National Security: Curbing the Excess To Protect Freedom and Democracy

British Columbia Civil Liberties Association

A Brief Prepared for the House of Commons Subcommittee
on Public Safety and National Security
And the Senate Special Committee on the *Anti-Terrorism Act*

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PART 1: EXECUTIVE SUMMARY

The British Columbia Civil Liberties Association (www.bccla.org) was established in 1963 to promote, protect and defend civil liberties and human rights in B.C and Canada. In forty years protecting civil liberties in Canada, the BCCLA has developed expertise in a variety of areas including national security and intelligence.[1] The goal of the BCCLA in this submission is to identify some of the current problems in the current national security apparatus and urge reforms that curb the excesses while ensuring that Canada's national security agencies can continue to protect the interests of Canada and prevent terrorism. A compendium of specific recommendations is attached as Schedule "A" to this brief for ease of reference.

The B.C. Civil Liberties Association ("BCCLA" or "Association") welcomes the opportunity to present submissions to both the House of Commons Subcommittee on Public Safety and National Security (the "House Subcommittee") and the Senate Special Committee on the Anti-Terrorism Act (the "Senate Special Committee") which are reviewing the *Anti Terrorism Act* (ATA). The work of these committees to review the ATA represents an opportunity in less tumultuous times to revisit the all-too-brief debate preceding the passage of the ATA. This is arguably the most auspicious time to engage in full, impartial, sober, and informed review in order to contribute to striking the appropriate balance between the agencies that must be empowered to preserve our national security and democratic values that constitute Canadian culture and tradition.

No discussion of the tension between democratic values and the preservation of national security can omit mention of Canada's long and well-documented history of excess in its dealings with individuals and groups engaged in legitimate political, religious and ideological activities. In 1946, the Government of Canada initiated a secret purge of civil service employees suspected of communist loyalties, which was replete with unlawful detention and searches and devoid of basic

[1] An outline of the BCCLA's experience in this field is available online in our supporting materials for our application for intervenor status before the Honourable Justice Dennis O'Connor, Commissioner, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the "Arar Commission" or "Arar Inquiry"): http://www.bccla.org/othercontent/05araraffidavit.htm

due process protections.[2] In British Columbia, a religious sect of Doukhbours known as the Sons of Freedom were the continual subject of RCMP scrutiny in the 50s and 60s. In 1981, the McDonald Commission found that throughout the 1970s, the RCMP conducted surveillance, infiltrated and subverted the activities of legitimate political activist groups.[3] In 1970, the Federal Government invoked the *War Measures Act* arguably to quell the rising sentiments of Quebec sovereignty.[4] As our courage is tempered by the passage of time, we slowly reach a general consensus in Canada that excesses of this kind were both regrettable and avoidable.

Excesses of this kind are not just the stuff of post-colonial history. An obscure document called a Security Certificate is currently causing a human rights tragedy of shameful proportions. Five men of Muslim background have been imprisoned by Ministerial Order in Canada under inhuman conditions while they await possible deportation orders to countries known to practice torture. One of them was released into a strict form of bail akin to house arrest, and the remaining four languish in solitary confinement. The BCCLA calls upon the Committees to support the immediate release of all security certificate detainees from custody, and calls for a legislative overhaul to the deeply flawed regime.

Moreover, the incomplete and possibly misleading public record of the actual human impact of overbroad powers afforded since 2001 by the ATA reveals that the RCMP has targeted animal, environmental and Aboriginal activists, and Muslim clerics for special attention. The BCCLA, along with the general public and these Committees have limited access to the facts of these cases. It is as accordingly difficult to approve of this special attention as it is to denounce it. Though the RCMP's conduct cannot fairly or conclusively be appraised at this time, it is inexcuseable that there are no mechanisms for accountability that can reassure Parliament and Canadians that the powers and resources intended to deal with grave issues of national security

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[2] Reg Whitaker, "Keeping Up with the Neighbours? Canadian Responses to 9/11 in Historical and Compartive Context" (2003) 41 Osgood Hall L.J. 241

[3] Canada, Commission of Inquiry Concerning Certain Activities of the RCMP, Second Report: Freedom and Security Under the Law, vol.1 (Ottawa: Minister of Supply & Services, 1981)

[4] Reg Whitaker, "Apprehended Insurrection? RCMP and the October Crisis" (1993) 100 Queens Quarterly 383. Whitaker makes the point that the RCMP's intelligence leading up to the Cross and LaPorte kidnappings was good and that the RCMP advised against using invoking the *War Measures Act* because there was no evidence of an impending insurrection.

and terrorism are not being misdirected. The BCCLA fears that, due to overly broad definitions for “terrorist activity” and “national security”, there is nothing to prevent the RCMP from feeling itself bound to pay special attention to individuals and groups who may be unfairly labeled as terrorists. This problem arises both from problematic definitions and ineffective oversight, carries the potential to undermine the exercise of fundamental freedoms protected by the *Charter of Rights and Freedoms*, including freedom of expression, association and religion. Like the excesses of the past, the excesses of the present are both regrettable and avoidable.

At this critical juncture, Canadians should not avert their gaze from the unfortunate reality that the legislature has granted several of our national security agencies more power than they need to fulfill their mandates. Furthermore, the existing judicial, parliamentary and civilian mechanisms for democratic oversight of national security agencies are simply unable to prevent or redress the misuse of the state’s considerable authority in the realm of national security.

The remedy for these problems is not a mystery: the powers of investigative and enforcement authorities must be scaled back to justifiable levels and independent civilian oversight must be fortified where it exists and created where it does not. The ATA alone did not conjure up all of these shortcomings, but it exacerbated and codified them. The BCCLA respectfully suggests that it is necessary to look beyond the ATA to recommend comprehensive solutions to systematic failings.

The BCCLA requests that, in crafting a remedy for these failings, the House Subcommittee and Senate Special Committee give consideration to the following proposals:

1. Immediately advocate for an end to the inhumane and indefinite detention of individuals under Security Certificates. This issue is of such ethical and cultural

magnitude as to demand immediate rectification. Their ongoing detention is an assault to the Canadian conscience. Given their treatment, it is not much to ask that current detainees be granted access to reasonable (even heavily supervised) bail while awaiting a hearing and while awaiting deportation.

2. Overhaul Security Certificate powers under the *Immigration and Refugee Protection Act* to forbid reliance of information obtained by torture, unconditionally cease the practice of deportation to torture, prevent indefinite detention, maximize public disclosure of evidence, and enhance judicial oversight of the process.

3. Amend the definition of "terrorist activity" in the ATA to include only actions that are intended to or can reasonably be foreseen to cause death or serious bodily harm to persons not actively and directly involved in a dispute with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing an act.[5] This definition would tailor anti-terrorist powers to act against only those catastrophic events such as those in New York, Bali, Madrid, Istanbul and London, the horror of which is said to justify the creation of anti-terrorist powers. This definition would in no way imperil the usual power of policing authorities from investigating criminal militancy.

4. Engage in a comprehensive review of definitions and offences relating to national security, including the definition of "threats to national security of Canada" in the *Canadian Security Intelligence Service Act* and the harms listed in section 3 of the *Security of Information Act*.

5. Enhance judicial oversight of national security activities by amending the *Canada Evidence Act* to streamline the categories of information over which the government has control, eliminate the use of information derived from torture, invigorate secrecy hearings through the participation of parties adverse to secrecy (including security-cleared lawyers where necessary), and either eliminate government veto of court-

[5] The BCCLA does not say that this definition eliminates the need for judgment as to which actions constitute terrorism and which persons or groups can be said to be terrorists. In our view, the definition we propose is sufficiently specific to reasonably circumscribe anti terrorism powers, and avoids needless multiplication of terrorists and terrorist offences in a world which already has too many.

ordered disclosure or provide for a stay of proceedings in which a such a veto is exercised.

6. Create a National Security Review Committee to oversee and review the national security and intelligence activities of all national security and intelligence agencies and institutions.

7. Create an Office of the Civil Liberties Ombudsman as a last line of defence in the review process. Such an office would enhance public confidence in the oversight architecture and provide a refuge for the aggrieved.

In submitting these proposals, the BCCLA is attempting to urge reforms that curb excesses while ensuring that Canada's national security agencies can continue to protect the interests of Canada and prevent terrorism.

PART 2: DEFINITION OF TERRORISM AND NATIONAL SECURITY

(a) Foreward

The B.C. Civil Liberties Association submits that that *Criminal Code* provisions prior to the enactment of the *Anti-Terrorism Act* (the "ATA") would have captured all the conduct associated with the definition of "terrorist activity" under the ATA. The BCCLA believes, for example, that it is almost axiomatic that all terrorist offenses serious enough to deserve that term involve the offences of murder, attempted murder, or conspiracy to commit murder. Similarly, the definition of "terrorist activity" logically incorporates the serious offence of extortion under s.346(1) of the *Criminal Code of Canada.*[6] The considerable police powers and resources at the disposal of major crime and homicide squads would clearly be available to investigate terrorist offences as well.

In this respect, the BCCLA adopts the submission of the Canadian Association of University Teachers:

> Criminal law scholars have criticized the trend over the last decade whereby numerous offenses have been added to the *Criminal Code* in an *ad hoc*, political way to respond to tragic or highly publicized events, not because the *Code* could not capture such conduct within its existing principles, but because politicians felt a need to make a symbolic gesture condemning the conduct. These additions have unnecessarily complicated the *Code* and, in some cases, have undermined the principled application of the criminal law. The new "terrorism offenses" and definition of "terrorist activity" that the *ATA* introduces into the *Criminal Code* fall into both these categories.[7]

At this moment in time, however, it may well be that Canadian lawmakers and analysts are not yet prepared simply to repeal the ATA in its entirety. The BCCLA therefore submits that much of the mischief of the ATA can be suppressed by trimming the definition of the term "terrorist activity" to a level intended to facilitate investigation of the type of large-scale horrible events said to justify special anti-terrorism powers. The remainder of this part of the BCCLA's submission focuses on this definition as well as terms related to national security.

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[6] Section 346(1) of the Criminal Code enacts the offence of extortion as follows: "Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done."

[7] Canadian Association of University Teachers, "Submission to the House of Commons Subcommittee on Public Safety and National Security Regarding the Review of the *Anti-Terrorism Act*, 28 February 2005 at pages 27-31; online: http://www.caut.org/en/publications/briefs/2005anti_terrorism_brief.pdf . CAUT's submission is also outstanding for describing the problems of overbreadth that are posed by the definitions of "terrorist activity" and "terrorist offence": at 15-23.

(b) Definitions

All roads lead to and from the definition of "terrorist activity" in the ATA. Most, if not all, provisions that create offences in the ATA reference the definition of "terrorist activity". Thus, in critically examining the ATA, it is necessary to take some time to analyse this definition.

The BCCLA submits that the definition of "terrorist activity" in the *Anti-Terrorism Act* is overly broad. The BCCLA is very concerned that this problem of overbreadth will result in national security agencies targeting individuals who, though they *may* be legitimate targets for criminal investigation generally, are not engaged in terrorism or crime that can be reasonably said to impact national security. Moreover, this definition can have much more serious consequences in that it may encourage national security agencies like the RCMP and CSIS to target overtly political and religious groups engaged in legitimate activities. This could lead to a chilling effect on, if not outright violation of, the exercise of fundamental rights of freedom of expression, association, assembly and religion, all enshrined in section 2 of the *Charter of Rights and Freedoms*.

