

Comparative Counter-Terrorism Law

Edited by

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COMPARATIVE COUNTER-TERRORISM LAW

Terrorism law is as international as it is regionally distinct and as difficult to define as it is essential to address. Given recent pressures to harmonize terrorism laws from international organizations such as the United Nations Security Council, the Financial Action Task Force, and the Council of Europe, this book presents readers with an up-to-date assessment of terrorism law across the globe. Covering twenty-two jurisdictions across six continents, the common framework used for each chapter facilitates national comparisons of a range of laws, including relevant criminal, administrative, financial, secrecy, and military laws. Recognizing that similar laws may yield different outcomes when transplanted into new contexts, priority of place is given to examples of real-world application.

Including an extensive introduction to the field as well as a detailed final chapter on common themes and future challenges, this book will help establish comparative counter-terrorism law as an emerging discipline crossing traditional boundaries in legal scholarship.

Kent Roach is a professor of law at the University of Toronto. He served as General Reporter on counter-terrorism law at the XIX Congress on Comparative Law as well as Director of Research for the Air India bombing inquiry. His most recent book, *The 9/11 Effect: Comparative Counter-Terrorism* (2011), was co-recipient of the Mundell Medal for contributions to legal writing.

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3

Canada

Robert Diab

I. INTRODUCTION

Since 2001, Canada's Parliament and courts have developed a large body of law on counter-terrorism, giving rise to a range of issues and an often passionate and enduring public debate. Much of the focus has been on criminal and immigration law. The key features of Canada's legal framework were shaped in large part by UN Security Council Resolution 1373,¹ including an emphasis on preventing terror financing, the use of new terror-related offences in the *Criminal Code*,² and the imposition of stiffer punishments. Canada has also increased the scope of state secrecy and surveillance and the powers of various agencies to gather and share information. A salient problem in cases applying these new laws has been how to balance the need to protect the secrecy of information often obtained from other states with assurances and the need to be fair and transparent. Areas for improvement moving forward include the need for more effective central coordination and oversight of the agencies involved in counter-terrorism, given their enhanced powers, their often overlapping mandates and the greater secrecy under which many of them operate.

Canada's recent history with terrorism lends context to much of the law explored in this chapter. Among the most significant of our past experiences with terrorism were the October crisis of 1970 and the Air India bombing of 1985. In the earlier case, the Front de Liberation du Quebec kidnapped a British diplomat and a provincial cabinet minister and murdered the latter. The federal government declared a state of emergency, deployed six thousand troops in the streets of Montreal, detained close to five hundred people and suspended habeas corpus.³ The experience bolstered public support for the adoption of the *Canadian Charter of Rights and Freedoms*

¹ United Nations Security Council S/Res/1373 (2001) ["Resolution 1373"].

² RSC 1985, c C 34 ["*Criminal Code*" or "*Code*"].

³ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011), at 365–7.

in 1982,⁴ which curtailed police powers and in times of emergency allowed for a suspension of fundamental freedoms only with a constitutional override.⁵ Lessons learned from the crisis also led to the creation of the Canadian Security and Intelligence Service (CSIS), a civilian agency that gathers intelligence on threats to national security and is separate from law enforcement.⁶ Yet, the Royal Canadian Mounted Police (RCMP) also gained explicit authority to investigate and prevent threats to national security. The overlap in these services' mandate gives rise to a tension between the two in the gathering and use of intelligence and evidence in terrorism cases.

The tension was central to the efforts to prevent the Air India bombing of 1985, one of the largest acts of aviation terrorism to date,⁷ and in the prosecutions that followed. Sikh-Canadian extremists in Vancouver had placed bombs on planes bound for India, killing 331 people.⁸ The prosecutions were beset by various problems. CSIS had destroyed early wiretap evidence. Witnesses were murdered. The Crown refused to reveal confidential sources resulting in trials being stayed.⁹ By 2005, only a single guilty plea had been entered (to manslaughter), and the two remaining principals were acquitted. In 2010, the Air India inquiry pointed to various flaws in aviation security to explain the failure to prevent the bombing. It also found deficiencies on the part of both CSIS and the RCMP in terms of their collection and sharing of information in a timely fashion.¹⁰

The events of 9/11 have also played a role in Canada's experience of terrorism due to its direct impact on many fronts. Twenty-three Canadians were killed in the attacks.¹¹ The southern border with the United States was closed for several days, with significant economic consequences.¹² And while none of the 9/11 hijackers had entered the United States through Canada, the impression of Canada as a likely point of entry for terrorists would remain, exerting a pressure on Canadian lawmakers with consequences extending beyond the domain of border security.

Canada's primary legislative response to 9/11, and Resolution 1373, was the *Anti-terrorism Act (ATA)*¹³ of December 2001. It added to the *Criminal Code* a

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵ *Ibid* s 33.

⁶ Roach, *supra* note 3, at 365.

⁷ *Ibid* at 369.

⁸ *Ibid*.

⁹ *Ibid* at 369–72.

¹⁰ Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy* (Ottawa: Public Works, 2010) ["Air India Report"], vol. 1, at 22–3.

¹¹ Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) at 3.

¹² Roach, *supra* note 3, at 374.

¹³ S.C. 2001, c 41 ["Anti-terrorism Act"].

definition of terrorism, provisions for the listing of terrorist entities and several new offences, such as financing, facilitating and participating in terrorist activity. It gave police and prosecutors new powers, including preventive arrests and “judicial investigations,” and expanded surveillance powers of police and intelligence agencies with and without a warrant. The act also significantly expanded the scope for national security privilege.

But while prosecution was a crucial tool in countering terrorism, in cases involving non-citizens the government tended to favour the use of immigration detention. Pre-dating 9/11, Canada’s *Immigration and Refugee Protection Act*¹⁴ allowed for detention pending deportation on secret evidence. Together, the five men who were subject to these provisions for much of the decade generated extensive litigation (some still ongoing) that resulted in various limits and qualifications to the detention regime.

A first wave of terror prosecutions has resulted in significant sentences for those involved in serious plots, but also a directive from the Supreme Court that rehabilitation remains an important potential consideration in all terrorism sentencing. The experience in these early cases, including immigration, has helped to incline the government to proceed in a recent case involving non-citizens by way of criminal prosecution. Yet state secrecy and expanded powers of surveillance remain important to Canada’s security policy. And the government has thus far resisted calls for more effective central coordination and oversight of national security agencies.

II. THE DEFINITION OF TERRORISM

Prior to the passage of the *Anti-terrorism Act* in 2001, Canadian law had lacked a definition of terrorism. Drafters of the ATA drew upon the definition in the United Kingdom’s *Terrorism Act 2000*.¹⁵ Although Canada’s definition differs in many respects, it follows the UK’s approach in defining terrorism to include harm to essential services in addition to persons and property.¹⁶

The definition in Canada’s *Criminal Code* contains two general parts. The first part deems any one of a series of *Code* offences to be a “terrorist activity” if committed in or outside of Canada. These include hijacking, hostage taking and bombing – most of which were included in the *Code* prior to 2001 pursuant to various international conventions.¹⁷ The second part of the provision sets out a substantive definition, which in turn contains several parts.

¹⁴ SC 2001 c 27.

¹⁵ *Terrorism Act 2000 (U.K.)*, c 11 ss 1; Roach, *supra* note 3, at 377.

¹⁶ Roach, *ibid.*

¹⁷ *Criminal Code*, *supra* note 2, s 83.01(1)(a).

First, a “terrorist activity” is any act committed in or outside of Canada that is committed for a “political, religious or ideological purpose, objective or cause.”¹⁸ Concerns about police profiling against ethnic or religious groups in Parliamentary debates led to a qualifying provision which indicates that “the expression of a political, religious or ideological thought, belief or opinion” does not fall within the scope of terrorist activity unless it satisfies the other criteria of the definition, including the intent requirements.¹⁹ The act must also be committed

in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada [...].²⁰

Notable aspects here are the high degree of subjective culpability required – intent rather than recklessness – and the variety of cases in which this intent might be applied. In distinction to the UK definition, which is confined to conduct aimed at influencing governments or the public, Canada’s definition extends to a segment of the public or single individuals, along with corporations and organizations.²¹ The definition also extends to acts meant to impact *economic* security, such as violent acts of protest aimed at banks or corporations.

The activity must also intentionally cause death or serious bodily harm “by the use of violence,” endanger a person’s life, cause a serious risk to the health or safety of the public or a part of it, or cause serious disruption of an essential service or facility, public or private.²² The definition excludes forms of disruption that result from “advocacy, protest, dissent or stoppage of work” not intended to endanger life or cause serious risk to public health or safety. It therefore excludes a form of protest that intentionally disrupts an essential service or aims to influence a corporation or government – but does not endanger life or cause serious risk to public health or safety.²³

The definition also includes as terrorist activity the counselling, conspiracy, attempt, or threat to commit any of the acts defined, along with being an accessory

¹⁸ *Ibid* s 83.01(1)(b)(i)(A). A constitutional challenge to this provision is discussed later in this chapter.

¹⁹ *Ibid* s 83.01(1.1).

²⁰ *Ibid* s 83.01(1)(b)(i)(B).

²¹ Roach, *supra* note 11, at 33.

²² *Criminal Code*, *supra* note 2, s 83.01(1)(b)(ii).

²³ Roach, *supra* note 11, at 34 notes that an earlier version of the definition excluded only “lawful” forms of politically inspired protest that caused disruption and did not pose a serious risk to public safety. Concerns were raised about the broad sweep of such a provision, with the final version now contemplating the exclusion of forms of protest that may involve minor criminal offences or infractions of provincial or municipal law.

after the fact.²⁴ The *Criminal Code* had already contained separate offences for each of these contemplated forms of involvement, except threatening to commit a terrorist activity, which creates a new and distinct threatening offence.²⁵ The ATA thus captures as terrorism a wide range of conduct at a significant remove from actual acts of terror in both space and time. The critical safeguard here is the high level of intent required to contribute to terrorist activity of some kind – a point explored further later in this chapter.

Finally, the definition excludes acts committed “during an armed conflict” if carried out “in accordance with customary international law or conventional international law applicable to the conflict.”²⁶ It also excludes acts committed “by military forces of a state in the exercise of their official duties” consistent with international law.²⁷ This was intended to capture acts of assistance or involvement in civil or inter-state conflicts, but not violent acts by armed insurrectionaries not respecting laws of war: for example, those targeting civilians. Yet, it remains unclear where this line is to be drawn and whether it would exclude forms of assistance with revolutionary groups against dictatorships abroad.²⁸

The definition is therefore broad in its potential scope, yet it requires a high degree of subjective intent, and intent of a specific nature: politically or religiously motivated and intended to intimidate, significantly disrupt, or endanger life or pose a serious risk to health and safety. The potential scope of the definition can be further understood by considering its operation in relation to the new set of terrorism offences in the ATA.

