot be said of Omar Khadr, a Canadian teenager who has been detained at Guantanamo Bay since late October, 2001. He is alleged to have killed an American medic in combat on the Afghanistan/Pakistan border. He has not yet been charged with an offence and concerns have been raised about whether Canada is being vigorous enough in advocating for him with the United States or whether Canada has enough influence with the United States to secure his release. In addition to litigation in the United States, Omar Khadr is suing the Canadian government alleging a failure to provide consular access⁶⁷ and has obtained an interlocutory injunction enjoining Canadian officials from continuing to question him at Guantanamo on the basis that there was a serious question whether such questioning violated Khadr's rights under the Canadian Charter.⁶⁸

Omar Khadr's father, Ahmed Khadr, was involved with a charity, Human Concern International, that has been listed as a group that provides money to terrorists. Khadr senior was arrested in Pakistan but released after a well publicized hungry strike and intervention

⁶⁵ S. Heafey "Civilian Oversight in a Changed World" in *Terrorism, Law and Democracy*.

⁶⁶ *Canadian Security Intelligence Service Act* R.S. 1985 c.C-23.

⁶⁷ *Khadr v. Canada* [2004] F.C.J. no. 1391. The family of the deceased American serviceman are serving Khadr and his family in American civil courts.

⁶⁸ *Khadr v. Canada* 2005 FC 1076.

for his release by Jean Chretien, then Canada's Prime Minister. He eventually returned to Pakistan where after 9/11 he was killed in a battle with Pakistani soldiers. Another son, Abdurahman Khadr was also detained at Guantanamo and has described his family as "an al Qaeda family". A sister, Zaynab Khadr, was the subject of a publicized search warrant upon her return to Canada and the RCMP has recently stated that the search of a laptop computer in her possession has provided "time and place information regarding activities of key Al Qaeda and Taliban personalities who are presently at large and operating against coalition troops."⁶⁹ The Khadr family is unpopular in Canada to say the least and provides a counter narrative to that of Maher Arar. For example, Canada's domestic intelligence agency responded to a court decision prohibiting it from continuing to question Omar Khadr at Guantanamo with the statement that "the Khadr family has made no secret of its affiliation to al-Qaeda or its loyalty to Osama bin Laden" and stated that its questioning of Khadr was shared with the United States as part of its investigation of "Sunni Islamic extremism."⁷⁰ At the same time, the court's order seemed to renew some public interest in Omar Khadr's case with Canada's national newspaper editorializing that "the Canadian government has acted scandalously" both by interrogating the teenager and by failing to lobby as effectively as other countries such as the United Kingdom and Australia for protecting the rights of its citizens held at Guantanamo. It stated: "there is not and may never be a groundswell of opinion that Omar Khadr's rights need protection. But they do. The Canadian government's eagerness to exploit Guantanamo in the case of a Canadian teenager incarcerated since he was 15 is shameful."⁷¹

Canada's New National Security Policy

In April, 2004 Canada articulated its first formal national security policy "Securing an Open Society". It is based on an all risks approach to national security that is concerned not only with threats of terrorism, but diseases and natural and man-made disasters and includes commitments to better emergency preparedness, better public health, better transport security and better peace-keeping, as well as the more traditional terrorism specific proposals relating to better intelligence and better border security.⁷² Well publicized post 9/11 incidents of SARs, black outs, and contamination of food and water probably all influenced the government to define national security in such a broad manner.

Canada's new national security policy is backed up the enactment in 2004 of a comprehensive *Public Safety Act* that provides various administrative measures for dealing with emergencies and better protection for critical infrastructures and various materials that could be used for terrorism. At the same time, this Act provides for enhanced information sharing within government, raising concerns about not only privacy but the quality and type of information that is shared. It is also supported by the creation of new Ministry of Public Safety and Emergency Preparedness. The Minister chairs a new Cabinet committee on Security, Public Health and Emergencies and has responsibilities for a new Canada Border Services Agency and the Office of Critical Infrastructure and Emergency Preparedness, as well as for the RCMP and Canada's security intelligence agency. The new Ministry was

⁶⁹ "Mounties uncover 'Al Qaeda' cache' *Toronto Star* June 14, 2005.

⁷⁰ "Judge orders Canada to stop quizzing teen in Guantanamo" *Globe and Mail* August 10, 2005.

⁷¹ "Omar Khadr's Limbo" *Globe and Mail* August 11, 2005.