In examining the definition of "terrorist activity" in the ATA, it is important to make two preliminary observations. First, the definition of "terrorist activity" in the ATA is not the only definitional source for crimes against national security that provide authority to national security agencies like the RCMP and CSIS to undertake work in the field of national security and counter-terrorism. The BCCLA submits that the Subcommittee and any other body examining the definition of "terrorist activity" must also consider the relevant legislation that deals with national security matters given the direct link between terrorism and national security in terms of state authority and the conduct of agencies whose mandate is to protect us against threats to national security and counter terrorism.

Second, there has long been disagreement within the international community about a unified definition of "terrorism". This is likely due to the inherent problem for politics to influence one's understanding of what is meant by terrorism and the disagreements that inevitably flow from one's political views about what methods may legitimately be pursued to further a cause. The result at the international level is that international agreements reflect consensus on particular actions (bombing,

hijacking, hostage taking) as opposed to a general "stipulative" definition.[8] However, there have been more recent efforts to develop a comprehensive convention against international terrorism that provides a general definition of terrorism.[9] It is important to examine these related national and international provisions to understand the context in which the ATA and its definition of "terrorist activity" were created and currently operate within.

With respect to Canada's domestic legislation, the definition of "terrorist activity" in the ATA has two aspects. First, it includes offences as defined in a variety of international conventions to which Canada is a signatory and has ratified (including the two cited above). Second, there is a more broad definition of "terrorist activity" which reads:

> "(*b*) an act or omission, in or outside Canada,
>
> (i) that is committed
>
> (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
>
> (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
>
> (ii) that intentionally
>
> (A) causes death or serious bodily harm to a person by the use of violence,
>
> (B) endangers a person's life,
>
> (C) causes a serious risk to the health or safety of the public or any segment of the public,
>
> (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
>
> (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),
>
> and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable

[8] For example, the *International Convention for the Suppression of Terrorist Bombings (1997)*, A/RES/52/164, 9 January 1998 and the *International Convention for the Suppression of the Financing of Terrorism (1999)*, A/RES/54/109, 25 February 2000.

[9] See UN Document A/59/894, 12 August 2005.

> to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law."[10]

With respect to national security legislation, the *Security Offences Act* gives the RCMP the primary responsibility for investigating and enforcing criminal laws that protect national security. It also gives the federal Attorney General primary responsibility for prosecuting such crimes.[11] This legislation references the *Canadian Security Intelligence Service Act* for a definition of "threats to the security of Canada" which include:

> "(*a*) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
>
> (*b*) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
>
> (*c*) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
>
> (*d*) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,"

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (*a*) to (*d*).[12] Note that the words "religious and ideological" in paragraph (c) were added by operation of the ATA.

The *Security of Information Act* also creates a long list of harms that are based on "purposes prejudicial to the safety or interests of the State".[13] Section 3 of this Act outlines these harms:

> **3.** (1) For the purposes of this Act, a purpose is prejudicial to the safety or interests of the State if a person
>
> (*a*) commits, in Canada, an offence against the laws of Canada or a province that is punishable by a maximum term of imprisonment of two years or more in order to advance a political, religious or ideological purpose, objective or cause or to benefit a foreign entity or terrorist group;
>
> (*b*) commits, inside or outside Canada, a terrorist activity;

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[10] Section 83.01 of the *Anti-Terrorism Act*.
[11] See *Security Offences* Act, 1984, c. S-7, as amended, sections 4 and 6.
[12] *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23, s.2
[13] R.S., 1985, c. O-5, s. 1; 2001, c. 41, s. 25.

(*c*) causes or aggravates an urgent and critical situation in Canada that

(i) endangers the lives, health or safety of Canadians, or

(ii) threatens the ability of the Government of Canada to preserve the sovereignty, security or territorial integrity of Canada;

(*d*) interferes with a service, facility, system or computer program, whether public or private, or its operation, in a manner that has significant adverse impact on the health, safety, security or economic or financial well-being of the people of Canada or the functioning of any government in Canada;

(*e*) endangers, outside Canada, any person by reason of that person's relationship with Canada or a province or the fact that the person is doing business with or on behalf of the Government of Canada or of a province;

(*f*) damages property outside Canada because a person or entity with an interest in the property or occupying the property has a relationship with Canada or a province or is doing business with or on behalf of the Government of Canada or of a province;

(*g*) impairs or threatens the military capability of the Canadian Forces, or any part of the Canadian Forces;

(*h*) interferes with the design, development or production of any weapon or defence equipment of, or intended for, the Canadian Forces, including any hardware, software or system that is part of or associated with any such weapon or defence equipment;

(*i*) impairs or threatens the capabilities of the Government of Canada in relation to security and intelligence;

(*j*) adversely affects the stability of the Canadian economy, the financial system or any financial market in Canada without reasonable economic or financial justification;

(*k*) impairs or threatens the capability of a government in Canada, or of the Bank of Canada, to protect against, or respond to, economic or financial threats or instability;

(*l*) impairs or threatens the capability of the Government of Canada to conduct diplomatic or consular relations, or conduct and manage international negotiations;

(*m*) contrary to a treaty to which Canada is a party, develops or uses anything that is intended or has the capability to cause death or serious bodily injury to a significant number of people by means of

(i) toxic or poisonous chemicals or their precursors,

(ii) a microbial or other biological agent, or a toxin, including a disease organism,

(iii) radiation or radioactivity, or

(iv) an explosion; or

(*n*) does or omits to do anything that is directed towards or in preparation of the undertaking of an activity mentioned in any of paragraphs (*a*) to (*m*).

Note that the ATA amended the *Official Secrets Act* and renamed it the *Security of Information Act*.

As a means of discussing international approaches to defining "terrorism" and for understanding the meaning of "terrorism" and "danger to the security of Canada", it is important to examine Canadian jurisprudence on these points. In particular, the case of *Suresh v. Canada (Minister of Citizenship and Immigration)* provides specific guidance on these issues.[14] In *Suresh*, the Supreme Court of Canada elaborated on the meaning of "danger to the security of Canada" and "terrorism" in order to answer a constitutional challenge by Mr. Suresh that these terms in the *Immigration Act* were constitutionally vague and thus of no force or effect. This legislation has been amended and renamed the *Immigration and Refugee Protection Act* but the current legislation retains the same provisions that permit the Minister of Citizenship and Immigration to issue a security certificate making a person inadmissible to Canada on security grounds.[15] In *Suresh*, the Court ruled that the Minister retains a discretion to deport persons at risk of torture only in exceptional circumstances, though the Court does not define what might be considered exceptional circumstances.[16] It is worth noting that Mahmoud Jaballah, imprisoned on a security certificate, has recently been ordered to be deported despite government acknowledgement that there are substantial grounds to believe that Mr. Jaballah would be subject to torture or the death penalty if he is returned to Egypt. Mr. Jaballah is currently challenging this order in Federal Court.[17]

With respect to the interpretation of "danger to the security of Canada", the Court stated:

> "85 Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to "danger to the security of Canada" in deportation legislation. We recognize that "danger to the security of Canada" is difficult to define. We also accept that the determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision.
>
> 86 The question arises whether the Minister must present direct evidence of a specific danger to the security of Canada. It has been argued that under international law the state must prove a connection between the terrorist activity and the security of the deporting country: Hathaway and Harvey, *supra*, at pp.

[14] [2002] 1 S.C.R. 3 (SCC).
[15] *Immigration and Refugee Protection Act*, 2001, c. 27, section 34.
[16] *Suresh*, *supra*, note 13 at paragraph 78.
[17] See: http://www.homesnotbombs.ca/jaballah2.htm

289-90. It has also been suggested that the *travaux préparatoires* to the *Refugee Convention* indicate that threats to the security of another state were not intended to qualify as a danger sufficient to permit *refoulement* to torture. Threats to the security of another state were arguably not intended to come within the term, nor were general concerns about terrorism intended to be sufficient: see *Refugee Convention, travaux préparatoires*, UN Doc. A/CONF.2/SR.16, at p. 8 ("Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency"); see A. Grahl-Madsen, *Commentary on the Refugee Convention, 1951* (1997), at p. 236 ("`[T]he security of the country' is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned").

87 Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security: see *Rehman*, *supra*, *per* Lord Slynn of Hadley, at paras. 16-17. International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.

88 First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them
in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security.

89 While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to return (*refouler*) a refugee under s. 53(1)(*b*) to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. Insofar as possible, statutes must be interpreted to conform to the Constitution. This supports the conclusion that while "danger to the security of Canada" must be given a fair, large and liberal interpretation, it nevertheless demands proof of a potentially serious threat.

90 These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

91 This definition of "danger to the security of Canada" does not mean that Canada is unable to deport those who pose a risk to individual Canadians, but not the country. A different provision, the "danger to the public" provision, allows the government to deport those who pose no danger to the security of the country *per se* -- those who pose a danger to Canadians, as opposed to a danger to Canada -- provided they have

committed a serious crime. Moreover, if a refugee is wanted for crimes in a country that will not torture him or her on return, the government may be free to extradite him or her to face those charges, whether or not he or she has committed crimes in Canada."

With respect to the meaning of "terrorism", the Court ruled:

"93 The term "terrorism" is found in s. 19 of the *Immigration Act*, dealing with denial of refugee status upon arrival in Canada. The Minister interpreted s. 19 as applying to terrorist acts post-admission and relied on alleged terrorist associations in Canada in seeking Suresh's deportation under s. 53(1)(*b*), which refers to a class of persons falling under s. 19. We do not in these reasons seek to define terrorism exhaustively -- a notoriously difficult endeavour -- but content ourselves with finding that the term provides a sufficient basis for adjudication and hence is not unconstitutionally vague. We share the view of Robertson J.A. that the term is not inherently ambiguous "even if the full meaning . . . must be determined on an incremental basis" (para. 69).

94 One searches in vain for an authoritative definition of "terrorism". The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, "the term is open to politicized manipulation, conjecture, and polemical interpretation": factum of the intervener Canadian Arab Federation ("CAF"), at para. 8; see also W. R. Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy* (1982), at p. 6 ("The term [terrorism] is somewhat `Humpty Dumpty' -- anything we choose it to be"); O. Schachter, "The Extraterritorial Use of Force Against Terrorist Bases" (1989), 11 *Houston J. Int'l L.* 309, at p. 309 ("[n]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty"); G. Levitt, "Is `Terrorism' Worth Defining?" (1986), 13 *Ohio N.U. L. Rev.* 97, at p. 97 ("The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail"); C. C. Joyner, "Offshore Maritime Terrorism: International Implications and the Legal Response" (1983), 36 *Naval War C. Rev.* 16, at p. 20 (terrorism's "exact status under international law remains open to conjecture and polemical interpretation"); and J. B. Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978), at p. x ("The very word [terrorism] becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future.")