III. CRIMINAL LAWS AND PROSECUTIONS

A. *Criminal Law*

In addition to setting out a definition of “terrorist activity,” the ATA added a series of new offences, including financing, participating, facilitating and instructing terrorism. The new crimes draw upon the definition of terrorist activity and of a terrorist group (discussed later in this chapter) and carry more severe punishments.

Notably, Canada chose not to criminalize membership in a terrorist organization due in part to concerns about the constitutionality of such a law, given the protection of free association in the *Charter*. Parliament instead added the offence of participating

²⁴ *Criminal Code*, *supra* note 2, s 83.01(1)(b).

²⁵ The existing offence of “uttering threats” in section 264.1 of the *Criminal Code* is aimed more generally at conveying a threat to cause death, bodily harm, or damage to property.

²⁶ *Criminal Code*, *supra* note 2, s 83.01(1)(b).

²⁷ *Ibid.*

²⁸ Roach, *supra* note 11, at 31.

or contributing to terrorism, which has a potentially wider scope than a membership offence. Section 83.18 requires proof that a person has *knowingly* participated in or contributed to any activity of a terrorist *group* for the purpose of enhancing its ability to carry out a terrorist activity.²⁹ Participation is defined to include a range of conduct, such as recruiting, training, travelling, waiting, or providing a skill or expertise for the group's benefit. Participation may also be established regardless of whether a terror group carries out a terrorist activity, whether the person's involvement enhances the terror group's ability to carry out the activity, or whether the person knows of the specific nature of the activity.³⁰ Challenged as overbroad in *Khawaja*, the Supreme Court upheld the provisions by applying a purposive interpretation.³¹ The purpose of the act is to prevent terrorism rather than punish minor or incidental acts not intended to contribute to terrorism. A conviction therefore requires a specific intent to enhance a group's ability to carry out a terrorist activity (rather than recklessness or wilful blindness),³² and conduct that a reasonable person would believe to be "capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity."³³

The offence "facilitating terror" in section 83.19 is potentially broader in scope, requiring only that a person "knowingly facilitate a terrorist activity."³⁴ It may therefore apply to terror involving an individual or a group. Similar to the participation provision, facilitation involves a subjective but discrete form of intent. The accused must intend to facilitate a terrorist activity, but need not know that a "particular terrorist activity is facilitated" or carried out, that "any particular terrorist activity was foreseen or planned at the time it was facilitated," or that "any terrorist activity was actually carried out."³⁵ The offence thus requires an intent to assist with terrorist activity of a more generalized nature. Presumably, trial courts will apply the Supreme Court's reading of section 83.18 in *Khawaja* to section 83.19, given the similarity in their wording. In summary, both the participation and facilitation provisions allow for significant penalties to result in a case where an accused specifically intended to assist a terrorist group in its general terrorist goals but *without discriminating as to the potential severity* of the terrorism that the group carries out.

Other new offences in the ATA include instructing and harbouring terrorism, and more recently Parliament has criminalized the act of leaving Canada with the intent of carrying out a terrorism offence.³⁶ A person is guilty of "instructing" when he or she

²⁹ *Criminal Code*, *supra* note 2, s 83.18(1).

³⁰ *Ibid* s 83.18(2).

³¹ *R v Khawaja*, 2012 SCC 69.

³² *Ibid* para 46.

³³ *Ibid* para 52.

³⁴ *Criminal Code*, *supra* note 2, s 83.19(1).

³⁵ *Ibid* s 83.19(2).

³⁶ *Ibid* ss 83.21, 83.22, 83.23 and ss 83.191, 83.201 and 83.202.

instructs another to carry out an activity in association with a terrorist group for the purpose of enhancing its ability to carry out terrorist activity.³⁷ The offence is potentially broader in scope than the older counselling offence in the *Code* given the lack of a requirement to instruct a particular person or to know their identity.³⁸ This provision provides the closest equivalent to the offence of inciting terror. Canada has not passed an inciting offence in response to UN Security Council Resolution 1624 in part due to concerns about the constitutional validity of such a provision given the protection of free speech in the *Charter*. Harboursing or concealing involves the knowledge that one harbours or conceals a person likely to carry out a terrorist activity for the purpose of enabling that person to carry out the activity.³⁹

As Kent Roach has noted, the need for these new offences was not clear in the fall of 2001, given that most if not every conceivable act of terrorism was already an offence in Canadian law (*e.g.*, murder, hijacking, and possessing or setting off an explosive device), and many carried life sentences.⁴⁰ The *Code* had also contained a series of inchoate offences such as counselling, conspiracy and attempts, and it provided for party liability for those aiding and abetting or those acting as accessories after the fact. There are, however, two distinct features of the new provisions. One is that many involve more limited knowledge of the terrorist activity to which a person is contributing, in ways noted previously. The other is that they involve different rules on sentencing.

Although none of the new terrorism offences carry mandatory minimums, many carry life sentences. For those that do not carry a life sentence, the ATA added a provision of general application that provides that any indictable offence can be punished with up to life if “the act or omission constituting the offence also constitutes a terrorist activity.”⁴¹ The ATA also mandated consecutive sentences for multiple counts of terrorism offences⁴² and allowed for increased periods of parole ineligibility.⁴³ Given the operation of a common law rule, accused persons are protected from multiple convictions for the same conduct, precluding, for example, convictions for facilitating terrorism and acting as a party to murder for the same actions.⁴⁴

³⁷ *Ibid* s 83.21.

³⁸ Roach, *supra* note 11, at 44.

³⁹ *Criminal Code*, *supra* note 2, s 83.23.

⁴⁰ Roach, *supra* note 11, at 22–3.

⁴¹ *Criminal Code*, *supra* note 2, s 83.27. The Crown is required to provide the accused with notice of intent to proceed under the provision, but there are no other conditions to its application.

⁴² *Ibid* s 83.26.

⁴³ *Ibid* s 743.6(1.2).

⁴⁴ *R v Kienapple*, [1975] 1 SCR 729.

B. Terrorism Prosecutions

Terrorism prosecutions proceed in the superior courts of Canada's provinces, which are the normal courts for serious criminal cases such as murder. Constitutional protections in Canada's *Charter* apply, as do common law defences and rules of evidence. However, in ways to be explored in section X below, questions of national security privilege in these cases are dealt with in separate but parallel proceedings in Canada's Federal Court system – a court that does not handle criminal law matters and deals primarily with administrative matters of federal jurisdiction. In ways to be explored later in this chapter, the *Canada Evidence Act*⁴⁵ allows for the granting of national security privilege in a criminal trial, but contains various safeguards of the accused's right to a fair trial. The *Criminal Code* also explicitly prohibits the use in any proceeding in Canada of evidence obtained through torture or degrading treatment.⁴⁶

Thus far, the terrorism provisions of the ATA have been tested in two sets of cases. The most common charges were participating in or facilitating terrorism, along with older offences related to bomb making. The first prosecution under the ATA resulted in the conviction of Mohammad Khawaja in 2008 for participating in a terrorist group and facilitating terrorist activity in Canada, the UK and Pakistan.⁴⁷ Khawaja assisted the group by building a prototype for a remote bomb detonator, with a view to building thirty more. The group had intended to use one of the detonators to bomb an office building in London. Khawaja also provided funds, accommodations in his parent's home in Pakistan for co-conspirators and possessed various weapons and cash in his Ottawa home. The court found that Khawaja lacked knowledge of the specifics of the UK bomb plot but had knowingly facilitated terrorist activity. Khawaja sought to rely on the armed insurgency exception in the ATA's definition of terrorism, claiming that his intent throughout was only to assist with the Taliban and Mujahedeen insurgency in Afghanistan. The court rejected this defence on the basis that the groups in question were not acting in accordance with international law, as required by the definition of terrorism in the ATA.

Khawaja's case was also important for raising a number of challenges to new terrorism laws. He was successful at trial in arguing that the motive provision was an unreasonable limit on free speech, belief and expression, although, as noted, this holding was overturned on appeal.⁴⁸ He was not successful in challenging the *mens rea* requirements of the participating and facilitation provisions, with the Supreme

⁴⁵ *Criminal Code*, *supra* note 2, s 269.1(4).

⁴⁶ RSC 1985, c C-5 ["CEA"].

⁴⁷ *R v Khawaja* [2008] 238 CCC (3d) 233.

⁴⁸ *R v Khawaja* 2012 SCC 69.

Court holding that a generalized intention to assist with terrorist activity sufficed.⁴⁹ Khawaja received a 10.5 year sentence at trial, which the Court of Appeal raised to a life sentence and the Supreme Court upheld.⁵⁰

In 2006, eighteen people, including four youths, were arrested in two terror plots, one involving a plan to storm Parliament and murder MPs and another to carry out bombings at various buildings in Toronto. The case involved large amounts of wiretap evidence and two informers within the Muslim community who worked closely with the RCMP.⁵¹ Four accused chose to go to trial, resulting in convictions for various offences; seven pled guilty, and the Crown stayed the remaining charges.⁵² One of the two principal figures, Amara, twenty years old at the time, received a life sentence for participating in a rural terrorist training camp and for committing explosives offences for a terrorist purpose.⁵³ Sentences in the other cases ranged widely, though in two of them the Court of Appeal raised the sentences by several years.⁵⁴

Two terror-related prosecutions are currently unfolding in Canada. One involves two non-citizens who were plotting to bomb a passenger train outside of Toronto. Another involves two Canadian citizens who were attempting to set off bombs at the Canada Day gathering outside of British Columbia's Legislative Assembly in Victoria in July 2013.

C. *Punishment of Terrorism*

Sentences under the ATA have generally been more severe than might have been the case for similar conduct prior to 2001.⁵⁵ In reviewing the sentences in four of the early terrorism prosecutions, the Ontario Court of Appeal held that, categorically, terrorism offences warranted a primary emphasis upon denunciation and deterrence.⁵⁶ In affirming Khawaja's sentence, the Supreme Court rejected the ratio of the lower court's decision, holding that rehabilitation remains a potentially significant consideration in all terrorism cases, including the more serious ones.⁵⁷

⁴⁹ *Ibid* paras 34–64.

⁵⁰ *Khawaja*, *supra*, note 43.

⁵¹ Roach, *supra*, note 3, at 408.

⁵² *Ibid*.

⁵³ *R v Amara*, 2010 ONSC 441, upheld on appeal, 2010 ONCA 858.