⁷² "This system is capable of responding to both intentional and unintentional threats. It is as relevant in securing Canadians against the next SARS-like outbreak as it is in addressing the risk of a terrorist attack." *Canada Securing an Open Society: Canada's National Security Policy* April 2004 at 10.

designed in part to allow for better integration with the new American Department of Homeland Security, but it also has the potential to develop a more comprehensive and rational approach to the various risks that Canadians face to their well-being. An all risks approach that relies more on administrative regulation of sites and substances vulnerable to terrorism relies less on targeting individuals than either reliance on criminal or immigration law. As such the administrative approach may present less risk of targeting innocent Muslims in Canada and also provide more effective security given the difficulties of identifying and incapacitating all terrorists.⁷³

Cross-Cultural Roundtables and Dialogues

Part of the 2004 National Security Policy was the creation of a “Cross-Cultural Roundtable on Security...comprised of members of ethno-cultural and religious communities from across Canada”. The roundtable will “engage in a long-term dialogue to improve understanding on how to manage security interests in a diverse society”.⁷⁴ The roundtable is chaired by Zaheer Lakhani, a medical doctor who has been honoured for his outreach work with the Ismaili Muslim community. Its 15 members include others who have worked with Canada’s diverse Muslim communities, as well as others. On the occasion of its first meeting, Anne McLellan, the Minister of Public Safety, stated that the roundtable was “an excellent opportunity for two-way dialogue between those who make national security policy and Canadians who are particularly concerned with the consequences of these policies.”⁷⁵ The Minister also held private meeting with about 100 Muslims in the wake of the London bombings. The president of the Coalition of Muslim Organizations called the meeting “a sign of respect” and 120 Imams in Canada issued a statement in late July 2005 after the London bombings stating in part that Canadian Muslims

have journeyed from six continents to make Canada our home. Our life in Canada has been of positive contribution and near seamless integration. It has not been a clash of cultures or of civilizations...We have opposed, and will continue, to oppose all extremism, hate and terrorism. Anyone who claims to be a Muslim and participates in any way in the taking of innocent life is betraying the very spirit and letter of Islam. We will confront and challenge the extremist mindset that produces this perversion of our faith.⁷⁶

This important statement received some media attention in Canada and the Prime Minister of Canada subsequently met for an hour with 19 Imams who signed this statement.⁷⁷ More attention, however, was paid to statements by Imam from Toronto who did not sign the statement and who claimed that Canada’s security intelligence agency had harassed him, his

⁷³ For a defence of an all risks approach and a focus on sites and substances vulnerable to terrorism see K. Roach *September 11: Consequences for Canada* (2003) ch. 7.

⁷⁴ Canada *Securing an Open Society: Canada’s National Security Policy* April, 2004 at 2.

⁷⁵ “Inaugural Meeting of Cross Cultural Roundtable March 7, 2005 at www.psepc.gc.ca/publications/news/2005/20050307_e.asp

⁷⁶ Statement by Canadian Imams on Extremism July 21, 2005 at http://www.caircan.ca/itm_more.php?id=1789_0_2_0_C

⁷⁷ “After the closed meeting, Prime Minister Martin said “it is very important that the government respond, to show that we recognize the truth of their statement so we can build on that statement.” Imams promise PM to help root out extremism” *Globe and Mail* July 28, 2005 A4. A leader of a small secular Muslim organization, however, criticized the Prime Minister for meeting with the Imams. “Muslims Search for a Common Voice” *Ottawa Citizen* Aug 14, 2005. “Muslims Search for a Common Voice” *Ottawa Citizen* Aug 14, 2005.

mosque and others in the community.⁷⁸ The security intelligence agency responded that it had investigated the allegations and found them to be unfounded with the media reporting that the Imam in question has been close to Ahmed Khadr a man with known Al Qaeda connections.⁷⁹

Conclusion

The future relations between Canadian governments and Canada's diverse Muslim minority is uncertain, but the creation of the Cross Cultural Roundtable, the inquiry into the activities of Canadian officials in relation to Maher Arar, the three year review of the Anti-terrorism act, including the use of immigration law against terrorism suspects, and meetings between members of the Muslim community and senior Ministers and the Prime Minister are all positive signs. The fact that the Roundtable was included as an important part of Canada's new national security policy, along with a commitment to independent review of the RCMP's national security activities, suggests some awareness that better relations with Muslim communities and closer review of law enforcement activity could improve security rather than detract from it. Such progress, however, is fragile and could be seriously disrupted by either a terrorist act or an act of state abuse in a terrorist investigation.

⁷⁸ "Imams vow to report extremists" *Globe and Mail* July 22, 2005; "Imam warns Ottawa to back off Muslims" *Globe and Mail* July 25, 2005 A10

⁷⁹ "Imam's accusations unfounded, CSIS says" *Globe and Mail* July 27, 2005 A4.