95 Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached: see, e.g., I. M. Porras, "On Terrorism: Reflections on Violence and the Outlaw" (1994), *Utah L. Rev.* 119, at p. 124 (noting the general view that "terrorism" is poorly defined but stating that "[w]ith `terrorism' . . . everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list"); D. Kash, "Abductions of Terrorists in International Airspace and on the High Seas" (1993), 8 *Fla. J. Int'l L.* 65, at p. 72 ("[A]n act that one state considers terrorism, another may consider as a valid exercise of resistance"). Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.

96 We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated *International Convention for the Suppression of the Financing of Terrorism*, GA Res. 54/109, December 9, 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(1)(*a*), defining "terrorism" as "[a]n act which

constitutes an offence within the scope of and as defined in one of the treaties listed in the annex". The annex lists nine treaties that are commonly viewed as relating to terrorist acts, such as the *Convention for the Suppression of the Unlawful Seizure of Aircraft*, Can. T.S. 1972 No. 23, the *Convention on the Physical Protection of Nuclear Material*, 18 I.L.M. 1419, and the *International Convention for the Suppression of Terrorist Bombings*, 37 I.L.M. 249. Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2(1)(*b*) defines "terrorism" as:

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

97 In its submission to this Court, the CAF argued that this Court should adopt a functional definition of terrorism, rather than a stipulative one. The argument is that defining terrorism by reference to specific acts of violence (e.g. "hijacking, hostage taking and terrorist bombing") would minimize politicization of the term (CAF factum, at paras. 11-14). It is true that the functional approach has received strong support from international law scholars and state representatives -- support that is evidenced by the numerous international legal instruments that eschew stipulative definitions in favour of prohibitions on specific acts of violence. While we are not unaware of the danger that the term "terrorism" may be manipulated, we are not persuaded that it is necessary or advisable to altogether eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some (proscribed) acts from other (non-proscribed) acts by reliance on a term like "terrorism". (We note that the CAF, in listing acts, at para. 11, that might be prohibited under a functional definition, lists "terrorist bombing" -- a category that clearly would not avoid the necessity of defining "terrorism".)

98 In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.”

Suresh has been the subject of criticism. Current BCCLA President Jason Gratl and Past President Andrew Irvine have written that the Court in *Suresh* was greatly influenced by the September 11 attacks that occurred shortly before the judgment was written. Gratl and Irvine worry that the September 11 attacks influenced the Court to be less restrictive in the application of what constitutes a danger to the security of Canada and more readily inclined to accept government claims to national security confidentiality. According to these authors, the “effect [of *Suresh*] on public accountability is thus potentially catastrophic, and invites a critical

approach to *Suresh*.[18] Noted constitutional scholar Kent Roach has also been critical of the *Suresh* decision:

> *Suresh* is a Janus-faced decision. Its willingness to defer to executive actions that are not patently unreasonable and its willingness to contemplate that deportation to face torture might be constitutional in an exceptional cases stand in tension with its bolder and anti-majoritarian declaration under the Charter that it is, as a general rule, unacceptable to deport people to face torture.[19]

Putting aside criticisms dealing with the definition of "national security", the definition of "terrorism" preferred by the Supreme Court of Canada in *Suresh* is still considerably narrower in scope than the current definition of terrorist activity in the ATA.

The above extracts from *Suresh* provide a significant amount of discussion regarding sources of international law with respect to the definition of "terrorism". Recent efforts to develop new international agreements on terrorism at the United Nations include a September 2005 United Nations convention – the largest gathering of world leaders in history – the goal of which was to sign a Millenium Declaration to revitalize the UN. In preparation for this meeting, the UN Secretary-General issued a report in March 2005, *In Larger Freedom: Towards Development, Security and Human Rights For All*, that devotes a particular section to the threat of international terrorism entitled "Freedom from fear".[20] Secretary-General Koffi Anan states:

> "I endorse fully the High-level Panel's call for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by existing conventions, *any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing an act.*"[21] [Emphasis added]

Aside from domestic legislation and international treaties, it is important to examine internal RCMP policy with respect to how the RCMP itself understands its national security/anti-terrorism mandate. Under documents disclosed to the Arar Inquiry as part of the testimony of Garry Loeppky, RCMP Deputy Commissioner Operations, national security is accorded the following generous definition in the RCMP's Operational Manual:

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[18] Jason Gratl and Andrew Irvine, "National Security, State Secrecy and Public Accountability", University of New Brunswick Law [forthcoming in 2005].
[19] Kent Roach, *September 11: Consequences for Canada,* (McGill-Queen's University Press, 2003) at 105.
[20] UN Document A/59/2005, 21 March 2005.
[21] *Ibid*, at paragraph 91.

"E. National Security
a. National security is the defence and maintenance of the social, political and economic stability of Canada."[22]

This manual also refers to the *Security Offences Act*, the definition of "threat to the security of Canada" in the *Canadian Security Intelligence Service Act*, *Criminal Code* provisions regarding Internationally Protected Persons and offences under the *Security of Information Act* as discussed above.

In addition to this internal policy, the Minister for Public Safety and Emergency Preparedness Canada issued two Ministerial Directives that are relevant. The *Ministerial Direction Regarding National Security Responsibility and Accountability (November 2003)* confirms that national security investigations shall be coordinated through RCMP Headquarters, that the Commissioner of the RCMP is responsible to the Minister who is responsible to Parliament and that the Commissioner is obliged to keep the Minister apprised of all national security investigations that may give rise to controversy. As well, the *Ministerial Direction Regarding National Security Investigations in Sensitive Sectors (November 2003)* directs that all national security investigations involving "sensitive sectors" (defined as academia, politics, religion, media and trade unions) must be pre-approved by the Assistant Commissioner, Criminal Intelligence Directorate or designate. This directive also states that in regard to post-secondary campuses, "it is paramount that investigations undertaken by the RCMP do not impact on the free flow and exchange of ideas normally associated with an academic milieu."[23]

[22] RCMP Operational Manual IV.10 National Security Investigations, filed with the Arar Commission's Factual Inquiry as Tab 39 of Exhibit P-12, the Book of Documents of Garry Loeppky, RCMP Deputy Commissioner Operations.

[23] Arar Commission, Policy Review, "The RCMP and National Security – A Background Paper to the Commission's Consultation Paper", October 2004 at pages 41-44; online: http://www.ararcommission.ca/eng/RCMP%20and%20National%20Security.pdf

(c) Criticisms of the Definition of "Terrorist Activity"

(i) Defining Terrorism and National Security Narrowly

The BCCLA submits that the focus of the state's considerable authority with respect to counter-terrorism and national security should necessarily be limited to those individuals and organizations that actually or can be reasonably believed to menace *national* security and those who are actually engaged in or can be reasonably believed to be plotting the kind of terrorism witnessed since September 11 in Bali, Istanbul, Madrid and London. In order to properly constrain the Executive branch's legislative authority and deployment of resources to threats of terrorism properly understood and matters of true national security, it is imperative that legislation define "terrorist activity" and "national security" narrowly. Currently, the ATA defines "terrorist activity" too broadly. The same problem exists with respect to legislation that seeks to define national security: "threats to the security of Canada" (in the *Security Offences Act*) and "purposes prejudicial to the safety or interests of the State" (in the *Security of Information Act*).

The BCCLA submits that there are persuasive policy reasons why definitions of terrorism and terms relating to national security should be narrowly defined. First, the *Anti-Terrorism Act* creates novel and expansive powers, (e.g. preventive detention, investigative hearings, listing agencies and individuals that are terrorist organizations) that expand considerably the ambit of the criminal law and that engage constitutionally protected interests including liberty, privacy and due process. The legislation can also have a tremendously negative impact and stigmatizing effect on individuals and groups who are the targets of national security/terrorist investigations if such targeting is unjustified. The government has justified these provisions and the whole ATA on the basis of the *extraordinary* and *catastrophic* terrorism of the kind witnessed on September 11, 2001 and since then by bombings in Bali, Istanbul, Madrid and London. Crimes of this type are crimes that are two or three "cuts above" other crimes that are typically the focus for law enforcement. The exceptional character of this kind of crime, which targets innocent civilians, induces moral outrage in the general public. Consequently, terrorism of this type has been the source for the moral justification for the "War on Terror" and the provisions in the ATA. The definition of terrorism must be limited to the extraordinary and particularly heinous quality that provoked the creation of the ATA.

Second, the federal government has an absolute privilege to shroud in absolute secrecy to matters it deems involve national security with limited judicial oversight. We will have much more to say about the legislative regime (section 38 of the *Canada Evidence Act*) for protecting national security confidentiality later in this submission. For now, it is enough to say that the ATA codifies and extends the state's common law absolute privilege with respect to national security secrecy. The state justifies this secrecy, which includes the closure of court rooms and the non-disclosure of relevant evidence to those accused of crimes or subject to sanction, because greater transparency, it is alleged, would threaten national security. Yet, this degree of secrecy is anathema to the notion of accountability in Canada's free and democratic society. This degree of secrecy therefore must be reserved for the most exceptional cases that in fact do threaten Canada's national security.

Third, agencies responsible for enforcing laws relating to national security and terrorism like the RCMP and CSIS are by their very nature, culture and training apt to apply to the greatest extent possible their authority and discretion. To the extent that legislative definitions and authority is at all ambiguous and expansive, we can reasonably expect national security agencies to exploit that ambiguity and expansiveness. Furthermore, they will be inclined to give a "large and liberal" interpretation to terms like "terrorist activity" and "national security" rather than a narrow interpretation such as exhibited in their internal policy manual. This approach will necessarily result in more individuals being subject to their scrutiny rather than less and we fear this over-inclusive approach will result in the inappropriate targeting of individuals and groups for national security/terrorism scrutiny by national security agencies. Furthermore, even with significantly more accountability, much of the national security activities of the RCMP, CSIS, and other agencies will not always be subject to detailed review by civilian agencies. This observation is not meant so much as a criticism, but rather acknowledges an institutional bias towards security and public safety. Protection of national security is the duty of national security agencies. Given this mandate and bias, laws and public policy must be designed to properly balance national security and intelligence agencies' needs to combat terrorism and threats to national security while sufficiently constraining them to ensure that counter-terrorism laws and measures focus only on those individuals and groups that truly merit this heightened scrutiny.