⁵⁴ *R v Gaya*, 2010 ONCA 860; *R v Khalid*, 2010 ONCA 861.

⁵⁵ See, for example, Roach's discussion of sentences imposed against those involved in the murder of Pierre Laporte in the October crisis, *supra* note 3, at 367.

⁵⁶ *R v Khawaja*, 2010 ONCA 862, para 238.

⁵⁷ *R v Khawaja*, 2012 SCC 69, para 124. See also Robert Diab, "R v Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing" (2014) 39:2 *Queens Law Journal*.

Code provisions also allow courts to take into account a person's cooperation with authorities as a mitigating circumstance at sentencing, and in one of the Toronto 18 cases, the court did so.⁵⁸

IV. INVESTIGATIVE POWERS

A. Police Powers

The *Anti-terrorism Act* gave police special powers for investigating terrorism offences, not all of which are available in ordinary criminal investigations. Two that are unique to the context of terrorism are the preventive arrest and judicial investigation provisions. Originally included in the ATA, they were subject to a sunset clause and lapsed in 2007, but were re-enacted in 2013.

Under the preventive arrest provisions, police may obtain a warrant to arrest a person not charged with an offence and to detain the suspect for up to seventy-two hours.⁵⁹ The warrant may be issued where there are reasonable grounds to believe that a terrorist activity will be carried out and there is reasonable suspicion that the arrest is necessary to prevent it.⁶⁰ Kent Roach has drawn a contrast here between the standard of reasonable suspicion and the need for "reasonable and probable grounds to believe" an indictable offence has been committed for a warrantless arrest in ordinary criminal cases.⁶¹ Where a preventive arrest has occurred, the subject can be compelled to enter a recognizance of up to a year, placing him or her on conditions of release (a kind of "control order" as is used in the UK).⁶² If a person refuses to enter into the recognizance, the court may commit the person to custody for up to a year.⁶³

The ATA also added provisions that allow the court to carry out a kind of judicial interrogation of a terrorism suspect.⁶⁴ Police begin the process by applying *ex parte* for a subpoena-like order compelling a person to appear before the court to be questioned. The order may be issued where there are reasonable grounds to believe

⁵⁸ *Gaya*, *supra* note 54.

⁵⁹ *Criminal Code*, *supra* note 2, ss 83.3(2), (6) and (7).

⁶⁰ *Ibid* s 83.3(2). In order to seek a warrant, police first require the approval of the attorney general of Canada, but may proceed without a warrant in exigent circumstances (section 83.3(1) and (4)).

⁶¹ *Ibid* s 495(2); Roach, *supra* note 11, at 48.

⁶² *Criminal Code*, *supra* note 2, s 83.3(8).

⁶³ *Ibid* s 83.3(9). Section 810.01 of the *Code* provides for an analogous one-year recognizance where there are "reasonable fears" that a person may commit a terrorism offence, with up to a year of committal for refusal to enter into it.

⁶⁴ *Ibid* s 83.28.

a terrorism offence has been or will be committed, the person has information relating to it and reasonable attempts have been made to obtain the information by other means.⁶⁵ A person is obliged to answer any question asked of him or her, aside from matters of privilege or matters otherwise protected from disclosure by law.⁶⁶ The section also protects a person from self-incrimination by precluding the use of any statements made (or evidence derived from the person) except in a prosecution for perjury.⁶⁷

In 2004, the Crown brought an *ex parte* application under these provisions in a proceeding that took place alongside the Air India trial. The Crown had sought to obtain an order for the judicial examination of a potential Crown witness in the trial. The court ordered the proceedings to be held *in camera*, with defence counsel becoming aware of them only inadvertently. In response to a *Charter* challenge, the Supreme Court of Canada upheld the provisions, but extended the scope of the use immunity and derivative use immunity protections to immigration and extradition hearings.⁶⁸ In dissent, two justices (LeBel and Fish JJ.) held that the provisions violate the independence of the judiciary, contemplating a role in which the judge “takes part in and facilitates the police investigation without having real power to act as a neutral arbiter.”⁶⁹ In a companion decision, the majority read in to the provisions a presumption in favour of open court hearings.⁷⁰

The *Anti-terrorism Act* also extended the scope of police powers of surveillance that had been recently expanded in cases involving organized crime. As in that context, police investigating terrorism offences could now obtain a wiretap warrant lasting a year rather than the normal sixty days without needing to demonstrate that other, less invasive, methods are unlikely to succeed.⁷¹ Nor do police need to inform the subject of the warrant of the fact of the surveillance for up to three years.⁷² More generally, police investigating terrorism offences may seek to rely on the powers set out in section 25.1 of the *Criminal Code* to engage in unlawful conduct short of causing bodily harm or death intentionally or by criminal negligence.

⁶⁵ *Ibid* s 83.28(3) and (4).

⁶⁶ *Ibid* s 83.28(8).

⁶⁷ *Ibid* s 83.28(10).

⁶⁸ *Application Under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42.

⁶⁹ *Ibid*, para 188.

⁷⁰ *Vancouver Sun (Re)*, 2004 SCC 43.

⁷¹ *Criminal Code*, *supra* note 2, ss 185(1.1) and 186.1.

⁷² *Ibid* s 196(5). The court in *R. v. NY*, 2008 CanLII 15908 (Ont SC) has held that investigative necessity is not a requirement of a reasonable search under section 8 of Canada’s *Charter*. For a contrary view, see Steven Penny, “National Security Surveillance Powers in an Age of Terror” (2010) 48 Osgoode Hall LJ 247.

B. Intelligence Agencies

Intelligence agencies in Canada have important but distinct roles to play from the police in countering terrorism. Chief among these agencies are Canadian Security Intelligence Service (CSIS) and the Communications Security Establishment (CSE). The CSIS is a civilian agency tasked with gathering intelligence pertaining to terrorism, espionage and other threats to national security. The Communications Security Establishment collects foreign signals intelligence.

Turning to the first of these, notably, Parliament did not add to CSIS's powers or its investigative scope with the ATA. Earlier legislation had already mandated CSIS to collect "to the extent that is strictly necessary" and analyze and retain information relating to activity that "may on reasonable grounds be suspect of constituting threats to the security of Canada."⁷³ CSIS was also able to apply to a Federal Court judge to obtain a sixty-day warrant to intercept communications or carry out other forms of search or seizure where there are reasonable grounds to believe it necessary for CSIS to "investigate a threat to the security of Canada."⁷⁴ But unlike the police under the expanded warrant provisions of the ATA, CSIS must also establish that other investigative means are not practicable or that the urgency of the matter renders other methods impractical.⁷⁵ Oversight of CSIS activity is conducted by the Security Intelligence Review Committee, consisting of a group of between two and four members of the Privy Council who are not also Parliamentarians. The committee has access to confidential materials and provides Parliament an annual review.

In many cases, intelligence gathering begins and ends with CSIS, but in some cases, the service may work with police or other state or foreign agencies, giving rise to the possible use of intelligence in terrorism prosecutions or administrative matters in ways that directly affect a person's liberty. Section 19 of the *CSIS Act* contemplates the sharing and use of intelligence in other contexts, including a criminal prosecution.⁷⁶ Thus far, in terrorism prosecutions after 2001, the Crown has not attempted to rely upon CSIS intelligence as primary evidence in a given case. The Crown has instead tended to rely on police evidence based on investigations that have been informed to varying degrees by CSIS intelligence. The defence has sought disclosure of the intelligence, and CSIS or the Crown has opposed this on

⁷³ *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s 12 ["CSIS Act"].

⁷⁴ *Ibid* s 21.

⁷⁵ *Ibid* s 21(2)(b).

⁷⁶ In *Charkoai v Canada*, 2008 SCC 38, a case involving immigration detention, the Supreme Court held that where CSIS gathers intelligence involving individuals or groups, it has a duty to retain material pertaining to it that may, upon review, be disclosed to the detainee. The logic would seem to extend to information that might be used in criminal proceedings.

one or more of several grounds: national security privilege (explored later in this chapter); that the information was not obtained for the purpose of the prosecution; that it is not essential to proving the accused's innocence; or that it is not subject to the usual disclosure requirements in criminal law.⁷⁷

Although the CSE had been collecting foreign signals intelligence prior to the ATA, the act gave clear legislative definition to the agency's scope.⁷⁸ Prior to the ATA, the *Criminal Code* prevented the CSE from intercepting communications that either originated or terminated in Canada.⁷⁹ The ATA amended the *National Defence Act* to authorize interceptions involving individuals located in Canada, so long as the interceptions are "directed at foreign entities located outside Canada."⁸⁰ The act requires the minister to confirm that "satisfactory measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security."⁸¹ Roach suggests that this last qualification would pose an obstacle to the use of such intelligence as evidence in a criminal trial.⁸² Yet the act still contemplates a form of mass warrantless surveillance similar to what is permitted in the United States under section 702 of the *Foreign Intelligence Surveillance Act*.⁸³ A civil liberties group has brought a *Charter* challenge to these provisions, citing evidence of numerous ministerial authorizations for the collection of metadata from non-suspected persons in Canada from 2002 to the present.⁸⁴

V. LISTING OF TERRORIST ENTITIES OR INDIVIDUALS

A. Proscription Mechanisms

There are two primary means under Canadian law to proscribe or list individuals or groups as terrorist entities, with various legal consequences. One method for listing

⁷⁷ See, for example, the use of CSIS intelligence as part of the police investigation of the Toronto 18 and the application for disclosure in *R. v. Ahmad*, 2009 Canlii 84776. The issue also arose in the Khawaja prosecution, where the defence sought disclosure of information that the RCMP had obtained from UK intelligence: *Attorney General v. Khawaja*, 2007 FCA 342 and *Canada v Khawaja*, 2008 FC 560.

⁷⁸ Martin Friedland, "Police Powers under Bill C-36," in Ronald Daniels et al., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) 269, at 275.

⁷⁹ *Ibid.*

⁸⁰ *National Defence Act*, RSC, 1985, c N-5 ["NDA"], s 273.65.

⁸¹ *Ibid* s 273.65(2)(d).

⁸² Roach, *supra* note 3, at 389.

⁸³ (1978), Pub.L. 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36. Roach, *supra* note 3, at 389.

⁸⁴ See the British Columbia Civil Liberties Association's Notice of Civil Claim, online: <http://bcccla.org/wp-content/uploads/2013/10/2013-10-22-Notice-of-Civil-Claim.pdf>.

pre-dates the ATA and is found in regulations to the *United Nations Act*.⁸⁵ The other was added to the *Criminal Code* by the ATA. The two methods continue to function. To understand their distinct purposes, it may help to consider the context in which they were created.

The earlier method for listing draws authority from the *United Nations Act*, which was passed in 1945 to provide a vehicle through which Canada could comply with UN resolutions in short order through the passage of regulations to the act.⁸⁶ In 1999, cabinet passed an earlier version of what is now called the *United Nations Al-Qaida and Taliban Regulations*⁸⁷ in response to UN Security Council Resolution 1267. This called upon member states to pass law prohibiting forms of financial assistance to the Taliban and related entities, a call that was expanded in Security Council Resolution 1333 to include al Qaida and associated persons defined on a list kept by the UN's 1267 Committee. The Canadian regulations did not create a separate list. It set out consequences for those engaged in prohibited conduct with persons or entities on the UN list.

Resolution 1373, passed September 28, 2001, required member states to pass law prohibiting the financing of terrorism and allowing for the seizure of funds and property relating to a wider range of entities and individuals across the globe.⁸⁸ Four days later, cabinet passed the *Suppression of Terrorism* regulations.⁸⁹ These created a separate list in Canadian law with two sources: the UN's 1267 list and a schedule to the regulations to which cabinet could add names upon the recommendation of the minister of foreign affairs. Later amendments have limited the source to cabinet alone. The governor in council may add to the list where there are reasonable grounds to believe that an entity or person has (a) carried out, participated in, facilitated or attempted terrorist activity, or (b) is acting on behalf of, at the direction of or in association with any person conducting such activities.⁹⁰ The specific prohibitions of both regulations are discussed in the section VII.

As a further response to Resolution 1373 and the *Convention on the Suppression of Terrorism Financing*,⁹¹ Canada added a further means for listing in the *Criminal Code*.⁹² Listing under the *Code* is significant for its potential function with the

⁸⁵ *United Nations Act*, RSC, 1985, c U-2 ["UN Act"].

⁸⁶ Alexandra Dosman "For the Record: Designating 'Listed Entities' for the Purposes of Terrorist Financing Offences at Canadian Law" (2004) 62 *U.T.Fac.L.Rev.* 1.

⁸⁷ (SOR/99-444) ["Al-Qaida regulations"].

⁸⁸ Dosman, *supra*, note 86, at 10.

⁸⁹ *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360 ["Terrorism Suppression regulations"].

⁹⁰ *Ibid* s 2.

⁹¹ UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517.

⁹² *Criminal Code*, *supra* note 2, s 83.05.

previously surveyed terrorism offences in the *Code*. Along with defining “terrorist activity,” the ATA defined a “terrorist group” as “an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity,” an association of such entities, or a listed entity.⁹³ A number of the terrorism offences in the *Code* – participating, instructing, providing property and financial services for terrorist purposes – require a form of association with a “terrorist group.” The provisions therefore make it easier for the Crown to establish proof of these offences, since one of the essential elements of the offence – the character of a person or a group as a “terrorist group” – is established on the basis of their having been listed.⁹⁴

The process by which persons or groups may be added to the *Code* list is similar to that under the *Terrorism Suppression* regulations, with a slightly more stringent test. In this case, acting upon the recommendation of the minister of public safety and emergency preparedness, the governor in council may add groups or persons if there are reasonable grounds to believe the entity has *knowingly* carried out a “terrorist activity”; if they have facilitated, participated in, or attempted such activity; or if they have *knowingly* acted at the direction of, in association with, or on behalf of such an entity.⁹⁵ Thus, under both the *Code* and the *Terrorism Suppression* regulations, a person or group may not be listed solely on the basis of speech or advocacy of terrorism. However, under both the regulations and the *Code*, a person or group may be listed without prior notice or a chance to oppose the listing before it occurs.

B. Challenges to Proscriptions and Listings

Both the *Terrorism Suppression* regulations and the *Code* contain similar provisions to allow a listed entity to apply in writing to be delisted.⁹⁶ In the case of the *Code*, where the minister of public safety receives an application, he or she must decide whether there are “reasonable grounds to recommend” that cabinet delist the entity.⁹⁷ The decision not to recommend delisting may be reviewed by a judge of the Federal Court within sixty days on the relatively low standard of whether the

⁹³ *Ibid* s 83.01(1). Note that this section defines “entity” to mean a person, group, trust, partnership, fund, or unincorporated association or organization.

⁹⁴ David Paciocco queries the constitutional validity of this aspect of the provisions on the basis that they may violate the presumption of innocence: “Constitutional Casualties of September 11” (2002) 16 SCLR (2d) 199.

⁹⁵ *Criminal Code*, *supra* note 2, s 83.05(1). By contrast, s 2(1) of the *Terrorism Suppression* regulations, *supra* note 89, does not contain a knowledge requirement.

⁹⁶ Section 5.3(1) of the *Al Qaida* regulations, *supra* note 87, also provides an analogous means for requesting that the minister of foreign affairs petition the UN’s 1267 Committee for delisting (since, as noted, those regulations set out consequences for UN listing but do not contain a separate list).

⁹⁷ *Criminal Code*, *supra* note 2, s 83.05(2). See sections 2.1 and 2.2 of the *Terrorism Suppression* regulations, *supra*, note 89, for the equivalent process.

decision is “reasonable on the basis of the information available to the judge.”⁹⁸ The court may privately examine secret intelligence on which the decision was based and may receive Crown submissions in the absence of the applicant or his or her counsel where disclosure would “injure national security or endanger the safety of any person.”⁹⁹ In addition, the court may receive into evidence “anything that, in the opinion of the judge, is reliable and appropriate,” and the decision upon review may be based on such evidence.¹⁰⁰ Notably, there is no provision under either the *Code* or the *Terrorism Suppression* regulations for the use of special advocates. The review procedure in both cases contemplates only a limited form of adversarial challenge, reliant upon whatever information counsel for the applicant happens to be provided – which may not even include a summary of the information on which the cabinet has relied.¹⁰¹

After listing six groups in early 2002 upon the *Code* provisions coming into force, the list has grown to forty-seven at present, with thirty-six listed under the *Terrorism Suppression* regulations.¹⁰² The only challenge to inclusion in any of these lists has been brought by a Somali-Canadian, Liban Hussein, who had been mistakenly added to the *Terrorism Suppression* list by the cabinet, following his addition to a list under the Bush administration (and, soon after, by the 1267 Committee) in late 2001. In the course of extradition proceedings brought by the United States, Hussein brought a *Charter* challenge to the *UN Act* regulations.¹⁰³ In June of 2002, prior to the hearing of the matter, Canada determined that Hussein had not been involved in terrorist activity, abandoned the intent to extradite him and delisted him from the *Terrorism Suppression* regulations. Canada then asked the 1267 Committee to remove Hussein, which occurred in July 2002.

VI. REGULATION OF TERRORISM FINANCING

A. *The Regulatory Regime to Counter Terrorism Financing*

As a founding member of the UN’s Financial Action Task Force (FATF), Canada has sought to implement its recommendations regarding the prevention of terrorism financing in a number of ways. In addition to the regulations under the *UN Act*,

⁹⁸ *Criminal Code*, *supra* note 2, s 83.05(6)(d).

⁹⁹ *Ibid* s 83.05(6)(a).

¹⁰⁰ *Ibid* s 83.05(6.1).

¹⁰¹ Roach, *supra* note 11, at 38.

¹⁰² The *Code* list is published online by the Ministry of Public Safety: <http://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-eng.aspx>. The Office of the Superintendent of Financial Institutions publishes a consolidate list of entities under all three lists discussed here: <http://www.osfi-bsif.gc.ca/Eng/fi-if/amlc-clrpc/atf-fat/Pages/default.aspx>.

¹⁰³ For an account of this litigation, see Dosman, *supra* note 86, at 18.

discussed earlier in this chapter, which prohibit financial dealings with listed entities, the ATA added new terrorism finance offences to the *Criminal Code*. Some of them depend on proscription or listing, but a number rely on the *Code*'s definition of terrorism and thus have a broader possible scope. The ATA also amended the *Proceeds of Crime (Money Laundering) Act* to include terrorism financing, and expanded the mandate of the Financial Transactions and Reports Analysis Centre (FINTRAC) of Canada.¹⁰⁴ FINTRAC is the agency that oversees compliance with the reporting requirements that the act imposes on a range of financial institutions and entities. The ATA also added the *Charities Registration (Security Information Act)*,¹⁰⁵ which allows for the use of secret information to monitor and revoke an entity's charitable status under the *Income Tax Act* where there are reasonable grounds to believe that an organization is using funds to finance terrorism. Finally, in 2006, as a further response to FATF recommendations, Parliament passed Bill C-25.¹⁰⁶ This required registration and reporting of a wider range of financial service entities, mandated more extensive identification for wire transfers and provided greater scope for the Canada Revenue Agency (CRA) to disclose information to law enforcement and intelligence agencies in relation to registered charities.¹⁰⁷

Canada has followed other countries in modeling its terrorism financing regulation on earlier money laundering legislation.¹⁰⁸ The merits of this approach have been questioned, given the small costs of many significant terrorist acts and the many informal channels through which funds may be raised.¹⁰⁹ Yet, as the Final Report of the Air India Inquiry noted, "much of Canada's anti-terrorist financing initiative is based on a money laundering model that focuses on transactions over \$10,000."¹¹⁰

¹⁰⁴ The act is now titled *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*, SC 2000, c 17 ["PCMLTFA"].

¹⁰⁵ SC 2001, c 41, s 113 ["CRSIA"].

¹⁰⁶ *An Act to Amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to Make a Consequential Amendment to Another Act*, S.C. 2006, c. 12 ["Bill C-25"].

¹⁰⁷ Air India Report, *supra* note 10, vol. 5, at 67; on the CRA provisions, see David Duff, "Charities and Terrorist Financing: A Review of Canada's Legal Framework," in Air India Report, *supra* note 10, *Research Studies – Volume 2: Terrorism Financing, Charities, and Aviation Security* (Ottawa: Public Works, 2010), 199 at 231–5.

¹⁰⁸ Air India Report, *supra* note 10, vol. 5, at 55–6.

¹⁰⁹ *Ibid* vol. 1, at 185.