Fourth, terrorism is inherently difficult to define and subject to politicization. This uncertainty and risk is summed up in the maxim: my terrorist is your freedom fighter or *vice versa*. Before the evil of apartheid was universally condemned and subject to international sanction, Nelson Mandela was considered the terrorist leader of a terrorist organization known as the African National Congress, a point aptly made by the Supreme Court of Canada in *Suresh* as quoted above.[24] Even now in Canada, the Tamil Tigers remain unlisted as a terrorist organization despite their listing in Britain and the United States. The international community remains divided over a definition of "terrorism" as Islamic nations resist a definition that includes the "deliberate and unlawful targeting and killing" of civilians on the basis that such a definition could be used against national liberation movements fighting foreign occupation.[25] Related to this point, we must recognize that governments, even democratically elected ones in the West, can manipulate threats to national security or, even worse, manufacture such threats for political reasons. We all now know that America's and Great Britain's justification for their invasion of Iraq – that Iraq possessed weapons of mass destruction – has now been plainly revealed as false. Supporters of these governments are more willing to accept their explanation that the governments relied on poor intelligence. Critics believe that the original justification and the subsequent explanation were all simply dishonest strategies to justify war. The BCCLA submits that Canada is not immune to such manipulation. Noted security scholar Reg Whitaker writes that research sources demonstrate that the invocation of the *War Measures Act* to respond to the October Crisis of 1970 could not be justified as a matter of apprehended insurrection in Quebec but rather a result of Quebec ministers in Ottawa who "deliberately chose to escalate the political magnitude of the crisis to justify emergency powers as a means of intimidating nationalists and separatists, with whom the federalist Quebeckers were locked in a bitter conflict for the allegiance of Quebec."[26]

Fifth, history teaches us that in times when societies fear uncertain but catastrophic harm from unknown enemies, whether that fear is reasonably justified or not, individuals and groups who engage in political, religious and ideological activities outside of the mainstream (and sometimes even within the mainstream), are especially vulnerable to the intrusions of national security agencies. Indeed, one

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[24] *Suresh*, *supra*, at paragraph 95.
[25] Stephen Edwards, "Members disagree on terror definition", *National Post*, 15 September 2005.
[26] Reg Whitaker, "Apprehended Insurrection? RCMP Intelligence and the October Crisis" (1993) 100 Queens Quarterly 383; Whitaker makes the point that the RCMP's intelligence leading up to the Cross and LaPorte kidnappings was good and that the RCMP advised against using invoking the *War Measures Act* because there was no evidence of a impending insurrection.

of the justifications for Canada's *Charter of Rights and Freedoms* is to create limits on the ability of the state to intrude unjustifiably into Canadians' freedom. If Canada wishes to maintain a truly free and democratic society by maintaining a vigorous milieu that encourages political and religious activity, even controversial activity, it should draft anti-terrorism and national security legislation narrowly. The record of national security agencies with respect to dubious surveillance and infiltration of political, religious and ideological organizations is not good. There is a considerable body of academic and other literature that documents the problems of surveillance of legitimate political and religious activity, whether they be dissident or mainstream. As the Subcommittee will know, the creation of CSIS in 1984 was a direct result of inappropriate and illegal practices of the RCMP's Security Service targeting political organizations for surveillance as documented by the McDonald Commission.[27] Early criticisms of the ATA focused on the negative impact the definition of "terrorist activity" would create on political and religious activity and dissent.[28] Given the ethnic and religious background of the perpetrators of the September 11 and subsequent attacks in Madrid, London and elsewhere and given current world tensions, individuals of Arab background and Muslims in Canada are particularly vulnerable to profiling resulting in heightened scrutiny and violation of their rights. Muslim advocacy groups in Canada have specifically raised concerns about the vulnerability of their constituencies in such a climate with the Arar Inquiry.[29] Given the historical record of national security activities and the state and to some extent the experience of their constituents since September 11, these groups have good reason to be concerned.[30] In British Columbia, a religious sect of Doukhbours known as the Sons of Freedom were the continual subject of RCMP scrutiny in the 50s and 60s. In fact, the B.C. Civil Liberties Association was founded because of concerns regarding their treatment in 1962-63. In the

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[27] In particular, see: Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and security under the law*, Second Report, Vol. 1 (Ottawa: Supply and Services Canada, 1981) (Chair: Mr. Justice D.C. McDonald) and Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Certain R.C.M.P. Activities and the Question of Governmental Knowledge*, Third Report (Ottawa: Supply and Services Canada, 1981) at chapters 3 and 4 (Chair: Mr. Justice D.C. McDonald).

[28] See David Schneiderman and Brenda Cossman, "Political Association and the Anti-terrorism Bill" in R. Daniels, P. Macklem and K. Roach, eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001).

[29] Canadian Arab Foundation and Canadian Council on American-Islamic Relations, "Policy Review Submissions to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar" (21 February 2005); Online: http://www.caircan.ca/downloads/PRS-AC-02212005.pdf

[30] See Steve Hewitt, "Sunday Morning Subversion: The Canadian Security State and Organized Religion in the Cold War", in Richard Cavell, ed., *Love, Hate, and Fear in Canada's Cold War*, (Toronto: University of Toronto Press, 2004) at 57.

United States, the American Civil Liberties Union has documented ongoing targeting of political and religious groups by security agencies.[31]

Sixth and finally, national security and terrorist activities should be narrowly defined because legitimate national security and anti-terrorist activities deserve the support of the Executive, Parliament and the Canadian public. Questionable, unjustifiably intrusive and illegal activities will tarnish the reputation of national security agencies and may undermine their ability to garner the support they need in Cabinet, Parliament and from Canadians. We want our national security agencies to avoid the necessity of a McDonald Commission or Arar Inquiry. At a time when Canadians are told by the Canadian government that there is a real chance of terrorist activity on Canadian soil, we need CSIS, the RCMP and other national security agencies to be focusing on real threats to national security and terrorist threats, not controversial political or religious activity nor dubiously categorized threats like Ernst Zundel.[32]

(ii) Terrorism Distinguished from Criminal Militancy

The BCCLA was very disturbed that, in the rush to pass the ATA in 2001, there was very little substantive debate about what is meant by "terrorism". Public debate and attention focused primarily on concerns that the original definition of terrorist activity in the first reading of Bill C-36 included the word "legal" in the following clause: "other than as a result of *legal* advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)". The government's response was to eliminate the word "legal" to acknowledge that illegal work stoppages or acts of civil disobedience like tying oneself to a tree would not be caught within the definition of a "terrorist activity". We do not consider this a major victory given the more pressing and difficult question about what constitutes "terrorism" and the overbroad extension and application of the law and national security agencies to the actions of individuals and groups.

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[31] See the press release of the American Civil Liberties Union: http://www.aclu.org/news/NewsPrint.cfm?ID=18965&c=282; see also: http://www.aclu.org/spyfiles/

[32] The BCCLA believes that the deportation of Ernst Zunel on the basis that he is a threat to national security significantly undermines the credibility of national security agencies and the government of Canada. However much the BCCLA disdains Mr. Zundel's personal views and public expressions, we believe that it defies credibility to deport Mr. Zundel on this justification. See *Re Zundel*, [2004] F.C.J. No. 60.

The BCCLA submits that now is the time to undertake a more substantive debate. The Subcommittee on Public Safety and National Security should consider carefully whether the definition of "terrorist activity" is appropriate.

The BCCLA has been on record since the fall of 2001 regarding our concerns relating to the overbroad definition of "terrorist activity":

> "For example, should anti-terrorism measures, such as investigative hearings, electronic surveillance without warrant, and preventive detention be used against violent protestors who caused riots in places like Seattle and Genoa? Should such measures be used against so-called eco-terrorists who spike trees with the apparent aim of threatening serious injury, and perhaps death, to loggers? Should animal rights activists be treated as terrorists for poisoning Christmas turkeys or threatening animal researchers' lives?
>
> By threatening serious bodily harm in order to achieve political objectives, these activities all fall within the current definition of terrorism. Moreover, there will be powerful incentives to use any special measures that are available to deal with such activities, because they are dangerous and because they rightly have little public support.
>
> But the application of extraordinary anti-terrorism powers to these sorts of activities must be resisted. Such acts are certainly heinous and criminal and not to be tolerated. But it is a perilous exaggeration to describe them as terrorist, and thus on a par with the sorts of terrorist activity to which this legislation is a response.
>
> Indeed, counting as terrorists some of the more radical environmentalists, animal rights activists, anarchist hoodlums, and their ilk needlessly multiplies the number of terrorists on the ground in Canada. Among other things, this would distract from our efforts to detect and bring to justice the real terrorists. It will inevitably place the activities of legitimate protest groups under extraordinary, close government scrutiny. This is bound to have a chilling effect on those groups' activities and raise questions about the legitimacy of the campaign against terror. Most disturbingly, it may well push militants over the edge into real terrorism, as has happened in other countries.
>
> We must also remember that the current legislation was not prompted by the need to address such problems, which have been adequately handled with existing law enforcement measures. Moreover, there are ways in which these actions are typically qualitatively different from terrorism. And so some rough, but useful, distinctions can be drawn.
>
> Specifically, the aim of terrorism is typically to terrorize generally by visiting grievous violence indiscriminately and without warning. As a result, it frequently targets innocents rather than parties directly responsible for disputes.
>
> By contrast, tree spikers and some radical animal rights activists are different. They issue public warnings to attempt to ensure that harm can be effectively prevented, not caused. They aim to intimidate. But their aim is not to terrorize and undermine a sense of security in the community (as if a bomb could go off on any street at any time)."[33]

[33] BCCLA Newsflash: John Russell, "Distinguishing Terrorism From Other Types of Political Violence", 29 November 2001, online: http://www.bccla.org/01terrordefbroad.html

(d) Recommendations for Reform

First, the BCCLA recommends that, given the dangers described above with respect to overbreadth, the definition of "terrorist activity" should be amended to take out any reference to political, religious or ideological motivation. We recommend that the definition be amended and limited to the deliberate targeting of "non-combatants" or non-disputants for serious physical harm. In our view, the targeting of civilians who have no connection to an ideological dispute for serious harm is what distinguishes terrorists from criminal militants. Whereas the latter are thoroughly deserving of public condemnation through the use of the criminal law as a sanction for using violence as a way of achieving political change, terrorism distinguishes itself for our moral outrage because of its targeting of innocents who are not directly involved in ideological disputes as a means for causing change. Whatever one's views about the need to fight corrupt, totalitarian and abusive governments, we must agree that targeting innocent civilians for direct harm must never be the means by which we affect change.

Such a change would essentially eliminate paragraphs (b)(i)(A) (the motive element), (b)(ii)(D) (substantial property damage) and (b)(ii)(E) (serious interference of essential service, facility or system). Thus, the definition of terrorist activity would effectively focus on the physical harm to non-disputing individuals rather than economic harm to private or public interests. Though we acknowledge that the latter harm can be substantial and very disruptive to the society as a whole, this kind of harm is on a different moral scale than an attack on the physical security of civilians not involved in a dispute. These changes will go a long way to ensuring that terrorism is understood narrowly and thereby properly constrain our national intelligence and security agencies to targeting the kind of terrorism witnessed in New York, Bali, Istanbul, Madrid and London, not to mention Israel and the Middle East, since September 11.

In addition, the BCCLA recommends that the House Subcommittee and the Senate Special Committee recommend that definitions in the *Canadian Security Intelligence Service Act* and the list of harms in section 3 of the *Security of Information Act* be re-examined to ensure that only those threats of serious harm to *national* security be the subject of laws respecting national security and the national security activities of the RCMP, CSIS and other agencies. It can not be enough that all groups and individuals that have political causes who use violent and potentially illegal means to effect change in the names of

these causes fall under the rubric of national security. Moreover, if national security means anything, it must mean nothing less than *the security of the state of Canada*. It can not merely mean the security of one organization or business or even of an industry, but the nation. Though we acknowledge that economic mischief, if serious enough, can cause major disruption in the economy in Canada, it is not enough to threaten national security. Likewise regarding the disruption to an essential service. We have long weathered the most serious of economic hardship in the softwood lumber dispute at a massive cost to the Canadian economy (billions of dollars) and more recently as a result of the American trade embargo against Canadian beef due to Mad Cow disease, but no one has seriously argued that these problems have threatened national security.