¹¹⁰ *Ibid*. One exception to this is the broad scope of possible application of the *Code*'s terrorism financing provisions, discussed later in this chapter. Aside from these, and the broader range of entities required to register under the PCMLTFA pursuant to Bill C-25, *supra* note 106, Canada has not directly attempted to subject smaller, informal money transfer systems, such as "hawalas" to the terrorism financing regime

These limitations are evident in the work of FINTRAC, a primary agency responsible for tracking terrorism financing, given the extensive reporting it oversees under the *PCMLTFA*. The Centre receives roughly 7 to 8 million large cash transaction reports annually, along with roughly 11 million electronic funds transfer reports from various financial institutions and from entities tracking cross-border transfers of funds.¹¹¹ Only a small portion of the reports involve “suspicious transactions” – some sixty thousand to eighty thousand per year.¹¹² Yet, as the Air India report notes, “[a]bout 90 per cent of the terrorist financing cases that come to FINTRAC’s attention do so because law enforcement agencies or CSIS made voluntary reports to FINTRAC. The number of terrorist financing cases discovered solely by FINTRAC is minimal.”¹¹³ The Air India report also notes that despite the central role that both FINTRAC and the CRA are meant to play in preventing terror financing, neither is “sufficiently integrated into the intelligence cycle to detect terrorism financing or to provide the best financial intelligence to CSIS and the RCMP.”¹¹⁴

B. Criminal Offences of Terrorism Financing

As noted previously, Canada has passed a number of criminal offences relating to terror financing. In response to Security Council Resolutions 1267 and 1333, the *Al Qaida* regulations prohibit anyone in Canada from dealing with property or providing financial services to the Taliban, al Qaida, or any associated entities listed by the 1267 Committee.¹¹⁵ The regulations also placed a duty on Canadian financial institutions to “determine” whether to disclose when they are in possession or control of money or property belonging to listed entities.¹¹⁶ Similarly, the *Terrorism Suppression* regulations prohibit dealing with property or providing financial services to entities listed by cabinet, and impose a similar duty to determine and disclose possession or control of listed entity funds.¹¹⁷ Violations of either regulations are punishable as offences under the *United Nations Act*, with penalties of up to ten years in prison.¹¹⁸

The *Criminal Code* terror financing offences added by the ATA include knowingly dealing with property or providing financial services to a listed entity under the

¹¹¹ Financial Transactions and Reports Analysis Centre of Canada, *Results Through Financial Intelligence: FINTRAC Annual Report 2013* (FINTRAC Canada, 2013) at 9–10.

¹¹² *Ibid* at 10.

¹¹³ Air India Report, *supra* note 10, vol. 1, at 188.

¹¹⁴ *Ibid* at 186.

¹¹⁵ *Al Qaida* regulations, *supra* note 87, ss 3, 4, and 5.

¹¹⁶ *Ibid* ss 5.1, 5.2.

¹¹⁷ *Terrorism Suppression* regulations, *supra* note 89, ss 3, 4, 7 and 8.

¹¹⁸ *UN Act*, *supra*, note 85, s 3.

Code.¹¹⁹ The *Code* also imposes a continuous duty on various financial institutions to determine and report on possession of property belonging to or held on behalf of a listed entity¹²⁰ and a broader duty on every person in Canada to disclose to the RCMP or CSIS any property in their possession that they know is owned or controlled by or on behalf of a listed entity.¹²¹ In addition, the *Code* includes a series of more general terror finance provisions that are not dependent on listed entities. These include wilfully and without lawful excuse providing or collecting property knowing or intending it to be used for terrorist activities;¹²² providing property or financial services intending or knowing it to be used to carry out a terrorist activity;¹²³ or possessing property for the purpose of facilitating or carrying out a terrorist activity.¹²⁴ Each of these offences carries a ten-year maximum prison term. Finally, the *Code* contains provisions for the seizure and forfeiture of property or funds related to terrorism. These require the Crown to prove on a balance of probabilities that the property or funds are owned or controlled by or on behalf of a listed entity or will be used to facilitate or carry out a terrorist activity.¹²⁵

Further offences or sanctions can be found in the *PCMLTFA* (proceeds of crime) and the *CRSIA* (charities). The former act requires financial institutions such as banks, trust companies and securities brokers to report to FINTRAC transactions that they reasonably suspect involve a “terrorist activity financing offence,” which the act defines as any of a number of terror financing offences under the *Criminal Code*.¹²⁶ A violation of this requirement carries a fine of up to \$500,000 or six months in prison for a first-time offence.¹²⁷ Under the *CRSIA*, the ministers of public safety and national revenue may sign a certificate revoking an entity’s status as a registered charity under the *Income Tax Act* where there are reasonable grounds to believe the entity has made or will make available any resources to a list entity under the *Code*.¹²⁸ As David Duff notes, the act requires no knowledge or fault element on the part of the charity and does not allow for a due diligence defence.¹²⁹ The act

¹¹⁹ *Criminal Code*, *supra* note 2, s 83.08.

¹²⁰ *Ibid* s 83.11.

¹²¹ *Ibid* s 83.1.

¹²² *Ibid* s 83.02.

¹²³ *Ibid* s 83.03.

¹²⁴ *Ibid* s 83.04. Terror financing may also be caught by the facilitation, participation, or instruction provisions discussed earlier in this text (ss. s. 83.18, 83.19, 83.21), in addition to s 83.2, which makes it an offence punishable by up to life imprisonment to commit an indictable offence in association with a terrorist group.

¹²⁵ *Ibid* s 83.13 and 83.14; see also sections 462.32(4) and 462.35 for other instances in which terrorist funds or property may be forfeited.

¹²⁶ *PCMLTFA*, *supra* note 104, s 7(1).

¹²⁷ *Ibid* s 75(1).

¹²⁸ *CRSIA*, *supra* note 105, ss 4(1) and 8(1).

¹²⁹ Duff, *supra* note 107, at 240.

sets out a process for seeking review of the minister's decision that is closely analogous to those for delisting under the *Criminal Code* and *UN Act* regulations. Applications are reviewed in Federal Court and may involve secret intelligence to assess whether the decision to issue the certificate was "reasonable on the basis of the information and evidence available."¹³⁰ Despite the fact that until recently no charities had their status revoked under the act, concerns had been raised about the possible chilling effect the provisions would have on charities considering work in war zones and other troubled regions.¹³¹ Two charities have now had their status revoked as a consequence of concerns of involvement in terror financing.¹³²

At present, there has been only a single prosecution for a terrorism financing offence in Canada not coupled with other terrorism charges. The accused was forty-six years old, with no criminal record. He pled guilty to a single count of providing financial services knowing they would benefit a terrorist group, the Liberation Tigers of Tamil Eelam (LTTE), a listed entity under the *Code*. He received a six-month custodial sentence, which the Crown appealed. The appeal court upheld the decision partly on the basis that the Crown had taken the position at sentencing that the accused's conduct was "at the extreme low end of the continuum with respect to this type of conduct."¹³³

VII. IMMIGRATION MEASURES

A. Immigration Detention

Following 9/11, immigration detention had become an important tool in Canada's counter-terror efforts, due in part to the extraordinary powers it affords the government. It allows for lengthy detention on a standard lower than proof beyond a reasonable doubt, on mere suspicion of association with terrorist groups, and through the use of secret evidence. Canada used these provisions to detain five non-citizens from between 2001 to 2003, for periods of between two and seven years, along with a group of some twenty-three students from South Asia for a brief period in 2003 in what Canadian officials called Operation Thread.¹³⁴

¹³⁰ CRSIA, *supra* note 105, s 7(1).

¹³¹ See, for example, Duff, *supra* note 107, at 227, and Terrance S. Carter, "Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law" (2004), 19:1 *The Philanthropist* 43 at 44 [cited in Duff].

¹³² According to bulletins of the Canada Revenue Agency, the Canadian Foundation for Tamil Refugee Rehabilitation had its status revoked in 2010 and the ISNA Development Foundation had its status revoked in 2013; CRA online: <http://www.cra-arc.gc.ca/nwsrm/rlss/2011/m12/nr111209-eng.html>; <http://www.cra-arc.gc.ca/nwsrm/rlss/2013/m09/nr130920-eng.html>.

¹³³ *R v Thambaiturai*, 2011 BCCA 137, para 9.

¹³⁴ Kent Roach, "Counter-Terrorism In and Outside Canada and In and Outside the *Anti-Terrorism Act*" (2012) 16:2 *Review of Constitutional Studies* 243 at 255.

Long-term detention is authorized through the use of “security certificates” under the *Immigration and Refugee Protection Act*.¹³⁵ A part of the act since 1978, the certificate provisions mandate that the ministers of immigration and of public safety sign a certificate for the arrest and detention of non-citizens pending their deportation where there are reasonable grounds to believe they have engaged in terrorism, are a member of an organization that has or will engage in terrorism, or that they generally pose “a danger to the security of Canada.”¹³⁶ The certificate is reviewed in Federal Court, where a judge assesses whether the decision to issue it was “reasonable,” and once affirmed, the certificate becomes a removal order.¹³⁷ In advance of the hearing, the detainee receives only a brief summary of the information that forms the basis of the certificate.¹³⁸ The court may hear evidence *in camera* and in the absence of the detainee or his or her counsel where disclosure would be injurious to national security or to the safety of any person.¹³⁹ As Kent Roach has noted, the provisions do not require the court to engage in a balancing between the state’s interest in non-disclosure and interests in disclosure to the detainee, by contrast to analogous provisions in the *Canada Evidence Act* for assessing national security privilege in other proceedings.¹⁴⁰ Therefore, in contrast to a criminal case, a person may be detained under a security certificate entirely on the basis of secret evidence.

In 2007, the Supreme Court of Canada ruled that the certificate provisions violated the *Charter*’s guarantee not to be deprived of liberty or security of the person except in accordance with the principles of fundamental justice.¹⁴¹ The regime did so by depriving a detainee of a fair hearing, which includes the right to know the case to meet. The *Charter* requires that the hearing process provide either disclosure of material evidence or a “substantial substitute.”¹⁴² The Court held that special advocates could serve as such a substitute – counsel who could view the intelligence and consult with the detainee but not disclose the intelligence to him or her. As the court noted, special advocates had first been used in the 1980s by Canada’s Security Intelligence Review Committee, a body tasked with oversight of CSIS, and were used again to challenge secret evidence during the Arar Commission and in

¹³⁵ 2001, SC, c 27 [“IRPA”].

¹³⁶ *Ibid* s 34 and 77.

¹³⁷ *Ibid* s 80.1.

¹³⁸ *Ibid* s 77(2). As Craig Forcese notes, in “Assessing Secrecy Rules” (2009) *Institute for Research on Public Policy: Choices*, 15:5, at 15, in some cases, the summary provided has been “of the most general sort.”

¹³⁹ IRPA, *supra* note 135, s 83(1)(c).

¹⁴⁰ CEA, *supra* note 46, s 38.06, discussed later in this chapter; Kent Roach, “Secret Evidence and Its Alternatives,” in Aniceto Masferrer ed., *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (New York, Springer: 2011), at 184.