The Association submits that the ATA can repealed without undermining the ability of national security agencies to effectively prevent and combat legitimate terrorist threats and threats to national security. This approach is harmonious with the Senate Committee's recommendation in 2001 that the ATA in its entirety be subject to a five year sunset clause. That said, the BCCLA recognizes that it will be difficult to find the political will to take this measure. In this context, as an alternative, the BCCLA makes the following recommendations.

Recommendations:

1. The BCCLA recommends that the *Anti-Terrorism Act*'s definition of "terrorist activity" be amended to: *any action that is intended to or can be reasonably be foreseen to cause death or serious bodily harm to persons not actively or directly involved in a dispute with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing an act.*

2. The BCCLA recommends that the House Subcommittee and the Senate Special Committee recommend a comprehensive review of definitions and offences relating to national security including the definition of "threats to the security of Canada" in the *Canadian Security Intelligence Service Act* and the harms listed in section 3 of the *Security of Information Act.*

PART 3: INTEGRATED NATIONAL SECURITY ENFORCEMENT TEAMS (INSETS)

(a) The Appearance and Reality of the Public Record

The BCCLA submits that in addition to examining the technical legal provisions of the *Anti-Terrorism Act* (ATA), the Subcommittee must examine the efforts of national security agencies to investigate and enforce the new measures with respect to terrorism and national security. In undertaking this examination, the BCCLA submits that the Subcommittee has a responsibility to ascertain the actual and potential human impact of these agencies' activities, both in terms of actually preventing terrorism and protecting national security as well as their impact on civil liberties. The Subcommittee's responsibility to undertake this analysis flows out of the BCCLA critique about the ATA's definition of "terrorism" and consideration of the meaning of "national security" as outlined in our brief above. It also flows out of the responsibility of Parliamentarians as elected representatives of Canadians to ensure that the national security agencies responsible for the interpretation and application of the ATA (such as the RCMP and CSIS) are acting within the rule of law and in a manner that does not unjustifiably violate fundamental freedoms.

Since the hijacking attacks of September 11, 2001, the Canadian national security apparatus has expanded significantly. Existing agencies such as the RCMP and CSIS were restructured and infused with new resources. Other agencies, such as the Canadian Border Services Agency, were created somewhat afresh. A review of the *Anti-Terrorism Act* would be incomplete without an examination of the on-the-ground work of these agencies. The BCCLA proposes to review the work of the RCMP's Integrated National Security Enforcement Teams (INSETs) because INSETs are the most prominent instrument of the primary agency responsible for the enforcement of criminal law with respect to terrorist and national security related offences.

Given that Parliamentarians are as likely in the dark as the BCCLA and the general public about the impact of the activities of national security agencies, the only method available to undertake this sort of examination is to review the public record. This record will necessarily be incomplete and we do not propose that definitive conclusions can be drawn from this record. Nor do we pretend that, despite our

best efforts to locate information on the public record, we have been able to obtain all the information publicly available on any particular case. However, the information in the public record that we have been able to adduce can at least alert organizations like ours, elected representatives and others to legitimate concerns that call for greater examination and accountability. The following information will provide a backdrop to the BCCLA's call for greater accountability through reforms for oversight and review of the activities of national security agencies that we believe are necessary to sufficiently protect civil liberties.

Based on our review of the following cases on the public record in British Columbia in which INSET was deployed, the BCCLA submits that there is at least a reasonable concern that the definition of "terrorist activity" and the term national security are too broad in law. In other words, these cases are illustrative of our submissions in Part I that urge a narrow definition of terrorism and national security.

The deployment of INSETs in the following cases is, to be candid, surprising given that the BCCLA does not see evidence that these cases involve the kind of alleged criminal activities that threaten national security or involves the catastrophic targeting of civilians/non-disputants for violence that justified the government's creation of the ATA in 2001 and the creation of RCMP INSETs shortly thereafter. While the following cases may or may not justify the involvement of the police generally speaking, the BCCLA submits that INSET deployment should be reserved for those criminal investigations that truly give rise to the kind of terrorism that is invoked to justify the ATA or involves true threats to the security of Canada rather than general allegations of criminality. Given the explicit mandate of INSETs as more fully described below, those who come under INSET scrutiny, especially when acknowledged publicly by the RCMP, are subject to a special kind of stigma beyond that of mere criminality because INSETs are supposed to deal with terrorist and national security threats. Furthermore, as discussed in detail below, the RCMP's INSET mandate can only be invoked when there is a sufficient criminal nexus that is beyond mere intelligence gathering, unlike CSIS for example. That said, the RCMP acknowledge that they engage in "intelligence-led" policing and thus there remains an informational aspect to their work that has significant privacy implications for individuals as the RCMP share information with other agencies both domestically and internationally, a matter of considerable importance in the Arar Inquiry.

In sum, the BCCLA's concern in these cases is not so much with the deployment of INSETs but rather with such a broad definition of terrorism and national security that could justify the deployment of the INSETs.

Aside from the BCCLA's concern with the breadth of the definition of "terrorist activity" and the term national security, we are deeply concerned that there is no real means for independent civilian review of the work of INSETs or other agencies engaging in national security activities. While there may be more than meets the eye on the public record in these cases, given the level of secrecy involved in national security, current oversight and review mechanisms are not equipped with the legal authority nor resources to review such cases generally speaking. With our general concerns regarding INSETs articulated, we now turn to a description of the history and mandate of INSETs before examining specific cases.

(b) The Nuts and Bolts of RCMP INSETs

After September 11, 2001, the RCMP scrambled to increase its capacity to deal with national security threats and terrorism. The RCMP and other organizations were given significant new financial resources to fight the new "War on Terrorism". In addition, the RCMP reconfigured its organization and internally re-deployed existing human and other resources to create new capacity to address national security and terrorism threats. One of the organizational changes was the creation of Integrated National Security Enforcement Teams (INSETs). Prior to their creation in the fall of 2001, the RCMP's national security investigations were undertaken by National Security Investigation Sections (NSISs). Four NSISs were converted to INSETs after September 11, 2001 and INSETs now exist in Vancouver, Toronto, Ottawa and Montreal. Whereas NSISs use only RCMP personnel, INSETs integrate personnel from various agencies including the RCMP, provincial police, municipal police, CSIS, Canada Border Service Agency (CBSA) employees, Citizenship and Immigration Canada (CIC) employees, Revenue Canada employees and other agencies.[34] Officers from other agencies are not merely seconded to the RCMP INSETs; they are transferred to INSETs for a number of years though their pay is provided by their home agency which also retains the authority to discipline their officers. Transferred officers are

[34] Arar Commission, Policy Review, "The RCMP and National Security – A Background Paper to the Commission's Consultation Paper", October 2004 at page 50: http://www.ararcommission.ca/eng/RCMP%20and%20National%20Security.pdf

however subject to the RCMP chain of command.[35] Thus, the RCMP have the authority to direct and coordinate all members of INSETs.

A significant portion of INSET investigations are assigned by the RCMP's National Security Operations Branch (NSOB) which must also approve all national security investigations by INSETs and NSISs.[36] Subject to approval by NSOB, INSETs may also initiate national security investigations. Whether an INSET national security investigation is assigned by NSOB, referred from elsewhere or internally initiated, INSET national security investigations must have a sufficient national security nexus and have sufficient information/evidence with respect to a violation of the *Criminal Code* or other statute (ie sufficient criminal nexus).[37] Here it is worth recalling that, according to internal RCMP policy, "national security" is defined very broadly:

> "E. National Security
>
> 1.a. National security is the defence and maintenance of the social, political and economic stability of Canada."[38]

When created in the fall of 2001, the RCMP described the INSET mandate as follows:

> "[to gather] information to prevent, detect and prosecute criminal offences against national security. The mandate of the integrated units will be two-fold: first, to increase the capacity for the collection, sharing and analysis of intelligence among partners with respect to targets that are a threat to national security and second, create an enhanced enforcement capacity to bring such targets to justice. The integrated approach between intelligence/enforcement, from the very early stages of criminal activity has proven to be a highly effective model for successful prosecution. The integrated approach would also improve the capacity of law enforcement to respond to anticipated legislative initiatives [i.e. the ATA]."[39]

It is also important to note that the RCMP is very much involved in intelligence gathering in relation to criminal activity. This development, known as "intelligence-led policing", is interesting given that the McDonald Commission, which investigated the RCMP's history of illegal activity in relation to national security work, recommended the creation of security intelligence agency (now known as the Canadian Security Intelligence Service) to separate the functions of intelligence work on national

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[35] Arar Commission, Policy Review, "The RCMP and National Security: Supplementary Background Paper", June 2005 at Footnote 10, pages 6: http://www.ararcommission.ca/eng/RCMP_NS_jun14.pdf

[36] *Ibid* at pages 4 and 7: http://www.ararcommission.ca/eng/RCMP_NS_jun14.pdf

[37] *Ibid* at page 6.

[38] RCMP Operational Manual IV.10 National Security Investigations, filed with the Arar Commission's Factual Inquiry as Tab 39 of Exhibit P-12, the Book of Documents of Garry Loeppky, RCMP Deputy Commissioner Operations.

[39] RCMP Backgrounder: "An Investment in Canada's National Security", 12 October 2001.

security from police investigative work on criminal matters.[40] The RCMP now justify their criminal intelligence work, as opposed to national security intelligence work, on the basis that this work is critical to prevent crimes related to national security and terrorist activity. Practically, it is difficult to discern any difference between intelligence work by the RCMP or CSIS in matters relating to national security/terrorism.[41]

(c) On the Face of the Record: INSET Cases Publicly Reported 2002-2005

(i) David Barbarash

RCMP's INSET conducted a 'raid' on the home of David Barbarash on July 30, 2002[42]. Mr. Barbarash is a spokesperson for a militant animal protection group known as the Animal Liberation Front (ALF). The search and seizure warrant was pursuant to sec. 11(2) of the *Mutual Legal Assistance in Criminal Matters Act*, legislation that implements a treaty between Canada and the US that provides for cooperation among law enforcement agencies with respect to the collection of cross-border evidence and other matters.[43]

Barbarash was a former member of the ALF who quit his membership upon losing his anonymity when he was convicted of freeing cats used for experiments in a laboratory at the University of Alberta in 1992 and other criminal acts[44]. Since withdrawing his membership, he has acted as a spokesperson for

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[40] Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and security under the law*, Second Report, Vol. 1 (Ottawa: Supply and Services Canada, 1981) (Chair: Mr. Justice D.C. McDonald)

[41] For a more full discussion on intelligence-led policing, see Arar Commission, Policy Review, "The RCMP and National Security – A Background Paper to the Commission's Consultation Paper", October 2004 at pages 25-28; online: http://www.ararcommission.ca/eng/RCMP%20and%20National%20Security.pdf

[42] Jeremy Hainsworth (AP Writer) "Spokesman for group accused of eco-terrorism challenges police raid in court" AP newswires Wednesday November 13th, 2002; see also Nicholas Reid, "Decision due this week on police seizure of activist tapes: Animal Liberation Front spokesman David Barbarash says he is wrongly implicated in hunting club break-in," Vancouver Sun, November 18th, 2002.

[43] Zacharias, Yvonne. "Animal-rights activist raided: RCMP, acting on a request from Maine police, seizes tapes, computer records," Vancouver Sun, August 1, 2002 page B1; Court File BL0282 Vancouver Registry. Information to Obtain a Search Warrant in the Supreme Court of British Columbia in the Matter of an *ex parte* application pursuant to section 11(2) of the *Mutual Legal Assistance in Criminal Matters Act*, Sworn in the City of Vancouver, BC, ? July, 2002, by Corporal Derrick Ross of the RCMP INSET.

[44] Sokoloff, Heather and Yvonne Zacharias "Probe of animal-rights 'terror' leads to B.C. home: Computer files seized – Vigilante group accused of attacks on U.S. hunters" National Post August 2, 2002.

the ALF by receiving anonymous e-mail communications from the group and conveying information regarding their activities to the media and general public.[45]

The search of Mr. Barbarash's premises was related to allegations that the ALF were responsible for crimes at hunting clubs in Maine in 1999. The FBI and police in Maine had been investigating the ALF for their alleged involvement in crimes (burglary, theft, attempted arson and mischief) at hunting clubs and the Food and Drug Administration building in Maine.[46] The clubs had been broken into and stuffed animal heads were stolen, walls had been spray-painted and other property damaged.[47] The Maine police had no leads to the case until Barbarash was quoted in a Maine newspaper article as a spokesman for the ALF.[48] The article suggests that property damage amounted to approximately $8,700.

After several requests from U.S. law enforcement to Canada's Attorney General for assistance, the warrant was granted on July 25, 2005 by Associate Chief Justice Dohm of the B.C. Supreme Court.[49] Nine RCMP officers connected to INSET and local detachments seized two computers, computer disks, videotapes, photos and files from Barbarash's home.[50]

Barbarash challenged the search warrant in B.C. Supreme Court, stating the evidence used to obtain the warrant was based on triple hearsay.[51] Madam Justice E.A. Bennett quashed the warrant on the basis that there was not enough evidence of the reliability of the informant (the original Maine journalist

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[45] Hall, Neal. "Animal rights warrant quashed: Activist still faces fight to retrieve property" Vancouver Sun Thursday December 12th, 2002 at A2.
[46] Barbarash, David, North American Animal Liberation Front Press Office, Press Release November 12th, 2002. "RCMP anti-terrorism team under scrutiny: BC Supreme Court hearing Wednesday."; Court File BL0282 Vancouver Registry. Information to Obtain a Search Warrant in the Supreme Court of British Columbia in the Matter of an *ex parte* application pursuant to section 11(2) of the *Mutual Legal Assistance in Criminal Matters Act*, Sworn in the City of Vancouver, BC, ? July, 2002, by Corporal Derrick Ross of the RCMP INSET.
[47] *Ibid.*
[48] Hainsworth, Jeremy (AP Writer) "Spokesman for group accused of eco-terrorism challenges police raid in court" AP newswires Wednesday November 13th, 2002.
[49] Barbarash, David. North American Animal Liberation Front Press Office. Press Release November 12th, 2002. "RCMP anti-terrorism team under scrutiny: BC Supreme Court hearing Wednesday."
[50] Hainsworth, Jeremy (AP Writer) "Spokesman for group accused of eco-terrorism challenges police raid in court" AP newswires Wednesday November 13th, 2002; Report to the Supreme Court of British Columbia by RCMP Corporal Derrick Ross, 1 August 2002.
[51] Hall, Neal. "Animal rights warrant quashed: Activist still faces fight to retrieve property" Vancouver Sun Thursday December 12th, 2002 at A2.

who had interviewed David Barbarash's as spokesperson for the ALF).[52] The government's lawyer said that failing to act on information provided by U.S. authorities would amount to an "attack on the trustworthiness" of the U.S.[53]

Barbarash, pleased with the verdict, remained outraged at the justification of the warrant and the involvement of INSET. He questioned how speaking to the media is considered "a political terrorist threat."[54] He is quoted as saying "I don't see why our resources should be spent in this way, as if [being a spokesman] is some kind of terrorist activity, I think it's outrageous, [INSET is acting like] a political police force."[55]

(ii) Tre Arrow aka Michael Scarpetti

Tre Arrow, alias Michael Scarpetti, a high profile and outspoken environmental activist from Oregon, was arrested in Victoria in the summer of 2004 on shoplifting charges.[56] He has been held in Vancouver and Victoria ever since. Arrow is on the FBI's Top Ten Most Wanted List and American authorities are currently seeking his extradition to the United States to face arson and other charges for a 2002 attack on logging trucks.[57] Arrow had fled to Canada to avoid prosecution in the United States. Arrow has no history of violent crime or terrorist action other than the allegations regarding arson. Arrow gained Oregon's attention in 2000 when he climbed the U.S. Forest Service building in Portland and perched on a 9-inch ledge for 11 days to protest logging at Eagle Creek. He also ran for Congress that year, garnering 15,000 votes as a Pacific Green Party candidate.[58] In 2002, an Oregon court

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[52] *The United States of America v. David Barbarash* 2002 BCSC 1721; online: http://www.courts.gov.bc.ca/jdb-txt/sc/02/17/2002bcsc1721.htm at paragraphs 22-24.
[53] Hainsworth, Jeremy (AP Writer) "Spokesman for group accused of eco-terrorism challenges police raid in court" AP newswires Wednesday November 13th, 2002.
[54] Barbarash, David. North American Animal Liberation Front Press Office. Press release Monday March 24th, 2003.
[55] MacLeod, Andrew "Under the new federal anti-terrorism law, dissent becomes a suspicious activity" Monday Magazine, Victoria, BC. Issue 43, Volume 28, October 24-30, 2002. Online at: http://www.mondaymag.com/monday/editorial.43_2002/news.htm
[56] Browns, John "Tre Arrow: The FBI's Criminalization of Dissent, and Canada's Willing Participation" Autonomy & Solidarity January 15, 2005. Online at http://auto_sol.tao.ca/node/view/1110 June 30, 2005.
[57] Macleod, Andrew *"Secret Services"* Imc. Maritimes September 1, 2005. Online at http://maritimes.indymedia.org/news/2004/09/8267.php June 4, 2005.
[58] MacLeod, Andrew *"Tre Arrow, The Straight Arrow"*, Willamette Weekly Online, 30 March 2005: http://www.wweek.com/story.php?story=6156

banned the use in the media of the words "terrorist" and "eco-terrorist" in relation to his case.[59] In June 2005, Arrow was represented by lawyer Tim Russell of Victoria, B.C. in an application regarding the court's jurisdiction to hear the extradition matter.[60] According to one media source, INSET created a profile on Arrow and was "looking into his contacts and any possible criminal activity in Canada."[61] The same media source quotes Lloyd Plante, officer in charge of the Vancouver based INSET: "'We also look at domestic terrorism issues,' says Plante. Groups like the Earth Liberation Front and the Animal Liberation Front are often involved in violent crime, he says and are taken seriously. 'That fits within the definition of terrorism, and we're mandated to look at that.'"[62]

(iii) John Rampenan

At 6:00 am Saturday, September 21, 2002 an INSET raided the residence of John Rampenan and his common law wife, Nitinas Desjarlais in Port Alberni, British Columbia.[63] The search warrant was based on anonymous allegations that Rampenan had been stockpiling firearms.[64] The couple and their children were not home during the raid which resulted in no firearms being found.[65] The raid included the RCMP Emergency Response Team, local RCMP officers, an ambulance and the fire department.[66]

Later in the morning, INSET visited the residence of Rampenan's parents and found Desjarlais and Rampenan there. INSET separated Desjarlais from Rampenan and proceeded to question Desjarlais regarding Rampenan's involvement with "Native issues".[67] According to a media release by an aboriginal support group, during this interview INSET made allegations regarding the safety of Desjarlais's children. In this release, Desjarlais is reported to have heard RCMP officers state: "it

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[59] Sokoloff, Heather and Yvonne Zacharias "Probe of animal-rights 'terror' leads to B.C. home: Computer files seized – Vigilante group accused of attacks on U.S. hunters" National Post, August 2, 2002.
[60] Bains, Camille *"Arrow's offences 'political,' says lawyer"* Macleans.ca June 28, 2005. Online at http://search.macleans.ca/shared/print.jsp?content=062897A June, 29, 2005.
[61] "RCMP anti-terrorist squad helped bag vegan tree hugger", Monday Magazine, August 26 – September 1, 2004.
[62] ***Ibid.***
[63] Gathering Place First Nations Canadian News Special, Press Release, "Anti-Terrorist Unit Uses Excessive Force on Indigenous Family" (Tuesday October 4, 2002). Online at http://www.firstpeoples.org/updates/pressconference.htm.
[64] Canada: National Security and Civil Liberties "Terror laws used against aboriginal groups" Online at http://us.geocities.com/sara_ma00/security/security.htm#inset1; also see: http://www.turtleisland.org/news/news-wcwarriors.htm
[65] Gathering Place First Nations Canadian News Special, Press Release, "Anti-Terrorist Unit Uses Excessive Force on Indigenous Family" (Tuesday October 4, 2002). Online at http://www.firstpeoples.org/updates/pressconference.htm
[66] *Ibid.*
[67] *Ibid.*

would be a shame for [her] children to grow up without parents."[68] INSET informed Rampenan of the execution of the raid and the questioned him regarding stockpiling weapons. He denied any involvement with any unauthorized weapons.[69]

Later on September 21, 2002 and the following day, other members of the West Coast Warrior Society and their families were questioned by the RCMP.

Rampenan and Desjarlais have been actively involved in native issues and are members of the native youth movement organization called the West Coast Warriors Society where Rampenan is a 'commanding officer'. Rampenan admits to defending aboriginal rights but never while "brandishing firearms". Rampenan is also actively involved in drug and alcohol rehabilitation programs for aboriginal youth. INSET's actions left Rampenan's family "shaken" and intimidated. He still questions how indigenous people could be considered terrorist in their own land.[70]

(iv) West Coast Warrior Society

On June 27, 2005 in Vancouver BC, David Dennis and James Sakej Ward, both members of the aboriginal activist group the West Coast Warrior Society (WCWS), as well as a driver were taken into custody by at least 15 members of the Vancouver Police Department (VPD) as directed by two members of INSET.[71] In mid-afternoon, the officers blocked off the Burrard Street Bridge at both ends and surrounded the men using sub-machine guns and assault rifles.[72] The police seized 14 rifles and over 10,000 rounds of ammunition. The men were taken into custody but later released with no charges laid "as all necessary documents were in order for the possession of outdoor equipment and

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[68] *Ibid.*

[69] Canada: National Security and Civil Liberties "Terror laws used against aboriginal groups" Online at http://us.geocities.com/sara_ma00/security/security.htm#inset1; also see: http://www.turtleisland.org/news/news-wcwarriors.htm.

[70] *Ibid.*, see also Macleod, Andrew "Did Post-9-11 Bill Give Cops Too Much Power?" *The Georgia Straight.* Online at http://www.straight.com/content.cfm?id=6927.

71 Joseph, Eric "*Press Release: RCMP Interference*" Union of British Columbia Indian Chiefs Press Office. Online at http://www.ubcic.bc.ca/print/News_Releases/UBCICNews06280501.htm June 29, 2005; Armstrong, Jane "*RCMP blasted over 'high-risk takedown'*", The Globe and Mail, 30 June 2005.