¹⁴¹ *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9.

¹⁴² *Ibid* para 61.

immigration detention hearings in the UK. They seemed an adequate compromise despite the significant differences between the parties and their interests in these various contexts.

The court suspended the effect of the judgment for a year, declining to cancel any of the outstanding certificates. Parliament amended *IRPA* to allow for the use of special advocates, but it chose one of the more restrictive of the many possible frameworks for structuring the role of special advocates.¹⁴³ After viewing the secret information, the special advocate must maintain confidentiality but may not consult with the detainee without the court's permission.¹⁴⁴ The constitutionality of the revised scheme has been challenged and upheld.¹⁴⁵

B. *Immigration Proceedings and Torture*

Canada's *Criminal Code* makes torture an offence and prohibits the use of evidence obtained through torture or cruel and degrading treatment in any legal proceedings.¹⁴⁶ Provisions in *IRPA* confirm that this applies in security certificate reviews.¹⁴⁷

Canada does not maintain an absolute ban on *refoulement* or deportation to torture. Before being deported, security certificate detainees and others deemed inadmissible to Canada on security grounds may seek a "pre-removal risk assessment" under the *IRPA*, which may result in a stay of their removal. The act requires the minister to decide whether the detainee's risk of torture or cruel and unusual treatment in the receiving country is outweighed by the "danger that the applicant constitutes to the security of Canada."¹⁴⁸ In its 2002 decision in *Suresh*, the Supreme Court confirmed the constitutional validity of this balancing test.¹⁴⁹

Suresh involved a Sri Lankan refugee detained under a security certificate in 1995 on the basis of membership in the Tamil separatist group the LTTE. Canada considered the LTTE a terrorist group but knew that Sri Lanka had a record of torturing the group's members. The Court acknowledged that torture is absolutely prohibited under various international treaties to which Canada is a signatory and held that deportation to torture was generally prohibited under the *Charter*. Yet it also held that "in exceptional circumstances, deportation to face torture might

¹⁴³ For assessments of the revised scheme, see Kent Roach, "Charkaoui and Bill C-3" (2008) 42 *Supreme Court Law Review* 281, and Craig Forcese and Lorne Waldman, "A Bismarkian Moment: Charkaoui and Bill C-3" (2008) 42 *Supreme Court Law Review* 355.

¹⁴⁴ *IRPA*, *supra* note 135, s 85.4(2).

¹⁴⁵ *Harkat v Canada*, [2014] 2 S.C.R. 33.

¹⁴⁶ *Criminal Code*, *supra* note 2, s 269.1(4).

¹⁴⁷ *IRPA*, *supra* note 135, s 83(1.1).

¹⁴⁸ *Ibid* s 113(d)(ii).

¹⁴⁹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1.”¹⁵⁰ The exception was not applied in *Suresh*, but the government continues to rely in part on the balancing test in the *IRPA* and the *Suresh* exception as a basis for its position that remaining certificate detainees may be deported despite concerns about torture.¹⁵¹

The Federal Court has applied the *Suresh* exception in *Nlandu-Nsoki v. Canada* (2005).¹⁵² Nsoki was a refugee claimant from Angola found inadmissible to Canada on the basis of his membership in an Angolan terror group. The minister ordered his removal despite an opinion issued by a “pre-removal risk-assessment officer” concluding that there was a “very serious risk of torture and severe sanctions” if he were returned. Dismissing Nsoki’s challenge to the order, Justice Shore applied *Suresh* in notably broad terms: “In this case exceptional circumstances do exist, namely the need to protect Canada’s security.”¹⁵³

However, *Nlandu-Nsoki* runs against the grain of judicial approaches to the problem of deportation to torture after *Suresh*, in particular on the issue of whether seeking diplomatic assurances from receiving countries can adequately address *Charter* concerns. The Supreme Court in *Suresh* was sceptical of the merits of such assurances. It held that in the future, a minister’s decision to deport a detainee in reliance on such assurances could be reviewed in light of the receiving nation’s human rights record, that government’s record in upholding its assurances and its “capacity to fulfill the assurances” in light of doubts about its control over its security forces.¹⁵⁴ Canada’s attempt to deport on the basis of assurances was then challenged in *Mahjoub*,¹⁵⁵ a case involving a security certificate detainee to be sent to Egypt, and *Sing*,¹⁵⁶ a case involving deportation to China on the basis of serious criminality. The court in each case set aside the minister’s decision based on the failure to consider adequately the historical record of the nation in question and the lack of a requirement for an effective monitoring mechanism.

Where concerns about deportation to torture have persisted, courts have chosen to release the detainee on conditions or to cancel the certificate. The Supreme Court held in *Charkaoui* that over time, the state’s onus to justify detention becomes greater and may become harder to meet as information on which a certificate is based ages.¹⁵⁷ In all five post-9/11 security certificate cases, the detainees were eventually

¹⁵⁰ *Ibid* para 78.

¹⁵¹ Roach, *supra* note 3, at 403.

¹⁵² *Nlandu-Nsoki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 17.

¹⁵³ *Ibid* at para 22.

¹⁵⁴ Roach, *supra* note 3, at 403.

¹⁵⁵ *Mahjoub v. Canada*, 2006 FC 1503.

¹⁵⁶ *Sing v. Canada*, 2007 FC 361.

¹⁵⁷ *Charkaoui*, *supra* note 76, para 112–13.

released on conditions, with two of the certificates being cancelled. Yet the release conditions have been among the most restrictive in Canadian law, including house arrest (with exceptions); continuous surveillance, including phone calls; and the use of electronic bracelets and other tracking devices.¹⁵⁸

Canada's use of security certificates as a primary tool for counter-terrorism has been controversial among the public and has provoked a considerable amount of litigation, often favourable to the detainee. Partly as a consequence, no new security certificates have been issued since 2003, and the government has expressed a reluctance to return to them for counter-terror purposes.¹⁵⁹

VIII. ADMINISTRATIVE AND EXECUTIVE MEASURES

Apart from security certificates, Canada has not used other executive or administrative measures as an alternative counter-terror measure to criminal sanctions. Within the criminal law, as an alternative to prosecution and punishment, the *ATA* added an equivalent to UK-style control orders in the form of a recognizance with conditions, including electronic monitoring device. The court may order a person to enter into a recognizance of up to one year where there are reasonable grounds to fear that the person will commit a terrorism offence.¹⁶⁰ Breach of any of the conditions is an offence with a penalty of up to two years in prison.¹⁶¹ If a person refuses to enter into the recognizance, they may be held in custody for up to a year.¹⁶² The provisions do not contemplate the use of secret evidence, but do not preclude the assertion of national security privilege under the *Canada Evidence Act*, discussed in the following section.

IX. ROLE OF MILITARY AND EXTRA-TERRITORIAL COUNTER-TERRORISM ACTIVITIES

A. *Military Courts and Detention*

The military does not play a role in Canada's domestic enforcement of terrorism law. Nor does Canada detain terror suspects on a law of war basis, though Canada

¹⁵⁸ See the discussion of release conditions in *Charkaoui*, *supra* note 76, at para 103.

¹⁵⁹ Michelle Shepard and Tonda MacCharles, "Man Hounded by Ottawa Loses 'Terrorist' Tag at Last," *Toronto Star* (December 15, 2009).

¹⁶⁰ *Criminal Code*, *supra* note 2, s 810.01. Where a person has been previously convicted of a terrorism offence, the recognizance may be for up to two years: s. 810.01(3.1).

¹⁶¹ *Ibid* s 811.

¹⁶² *Ibid* s 810.01(4).

has accepted the transfer of former Guantanamo detainee Omar Khadr, who is serving the remainder of an eight-year sentence for war crimes.

B. *The Extra-Territorial Treatment of Citizens Suspected of Terrorism*

The detention of Canadian citizen Omar Khadr in Guantanamo and now in Canada has been the subject of much controversy and litigation since his capture by U.S. forces in 2002 in Afghanistan when he was fifteen years old. Canadian officials interrogated Khadr in Guantanamo in 2003, acting with the knowledge that he had been sleep-deprived by U.S. authorities. Fruits of the interrogation were shared with the United States for use in a military prosecution of Khadr for war crimes. In 2008, Canada's Supreme Court held that Khadr's detention violated international human rights law and the *Charter*. It ordered the Crown to disclose some of the transcripts of the interrogation but held that portions should remain confidential.¹⁶³

Khadr then sought an order in Federal Court compelling Canada's prime minister to seek his return from Guantanamo. The court granted the order, recognizing that Canada had a duty to protect Khadr under section 7 of the *Charter*. The Supreme Court then overturned the order in early 2010, holding that although the government's involvement in the case provided a sufficient nexus to establish a *Charter* breach, the appropriate remedy was to declare Khadr's *Charter* rights violated and leave to the government "how best to respond in light of current information."¹⁶⁴ In the fall of 2010, Khadr pled guilty to five war crimes, including the murder of a U.S. military medical aid, and received an eight-year prison sentence. Khadr was finally returned to Canada in September of 2012 following a request by the U.S. government for Khadr to serve the remainder of his sentence in Canada.¹⁶⁵ Khadr is now eligible to seek parole, but the present Conservative government, which has resisted the view of Khadr as a child soldier, vigorously opposes his release.

C. *Extra-Territorial Terrorism Law Enforcement*

A number of recent cases have explored the issue of whether domestic law, including the *Charter*, limits the actions of Canadian officials acting abroad. The Supreme Court has held that the *Charter* does not constrain the conduct of Canadian officials acting outside of Canada, except where their involvement with a foreign state (or its agents) entails conduct that is "contrary to Canada's international obligations or

¹⁶³ *Canada v Khadr*, 2008 SCC 28.