72 Miller, Jennifer with Brad Badelt "*Police arrest and release men after they buy guns and ammo*" Vancouver Sun, June 29, 2005. Online at http://www.canada.com June 30, 2005.

hunting rifles."[73] The men had recently purchased rifles and ammunition for the purposes of an Outdoor Indigenous Traditional Training program for the Tsawataineuk First Nation led by Chief Eric Joseph.[74] WCWS and Native spokespersons have alleged that the police used the raid to "criminalize warrior societies".[75] Media reports indicate that "[T]he Mounties, however, say the incident was part of an 'ongoing investigation' by their anti-terrorism unit."[76] A communique dated August 2, 2005 headlined: "West Coast Warrior Society Final Communique" states that the West Coast Warrior Society has disbanded due to the "unlawful and unethical activities of Canadian police agencies in targeting our members and our organization, and the unfair branding of Indigenous activists as terrorists".[77]

(v) Joseph Thul

Between June 10 and 13, 2003, over 1000 pounds of stolen explosives were seized by the RCMP's INSET from private residences, a motel suite and a storage facility in the Lower Mainland and Squamish areas.[78] The materials were reported stolen from a company in Squamish on May 31st, 2003.[79] The RCMP investigation expanded to include INSET when the Squamish RCMP "uncovered the possibility that the explosives could be illegally smuggled to the United States."[80] The explosives were mining related, and included: blasting caps, dynamite, detonator cord, and AMEX (a high nitrate product with diesel used in mining exploration).[81] Joseph Thul, of Coquitlam, was charged with Possession of Explosives, Possession of a Restricted Weapon and Possession of stolen property over $5000.[82] All charges have been stayed.[83]

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73 Joseph, Eric "*Press Conference Backgrounder: RCMP Interference*" Union of British Columbia Indian Chiefs Press Office. Online at http://www.ubcic.bc.ca/print/News_Releases/UBCICNews06299501.htm June 29, 2005.

74 Joseph, Eric "*Press Release: RCMP Interference*" Union of British Columbia Indian Chiefs Press Office. Online at http://www.ubcic.bc.ca/print/News_Releases/UBCICNews06280501.htm June 29, 2005.

75 Armstrong, Jane "*RCMP blasted over 'high-risk takedown'*", The Globe and Mail, 30 June 2005.

76 *Ibid.*

77 The Communique is unsigned and un-attributed other than the words "Coast Salish Territory".

78 RCMP "*Media advisory and release: Joint Investigative Team Recovers Stolen Explosives (Correction)"* RCMP Media Relations Website June 16, 2003. Online at http://www.rcmp-bcmedia.ca/pressrelease.jsp?vRelease=3154 July 4, 2005.

79 *Ibid*

80 *Ibid*

81 *Ibid*

82 *Ibid*

83 Personal communication with officials of the Port Coquitlam Provincial Courthouse, 3 October 2005.

(vi) Mohamed Aramesh

Mohamed Aramesh was a Muslim Canadian of Pakistani descent living in Vancouver's West End. He died by falling from out of his apartment window in an apparent attempt to evade the RCMP who were executing a warrant to search his residence in August 2003. Media reports suggested Mr. Aramesh may have been linked to the drug trade and that identification documents with different names were found in his apartment. An RCMP/INSET spokesperson is quoted as saying: "We're trying to determine right now and confirm if this person was linked to a [terrorist] group or groups. We don't know. [INSET] focus on the criminal activity of individuals or groups linked to terrorism. This file belongs to INSET and by their true nature of doing national security investigations, they don't discuss ongoing investigations."[84] According to media reports, neither the Vancouver Police nor INSET will confirm why Aramesh is suspected of terrorist activities.[85] The search warrant for drugs was sealed after his death and because Aramesh died while in police custody, a coroner was reported to be undertaking an inquiry into his death.[86]

(vii) Younus Kathradra

As of July 2005, the INSET had taken over a hate crimes investigation of Muslim cleric Younus Kathrada of the al-Madinah Islamic Society Centre in Vancouver. The cleric has faced media scrutiny following the October 2004 disappearance of two young Canadian men who frequented his lectures at the Fraser Street center. One of the men, Rudwan Khalil Abubaker, has been reportedly killed by the Russian forces in a battle with Chechen rebels. Allegedly anti-Semitic statements made by Kathrada during public speeches and published online on the al-Madinah website are the focus of the current investigation though the RCMP will not confirm a connection with terrorist activity.[87] INSET was

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[84] Petti Fong, "*Drug-raid jumper was suspected terrorist: Multiple Ids found in West End flat of man who plunged to his death*" Vancouver Sun August 2003. Online at http://www.baloch2000.org/news/Archives/2003/Aug03/saleh1.htm July 4, 2005.

[85] Petti Fond and Chad Skelton, "*Man who fell to death fleeing police had been up late 'chatting' online: Mohammad Aramesh is now being investigated for any links to terrorist organizations*" Vancouver Sun August 2003. Online at http://www.baloch2000.org/news/Archives/2003/Aug03/16-saleh.htm July 4, 2005.

[86] Petti Fong, "Drug-raid jumper was suspected terrorist Multiple Ids found in West End flat of man who plunged to his death", Vancouver Sun, August 2003; online:

[87] O'Brien, Amy, "Anti-terror team targets imam", Vancouver Sun, July 20, 2005.

previously involved in the hate crimes investigation but has now taken over full control sometime in the last six months. Kathrada denies accusations of extremism and says he has not been questioned by INSET or police investigators. Kathrada has been condemned by other Muslim leaders including the imam of B.C.'s largest mosque in Richmond, B.C. Imam Zihad Delic: "The word Muslim should not be mentioned here. If he is a religious leader, he does not represent Muslims in Canada."[88]

A spokesperson for the RCMP, Corporal Tom Seaman, states that while the INSETs deal with terrorism-related issues, Mr. Kathrada's case was referred to the cross-border force as a hate-crimes investigation only.[89] In addition, the RCMP refused to comment whether the Kathrada hate crimes investigation was at all related to the investigation into the disappearance of Rudwan Khalil Abubaker in Chechnya.[90]

Kathadra has most recently been in the news regarding media reports about Jeff Chen, a Chinese Canadian man from Richmond, B.C., who is a practicing Muslim, former Canadian Forces reservist and University of Victoria history graduate. Mr. Chen had contacted Kathadra by email in December 2004 and told him he was "itching to use the rifles that I have in actual combat (*jihad* in Middle East and elsewhere)."[91] Mr. Chen had attended a few of Kathrada's lectures in Vancouver. After receiving the emails, Kathadra forwarded them to the RCMP: "In the past I had received some e-mails that I saw as potentially, I guess, dangerous if you will, so I passed them on to the authorities basically. I did what I thought was right."[92] The RCMP, alerted to Chen by Kathrada, then seized Chen's collection of rifles, ammunition and other weapons. Mr. Chen was not charged but has been banned from possessing weapons for three years and forced to sell his collection. After the seizure, Mr. Chen was visited by the RCMP and CSIS. Mr. Chen reported to the media that these agencies "seemed more interested in the man [Kathrada] who turned him in" than with him.[93] Media reports suggest that Mr. Chen is a practicing Muslim who has moderated his views regarding *jihad* but that previously he was "ready to

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[88] Robert Matas, "Muslim group denounces sheik at center of hate-crime probe" *Globe and Mail* 21 July 2005. Online at http://www.theglobeandmail.com July 21, 2005.
[89] *Ibid.*
[90] Canadian Press "Hate investigation of Vancouver Muslim turned over to national security squad" Shaw News online July 20, 2005. Online at http://start.shaw.ca July 21, 2005.
[91] Colin Freeze, "'Die hard' found with arsenal", *Globe and Mail*, 16 August 2005.
[92] Martin van den Hemel, "Weapons stockpile confiscated", *Richmond Review*, 13 August 2005.
[93] *Globe and Mail* report, 16 August 2005.

take arms if Sheik Kathrada had told him to do that."[94] "I'm surprised why he [Kathadra] would hand me over … he's a fellow Muslim. … We're all brothers."[95]

(d) Analysis of INSET Activity

The BCCLA acknowledges that the public record will necessarily be limited given journalists' restricted access to facts and the limited amount of information the RCMP will release about "national security" cases. This means that there may be considerably more information that the RCMP possesses that may justify the involvement of an INSET in these cases. It may also be the case that the RCMP has access to confidential information that would initially justify the deployment of an INSET but after some investigation there is not enough evidence to further justify INSET involvement. The BCCLA does not object to INSET deployment in these situations. We would also expect that INSETs have been deployed in cases that legitimately raise *bona fide* concerns about "terrorism activity", but only under the overly expansive meanings of the term "terrorist activity" set out in the *Criminal Code* and set out in the RCMP Operational Manual.

We also note generally that, though the RCMP appears to be more than willing to comment publicly that a particular individual is subject to investigation by INSET – which necessarily deploys the rhetoric of terrorism and imbues the suspect with the stigma of a terrorist, there are no examples to indicate that the RCMP will also convey information to the media that someone is no longer a terrorist suspect or national security threat. The BCCLA finds this practice of selective disclosure regarding targets unfair and inappropriate.

Further preliminary comment is appropriate before we review specific INSET led investigations. The BCCLA believes that the RCMP must pursue criminal investigations in cases that merit investigation. Thus, law enforcement investigations may have been warranted in the cases discussed above. Our concern is not that the RCMP or the police is involved *per* se but rather that the facts of these cases may not justify the involvement of an INSET because there is no sufficient nexus between a threat to the nation and the target for investigation.

The BCCLA submits that there is an important distinction between a criminal investigation and an investigation that involves national security and terrorist activity which justifies the deployment of an

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[94] *Richmond Review* report, 13 August 2005.
[95] *Globe and Mail* report, 16 August 2005.

INSET. As we have argued in Part I of our submissions, INSET activities must be strictly confined to true national security or terrorism matters for the following reasons:

1. the extraordinary nature of national security/terrorism concerns,
2. the heightened degree of secrecy that attaches to these investigations thus precluding normal public accountability,
3. the inclination of national security agencies to interpret their mandates too broadly with negative impact for Canadians' civil liberties, philosophical differences in the definition of terrorism and the risk of politicization of national security risks,
4. the problem of the inherent politicization of the meaning of terrorism,
5. intrusions on political and religious activity and the need to guard support for legitimate national security work, and
6. the need to retain confidence in the work of our national security agencies.

With those preliminary comments made, we turn to the cases reviewed above for critical assessment.