¹⁶⁴ *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

¹⁶⁵ Michele Shephard and Tonda MacCharles, "Omar Khadr Back in Canada" *Toronto Star* (September 29, 2012).

fundamental human rights norms.”¹⁶⁶ The Court applied this exception in *Canada v Khadr* (2008), in light of the fact that the U.S. Supreme Court had found the military commission regime under which Khadr was being prosecuted to be contrary to international human rights law.¹⁶⁷

It is difficult, however, to reconcile these holdings with the outcome of litigation relating to detainees of Canada’s military in Afghanistan. Canadians were concerned that their military was transferring detainees to Afghan authorities despite the risk of torture. Amnesty International and other groups challenged the transfers as contrary to the *Charter*. The Federal Court held that the *Charter* did not apply on the basis that Canadian forces lacked “effective control” over the territory in question, and because Afghanistan had consented to the application of Canadian law to Canadian personnel but not to Afghan nationals.¹⁶⁸

Finally, Canada has extradited persons accused of involvement in terrorism to face prosecution in other countries, including France and the United States.¹⁶⁹ But it has not had cause in these cases to seek assurances from receiving countries that the death penalty not be sought or that military detention or trial be avoided. However, in the criminal context, the Supreme Court has held that in “all but exceptional cases,” the government is required to seek assurances against the death penalty where extradition may result in such an outcome.¹⁷⁰

X. SECRECY AND TERRORISM

A. Secrecy Claims and Secret Evidence

As noted earlier, criminal prosecutions for terrorism offences are conducted in the superior courts of Canada’s provinces. Trial judges in criminal cases have the power to adjudicate claims of police informer privilege at common law and public interest immunity under section 37 of the *Canada Evidence Act*.¹⁷¹ Under the latter provisions,

¹⁶⁶ *Khadr* (2010), *supra* note 164, at para. 14, paraphrasing the rule in *R v Hape*, 2007 SCC 26.

¹⁶⁷ *Khadr* (2008), *supra* note 163, at para. 26.

¹⁶⁸ *Amnesty International v Canada*, 2008 FC 336, aff’d 2008 FCA 401, leave to the SCC denied. On the conflict between these cases, see Kent Roach, “The Supreme Court at the Bar of Politics: the Afghan Detainee and Omar Khadr Cases” (2011) 28 *National Journal of Constitutional Law* 115.

¹⁶⁹ Examples include the case of Abdellah Ouzghar, a Moroccan-Canadian extradited to France in 2009 and sentenced to four years for having forged passports for terrorist organizations. Notably, the Ontario Court of Appeal upheld a stay of extradition against Khadr’s older brother Abdullah, sought by the United States for material support for terrorism. Having been subject to extensive abuse at the hands of Pakistani intelligence acting in concert with U.S. authorities, the court affirmed the trial court’s holding that to permit the proceedings would constitute an abuse of process: *United States of America v Khadr*, 2011 ONCA 358.

¹⁷⁰ *United States v Burns*, 2001 SCC 7, para. 8.

¹⁷¹ CEA, *supra* note 46, s 37.

evidence may be privileged on the basis that the public interest in disclosure is outweighed by one or more specific interests in non-disclosure, including the safety of informers and the protection of ongoing investigations or investigative techniques. These provisions might be applied to shield sources of information in affidavits used to obtain warrants under the *Criminal Code* or the *CSIS Act*, discussed earlier in this chapter.

Where claims of national security privilege arise in the course of a terrorism prosecution, or any other judicial proceeding in Canada, the *Canada Evidence Act* requires that they be heard in separate, parallel proceedings by a judge of the Federal Court.¹⁷² The matter is adjudicated without the Federal Court judge having heard the evidence in the criminal case, and his or her decision as to privilege is binding on the judge in the criminal trial. Secret evidence not disclosed to the accused may not be used in the criminal trial. Where the accused is denied disclosure of evidence on national security grounds and that evidence may be essential to his or her defence, the trial judge in the criminal case may order a stay of proceedings.¹⁷³

On a hearing under section 38, the court must first decide whether the disclosure of the information would be injurious to international relations, national defence, or national security.¹⁷⁴ If it would be, the judge must then decide whether “the public interest in disclosure outweighs in importance the public interest in disclosure.”¹⁷⁵ The court may order partial disclosure or impose conditions on an order granting privilege. For example, the court might require the Crown to provide a summary of the evidence or make an admission of fact. When deciding on privilege under section 38, the court may also hear evidence *in camera*, and either the Crown or defence may make submissions *ex parte*. A defence may thus be revealed without disclosing it to the Crown. The act also imposes a duty on the accused or any participant in a judicial proceeding to disclose to the Crown its intent to call evidence that is “potentially injurious,” defined as “information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.”¹⁷⁶ The duty also extends to any party intending to disclose “sensitive information,” which is defined with sweeping breadth as “information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or

¹⁷² *Ibid* s 38.04. The constitutional validity of the dual court provisions were challenged and upheld in *R. v. Ahmed* 2011 SCC 6, in part due to the power of the superior provincial (or criminal trial) court to remedy abuses of process or fair trial right violations.

¹⁷³ *CEA, supra* note 46, s 38.14.

¹⁷⁴ *Ibid* s 38.06.

¹⁷⁵ *Ibid* s 38.06(2).

¹⁷⁶ *Ibid* s 38.01.

outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.”¹⁷⁷

The decision of a Federal Court judge under section 38 may be appealed, which may cause further delay in the criminal trial. If the Federal Court of Appeal orders disclosure, the *CEA* allows the attorney general of Canada to personally issue a certificate prohibiting the disclosure – acting, therefore, as a kind of trump card.¹⁷⁸ The certificate may be reviewed by a single appeal judge, but only on a test of whether the evidence at issue *relates to* national defence or security.¹⁷⁹ As noted, the trial judge is bound by the holdings of the Federal Court under section 38, but may grant various remedies to protect the accused’s right to a fair trial. For example, he or she may dismiss counts on the indictment or order a stay of proceedings.¹⁸⁰

Despite the Supreme Court upholding the dual court process contemplated under section 38, commentators have noted a number of shortcomings with the process.¹⁸¹ When weighing the merits of disclosure, a judge in the Federal Court will not have heard evidence in the criminal trial and is not therefore in a strong position to assess the importance of disclosure. Nor are defence counsels in a strong position to argue for disclosure given the lack of information they possess in relation to the evidence.¹⁸² Moreover, without access to the privileged material, the trial judge in the criminal case is not in the best position to assess the merits of an application to stay a trial or order some other fair trial remedy. As a consequence, evidence may be disclosed in Federal Court when not truly warranted, or the trial judge might stay a criminal prosecution when not truly necessary.¹⁸³

B. *Secrecy in the Courtroom and Anonymous Witnesses*

There are also a number of mechanisms to protect state secrets in the course of a trial or other proceeding. The *Criminal Code* allows for part or all of a terrorism prosecution to be subject to a publication ban and also to be held *in camera*, if these are necessary in a trial judge’s view to “prevent injury to international relations

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* s 38.13.

¹⁷⁹ *Ibid* ss 38.131(8), (9) and (10).

¹⁸⁰ *Ibid* s 38.14.

¹⁸¹ See Kent Roach’s summary of criticisms in *Air India Report*, *supra* note 10, *Research Studies – Volume 4: Towards a Workable Relation Between Intelligence and Evidence* (Ottawa: Public Works, 2010), 192–5; see also the *Air India Report*, *supra* note 10, vol. 3, at 165–7.

¹⁸² See the discussion of the possible use of special advocates in this context in *Air India Report*, *supra* note 10, vol. 3, at 167–9.

¹⁸³ Kent Roach, “The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence,” in *Air India Report*, *supra* note 10, *Research Studies – Volume 3: Towards a Workable Relation Between Intelligence and Evidence* (Ottawa: Public Works, 2010), at 358–9.

or national defence or national security.”¹⁸⁴ Section 38 hearings under the CEA are generally subject to a publication ban.¹⁸⁵ And evidence at inquiries and in final reports may also be privileged or redacted pursuant to section 38.¹⁸⁶

The extent to which witnesses, including members of intelligence services, may protect their identity in the course of a terrorism prosecution is limited in Canadian law by various rules. Police informer privilege at common law protects the identity of police informants who provide information on condition of preserving their anonymity. The court does not engage in a balancing here between interests; where it applies, the privilege is absolute, except if the accused’s innocence is at stake (if disclosure is the only way to prove it).¹⁸⁷ But police informer privilege does not apply to state agents or operatives who become material witnesses to the crime being tried. It would therefore not extend to CSIS agents.¹⁸⁸ What is unclear in Canadian law at present is whether informer privilege may extend to informers who provide information to CSIS that is then turned over to the RCMP pursuant to section 19 of the *CSIS Act*.¹⁸⁹

Intelligence agents, and others not subject to police informer privilege, may still testify under rules allowing for partial anonymity. In addition to allowing for publication bans and *in camera* hearings, the *Criminal Code* allows for witnesses in a terror prosecution to testify outside the courtroom and behind a screen so as not to see the accused. The witness would still be visible to the accused, the judge and the jury.¹⁹⁰ Finally, at common law, judges may permit a witness to testify under a pseudonym.¹⁹¹ The Air India Commission has suggested that amendments to Canadian law permitting a prosecution that placed primary or crucial reliance on evidence from fully anonymous witnesses would likely violate the fair trial rights under the *Charter*, and not be found to be a reasonable limit on those rights under section 1.¹⁹²

¹⁸⁴ *Criminal Code*, *supra* note 2, s 486.1.

¹⁸⁵ CEA, *supra* note 46, s 38.02. In *obiter*, Lufty J. of the federal court, in *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, 2004 FC 1052 (CanLII), paras 34–45, has queried whether these are consistent with the open court principle affirmed in *Vancouver Sun (Re)*, *supra* note 70.

¹⁸⁶ *(Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar))* (F.C.), 2007 FC 766.

¹⁸⁷ *R. v. Leipert*, [1997] 1 S.C.R. 281.

¹⁸⁸ Air India Report, *supra* note 10, vol. 3, at 131.

¹⁸⁹ In the main Air India prosecution, information that was turned over in this fashion was not found to be subject to informer privilege partly on the basis that CSIS gave no indication when providing the information to the RCMP that informer privilege was a condition of obtaining it or providing it to police: *R v Malik and Bagri*, 2004 BCSC 554, para 18. See also *Harkat (Re)*, [2014] 2 S.C.R. 33, holding, in the context of security certificates, that CSIS sources were not subject to informer privilege but to public interest immunity at common law.

¹⁹⁰ *Criminal Code*, *supra* note 2, s 486.2.

¹⁹¹ *Vancouver Sun*, *supra* note 70, at para 91.

¹⁹² Air India Report, *supra* note 10, vol. 3, at 204–21.

XI. OTHER MATTERS

In the decade following 9/11, much of the discussion about national security in Canada has focused on terror prosecutions and administrative detention. From 2004 onward, however, Canada's counter-terror efforts have comprised only one part of a larger policy on national security premised upon protecting human security broadly understood.¹⁹³ The earlier Liberal government had thus sought to address terrorism as one among a range of concerns that include emergency preparedness (for medical and natural disasters), transportation and border security and the regulation of sensitive sites and materials. To fulfill this mandate, the government created a new Ministry of Public Safety and passed the *Public Safety Act*,¹⁹⁴ which bolstered the regulation of sensitive materials and aviation security and allowed for greater information sharing among domestic intelligence agencies and their international partners. The present Conservative government has remained committed to approaching terrorism as one of several threats to human security broadly conceived.¹⁹⁵

A further important aspect of Canadian counter-terrorism after 9/11 involves the use of inquiries to examine human rights abuses and other aspects of security law and policy.

From 2004 to 2006, Canada held an inquiry into the role of Canadian officials in the ordeal of Syrian-Canadian citizen Maher Arar. In 2002, the RCMP provided U.S. officials with information that prompted them to detain Arar on a stopover in New York, on his way back to Canada from a vacation in Tunisia.¹⁹⁶ The United States sent him to Syria, where he was tortured and imprisoned for almost a year, then released upon Canada's intervention. The Commission found that the RCMP had provided U.S. officials with inaccurate information, violated the RCMP's own screening policies for relevance and reliability and provided the information without caveats as to its use.¹⁹⁷ It was also critical of the lack of interagency coordination and

¹⁹³ Canada, *Securing an Open Society: Canada's National Security Policy* (Ottawa: Privy Council Office, 2004).

¹⁹⁴ SC 2004, c 15.

¹⁹⁵ Public Safety Canada continues to define its basic function as "a centralized hub for coordinating the work in counter-terrorism, critical infrastructure, cyber security and transportation security" ("National Security," online: <http://www.publicsafety.gc.ca/cnt/ntnl-scr/index-eng.aspx>). This multifaceted approach can also be discerned across a series of recently published strategies statements on security, including the Ministry's *Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy*, its latest global policy statement on point: online <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/index-eng.aspx?t=ntnl-scr>.

¹⁹⁶ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) ["Arar Commission Report"] at 27.

¹⁹⁷ *Ibid* at 13–14.

found that Canadian officials had not been sufficiently cautious in their reception and internal distribution of information obtained from Syrian officials through torture. Following the inquiry, the government paid Arar \$10.5 million in settlement of a civil action and issued an apology in the House of Commons.

A second inquiry looked into Canada's role in the detention and torture of three Canadian citizens traveling in Syria and Egypt in 2002. Headed by former Supreme Court Justice Frank Iacobucci, the inquiry, reporting in 2008, found that Canadian officials had indirectly contributed to the detention of two of the three men and indirectly contributed to the mistreatment of all three.¹⁹⁸ The inquiry pointed to various "deficiencies" in protocols for sharing information with Syrian and Egyptian authorities, and in their dealings with those authorities to obtain information from the detainees.¹⁹⁹

Only the first of these inquiries was tasked with making recommendations for improving counter-terror practices. The Arar Commission recommended that CSIS and the RCMP should abide by clearer divisions of labour in terms of intelligence gathering and law enforcement; that training and protocols for the RCMP's national security work (such as information sharing) be improved; and that the RCMP and other agencies with national security mandates (Canada Border Services, FINTRAC, the Department of Foreign Affairs, among others) be subject to a centralized review body with similar powers to access confidential information to those exercised by the Security Intelligence Review Committee that oversees CSIS.²⁰⁰ In response, the government has recognized the need for more central coordination of agencies in national security, but has thus far resisted the implementation of a central review body with powers to assess the efficacy of such coordination or access to confidential information commensurate to the task.²⁰¹

The government also ordered an inquiry into issues surrounding the failure to prevent the Air India bombing of 1985 and the investigation and prosecutions that followed. In addition to assessing causes of the failure to prevent the bombing (noted earlier in this chapter), the Commission made a series of recommendations relating to terror investigations and prosecutions. Among them were suggestions about how intelligence might be more effectively gathered with a view to its use as evidence and how to improve information sharing, witness protection and aviation security.²⁰² In

¹⁹⁸ Commissioner Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008), at 35–9.

¹⁹⁹ *Ibid.*

²⁰⁰ Arar Commission Report, *supra* note 191, at 363–9; see also the 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* (Ottawa: Public Works and Government Services, 2006).

²⁰¹ Roach, *supra* note 3, at 417.

²⁰² Air India Report, *supra* note 10, vol. 1, chapter VII.

response, the government has published an “Action Plan,” setting out its intention to make changes on several fronts.²⁰³ Notably, the government has declined to respond to two of the Commission’s key recommendations: enhancing the role of the prime minister’s national security advisor in the coordination of national security agencies and giving trial judges in terrorism prosecutions the power to decide on disclosure requests for secret intelligence.²⁰⁴

XII. CONCLUSION

In the fall of 2001, the *Anti-terrorism Act* was controversial, both during its brief period as a bill before Parliament and in the early years following its passage. Canada followed the United Kingdom by entrenching a broad definition of terrorism, and it followed the United States in expanding powers of state secrecy and surveillance. There were concerns that the definition of terrorism, provisions for listing, terror financing and charities would place a chill on free speech, hinder fundraising or be misapplied. There were concerns about the overreach of the new offences and the possible misuse of the preventive arrest or judicial interrogation provisions. Yet with the benefit of hindsight and a growing body of jurisprudence, many of these concerns have subsided. The RCMP, working in coordination with CSIS and other agencies, has succeeded in disrupting a number of plots in early stages. Early prosecutions under the ATA have unfolded without a pattern of misuse of police powers or an overbroad application of new offences in the *Code*.

However, concerns about the fundamental unfairness of the use of immigration detention have been borne out. Security certificate detainees have spent significant time in custody without charge on secret evidence. Doubts remain as to whether special advocates are indeed a “substantial substitute for disclosure” or whether there can be such a thing. Fortunately, Canada appears to have abandoned the use of immigration detention as a substitute for prosecution. It may be following the lead of the United Kingdom and the United States in shifting a focus back to prosecution and a closer adherence to conventional approaches to due process.

Concerns also remain about the overuse of privilege. In a number of cases, claims of privilege have coincided with sensitive issues of accountability of state agents, as in the Arar case, the Afghan detainees case and some of the security certificate cases. In addition to this, there is a concern that expansive claims of national security privilege will become normalized in a wider range of areas of Canadian law through

²⁰³ Canada, *Action Plan: the Government of Canada Response to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* (Ottawa, 2010).

²⁰⁴ Roach, *supra* note 3, at 373.

the spread of the use of special advocates as a kind of global solution to the problem of secrecy and fairness.

Among the challenges for Canada going forward will be to restrain the use of secrecy, carefully limit and oversee the use of surveillance and institute more effective central coordination and review of the various agencies involved in national security – possibly through enhanced powers of the national security advisor to the prime minister and a parallel review body.

XIII. POSTSCRIPT

At the time of this writing, the government of Canada has tabled two bills that contemplate significant changes to Canada's counter-terrorism law. The bills come in the wake of two events in October of 2014 that brought terrorism to the fore of public discussion. In Quebec, a radicalized individual, acting alone, struck two soldiers with his car, killing one of them. Three days later, in Ottawa, another radicalized, lone-wolf actor shot a soldier guarding a war memorial and entered Parliament attempting to claim more lives before he was shot dead.

Later that month, the government tabled bill C-44, the *Protection of Canada from Terrorism Act*. Now in third reading and likely to pass, the bill will allow CSIS to obtain a warrant to use measures outside of Canada that may violate the laws of a foreign state – including surveillance contrary to foreign privacy laws. The bill also extends the doctrine of informer privilege to CSIS informants, but allows the privilege to be lifted in a criminal case where it is essential to establishing the accused's innocence.

In January of 2015, following the attacks in Paris and with a federal election in Canada on the horizon, the government tabled bill C-51, the *Anti-terrorism Act, 2015*. Currently in first reading, the bill contains the most extensive set of revisions to Canada's counter-terror law since 2001 and is likely to pass in substantially similar form, given the governing party's majority status and recent policy pronouncements.

The bill adds a new offence to the *Criminal Code* of advocating or promoting terrorism. It prohibits knowingly communicating statements that advocate or promote the "commission of terrorism offences in general" knowing they will be committed or being reckless as to whether they may be committed. It carries a penalty of as much as five years in prison. Concerns have been raised about the overbroad scope of the offence given the uncertainty as to the meaning of the phrase "terrorism offences in general" and its application to terrorism that "may" be carried out. A related provision allows police to obtain a warrant to seize or destroy "terrorism propaganda," which is defined as any representation that advocates the commission of "terrorism offences in general."

The bill also contains a new *Secure Air Travel Act* that allows for the creation of a no-fly list of a broader scope than the ones discussed earlier in this chapter. The minister of public safety may add individuals to the list where there are “reasonable grounds to suspect” the person will “threaten transportation security” or commit a terrorism offence in Canada or abroad. The minister may direct airlines to “do anything . . . reasonable and necessary to prevent” the acts from occurring, including denying a person transportation or screening them. A listed person may make recourse to the minister or appeal his or her decision to a judge, who must assess whether any ministerial direction was reasonable.

Bill C-51 also lowers the threshold for preventive detention and orders placing a person on a recognizance with conditions. Whereas at present police may detain without charge where they reasonably suspect it to be “necessary” to prevent a “terrorist activity,” they may do so under the bill where it is “likely to prevent” such activity. Similarly, a terrorism recognizance order may be imposed not only where a terrorist act “will be carried out” and is “necessary to prevent” such an act – as is currently the case – but where it “may be carried out” and is “likely to prevent” the act. The bill will extend the limit on pre-trial detention from three to seven days and introduces a new terrorism peace bond that may last as long as five years and require electronic monitoring, surrendering a passport and travel restrictions.

Perhaps most controversially, bill C-51 amends the *Canadian Security Intelligence Service Act* to include a provision stating that where the service has reasonable grounds to believe an activity constitutes a threat to “the security of Canada,” its agents may “take measures within or outside Canada to reduce the threat.” The measures may not infringe a Charter right or be contrary to law unless CSIS obtains a warrant. A key consideration in granting the warrant is whether the measures are reasonable and proportionate – though regardless of whether they obtain a warrant, CSIS may not take measures that cause death or bodily harm, obstruct justice or “violate the sexual integrity of an individual.” By assuming this power, Parliament has blurred the clear separation between CSIS’s role as a civilian intelligence gathering agency and the RCMP’s role as a law enforcement body. Yet the bill does not include any substantial new oversight mechanisms for CSIS to accompany these new powers.

Finally, the bill introduces a new *Security of Canada Information Sharing Act*, which allows for greater sharing among federal agencies of information “relevant . . . in respect to activities that undermine the security of Canada.” The latter phrase is defined broadly to include any activity that may undermine the “sovereignty, security or territorial integrity of Canada” and may also include “interference” with the government’s “economic or financial stability.” No oversight mechanisms have been added that might enable more effective review of information sharing beyond the purview of single-agency review bodies.