(i) Barbarash and Arrow

These cases are illustrative of the problems raised by an expansive definition of "terrorist activity" and national security. Both cases involve allegations of crimes based on political motivation (animal welfare and environmental protection) that did not target civilians or non-disputants for direct physical harm. As such, neither of these cases involve crimes of terrorism that justified the creation of the ATA. Moreover, neither of these cases, at least based on the public record, appear to establish a sufficient nexus with *national* security unless of course national security is defined so broadly – and inappropriately – as to involve any criminal conduct involving ideological motives. Importantly, both cases originate from the United States where there is considerable evidence that law enforcement authorities and the Executive branch of government have utilized the extraordinary powers under the *Patriot Act* for purely domestic law enforcement purposes that have little or no nexus with terrorism.[96] In sum, these cases do not appear to give rise to concerns about terrorism that targets civilians for

[96] See U.S. Department of Justice, "Report from the Field: The USA Patriot Act at Work" (July 2004), online: http://www.epic.org/privacy/terrorism/usapatriot/doj_report.pdf at 2, 3, 5.

violent harm nor national security. As such, the BCCLA is concerned that the ATA and legislation relating to national security could provide the justification for the use of the INSETs. In addition, the BCCLA is concerned that there is very little opportunity for independent review of INSETs involvement in these cases. As we will explain more fully in Part V of our submission, the Commission for Public Complaints Against the RCMP has neither the legal authority nor the resources to provide adequate accountability for RCMP national security activities either through complaints or pro-active audits. These two cases provide good examples for the need to reign in the definition of terrorist activity, ensure that *national security* means more than any criminal matter involving a suspect with a political cause and the need to establish a civilian agency to oversee the work of national security agencies.

(ii) Rampenan and the West Coast Warrior Society

Unlike the Barbarash and Arrow cases, these cases at least have a Canadian nexus though the national security nexus remains dubious. But why would INSET be involved in these cases? In the Rampenan case, no weapons were found and no were charges laid. In the WCWS case, though the investigation is ongoing, the RCMP evidently had no legal grounds to arrest the individuals but only detain them temporarily. Media reports confirm that David Dennis and James Ward had all the proper permits with respect to the purchase and possession of the firearms that were seized. It seems inconceivable that if the RCMP had had sufficient grounds to be concerned about the potential for militant or illegal use of the firearms, Dennis and Ward would have received firearms permits to purchase the firearms in the first place. The RCMP, through criminal record checks and more, are directly involved in this process. Furthermore, no criminal charges have been laid in the aftermath of the seizure that occurred over three months ago. Of course, RCMP intelligence could have been faulty but the upshot is that these men now have the stigma of having been identified by RCMP INSETs as terrorist or national security threats. The West Coast Warriors Society has now apparently been disbanded thus raising at least the question about the RCMP's impact on political activity.

But perhaps there is a plausible argument for INSET involvement that might be expressed as follows: *The West Coast Warrior Society is a criminal militant group that seeks to use violence and physical force to achieve its political goals in the name of asserting aboriginal rights. They have demonstrated*

their willingness to use violent tactics in standoffs relating to aboriginal fisheries and disputed land claims. The RCMP would be remiss if we did not act on our intelligence that indicates that influential leaders of this group possess firearms that could be used in future confrontations.

Assuming these asserted facts are true, the RCMP's case would be even stronger if their intelligence indicates that the WCWS was planning to use the firearms in future confrontations. Given the broad definitions of terrorist activity and national security, the RCMP INSET deployment could now make some degree of sense. Yet understanding the RCMP deployment in this way underscores the BCCLA's concern about the current problematic definition of terrorism and national security. Is there really any credible evidence that aboriginal militancy in Canada, from whatever source, has reached a level that threatens *national* security or poses a true terrorist threat as opposed to mere criminal activity? The same question can be asked regarding environmental militancy or religious militancy or whatever ideological cause that exists. While the BCCLA does not see the evidence for these threats, we remain open to being convinced at least in a general way even if we and the rest of the public will not be privy to details due to national security confidentiality.

(iii) Thul and Aramesh

Given that charges for Possession of Explosives, Possession of a Restricted Weapon and Possession of stolen property over $5000 were stayed, it is unclear what to make of the Thul case. There is nothing in the public record to indicate that the allegations against Mr. Thul related to terrorism or national security. As noted above, the BCCLA does not object to INSET involvement in cases that may initially appear to have a national security/terrorism nexus but ultimately do not. However, in the Thul case, the RMCP's public justification for the deployment of the INSET was simply because the explosives could have been smuggled across the border. This justification provides no sufficient nexus to national security and raises concern about the INSET deployment in this case. Perhaps there is more to this case than meets the public eye, but of course neither the BCCLA nor any civilian agency responsible for the oversight and review of the RCMP's national security activities – because it does not exist – will be able to undertake that assessment.

The case of Mohamed Aramesh is puzzling. We would hope that the RCMP is usually very cautious about reporting a link to terrorism. Yet they did so in this case while not providing any specific information to justify that suggestion. While Aramesh belongs to a distinct ethnic community, the Balouch tribal group, there is no evident link between tribal membership in this group and suspicion of terrorism. As a Muslim man with Pakistani family connections (he was scheduled to fly to Pakistan shortly after the date of his death), he fits a general profile. We can only hope that the RCMP had more to connect him with terrorist activity than just the fact that he was Muslim with Pakistani connections and allegedly connected to the drug trade. Otherwise, the RCMP was engaging in questionable profiling. When a person dies during the execution of a police warrant, it is vital that the public be provided with reassurances and information with regards to reasons for that person's death. In this case, the INSET spokesperson was apparently willing to convey to the public that Mr. Aramesh was suspected of links to terrorism yet provided no further details to justify this allegation. BCCLA enquiries to the B.C. Coroner's Office to determine if the Coroner's Service of British Columbia held a public inquest or hearing or investigation into Mr. Aramesh's death were rebuffed. The result appears that Mr. Aramesh has gone to his grave linked with terrorism with no means for him or his family to clear his name. In general, unless national security is truly protected by doing so, it is inappropriate for the RCMP to provide information to the public that links a person to terrorism when they have no means of defending themselves.

(iv) Kathrada

It is difficult to draw any conclusions from the Younus Kathrada case. The RCMP have cautioned against drawing the conclusion that their investigation is anything more than a hate crime investigation based on Mr. Kathrada's comments. The RCMP have not publicly stated that they suspect Mr. Kathrada has engaged in terrorist activity, is a terrorist recruiter or an advocate for terrorism. But if so, one must ask why INSET is involved in investigating allegations of a hate crime when INSET's mandate is specific to national security and terrorism. The mere public acknowledgement of the deployment of INSET in this case is enough to stigmatize Kathrada with some link to terrorism or national security threat. Kathrada's statements were a matter of public record and controversy long before the London bombings in July 2005. If there was real concern that Mr. Kathrada was a legitimate threat to national security due to his teachings, then one would expect that the RCMP and INSETs

would have been investigating sooner. Maybe they were but the INSET spokesperson appears to be very coy about INSET's involvement in the case. In a news report shortly after the July London bombings, a Vancouver based lawyer named Richard Kurland who is described as a "policy analyst" commented on the public confirmation that INSET was investigating Kathrada:

> "It's very rare that even the smallest window is opened on the inner workings of Canadian intelligence services and when it is, it's for a darn good reason … At the present time [shortly after the July London bombings], I think the disclosure is appropriate because it should signal to all of Canada we're global leaders and we've got it under as much control as we can muster. It should be perceived as a warning to people who want to dabble in terrorist violence in Canada. They may be daily facing one-way intelligence mirrors."[97]

A more skeptical analysis might be that the RCMP's disclosure that INSET is investigating Mr. Kathrada (but not with respect to anything related to terrorism) is a public relations effort by the RCMP to reassure the public after the July London bombings that it is diligently doing its work protecting Canadians from terrorist threats in Canada.

Kathrada has been the center of public controversy because of public statements he has made that are a matter of public record. It is worth pausing to consider those statements. Before doing so, it is important to note that there is little context to the following statements and so there is considerable risk that they might be misunderstood, an objection that Mr. Kathrada himself has made to the media.

- [Jews are] "the brothers of monkeys and the swine" – a statement made after Israel assassinated Hamas leader Sheik Ahmed Yassim[98]
- "Once again they've shown their treachery; once again they've shown that they are cowards and that they cannot be trusted."[99]
- [The Prophet says] "Oh Muslim, Oh slave of Allah, that verily behind me is a Jew. Then come and kill him." [100]
- He says Islamic scripture predicts an apocalyptic battle with the Jews. [101]

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[97] Amy O'Brien, "Anti-terror team targets imam", Vancouver Sun, July 20, 2005.
[98] Canadian Press "Hate investigation of Vancouver Muslim turned over to national security squad" Shaw News online July 20, 2005. Online at http://start.shaw.ca July 21, 2005.
Matas, Robert "Muslim group denounces sheik at center of hate-crime probe" Globe and Mail July 21, 2005. Online at http://www.theglobeandmail.com July 21, 2005.
[99] Canadian Press "Hate investigation of Vancouver Muslim turned over to national security squad" Shaw News online July 20, 2005. Online at http://start.shaw.ca July 21, 2005.
[100] Matas, Robert "Muslim group denounces sheik at center of hate-crime probe" Globe and Mail July 21, 2005. Online at http://www.theglobeandmail.com July 21, 2005.
[101] *Ibid.*

- "Unfortunately we hear too many people saying we must build bridges with them. No. They understand one language. It is the language of the sword, and it is the only language they understand." [102]

- He endorses offensive holy war, jihad, to convert non-believers.

- "It is in order to establish security on this earth. It is so that the word of Allah will be the superior word." [103]
- He says all Muslims should desire to become martyrs if the opportunity arises. [104]

- "That he [Allah] place us amongst those who will, God willing, be martyred," he said as an invocation at the end of a sermon.[105]

- "For one of you to be in the front row of Muslims… with the mujahedeen is better than him standing in prayer for 60 years. It is inconceivable that a true believer will not desire martyrdom."[106]

- "I have no problem calling the Christians and the Jews and those who are not Muslim kuffar [meaning = non-believer] and if they die in that state they will abide in the hell-fire forever. I don't care what anyone else says." [107]

- "We want everyone to understand what we are repeating over and over. It does not mean now that we go and arm ourselves, and walk through the streets of Vancouver and start killing the kuffar. It doesn't mean that. It doesn't mean that we go, and you know, single out certain buildings and we take it in our own hands to go and bring those buildings down."[108]

The B.C. Civil Liberties Association does not condone the use of hate speech and we believe that the citizenry has a responsibility to publicly censure such speech and the speakers.

However, the BCCLA also opposes the creation or use of anti-hate speech legislation by government. In our view, hate speech laws are unjustifiable censorship. That said, there are a variety of sections in

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[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid.*
[105] Canadian Press "Hate investigation of Vancouver Muslim turned over to national security squad" Shaw News online July 20, 2005. Online at http://start.shaw.ca July 21, 2005.
[106] Matas, Robert "Muslim group denounces sheik at center of hate-crime probe" Globe and Mail July 21, 2005. Online at http://www.theglobeandmail.com July 21, 2005.
[107] Hume, Mark "Muslim leader investigated for slurs Vancouver lecturer called Jews "the brothers of monkeys and swine" Globe and Mail in Canadian Jewish Congress online newsletter Oct 23, 2004. Online at http://cjc.ca July 21, 2005.
[108] Hume, Mark "Muslim leader investigated for slurs Vancouver lecturer called Jews "the brothers of monkeys and swine" Globe and Mail in Canadian Jewish Congress online newsletter Oct 23, 2004. Online at http://cjc.ca July 21, 2005.

the *Criminal Code* that deal with hate crimes, including section 319 which prohibits the willful promotion of hatred. These provisions have been found to be constitutionally valid which may be the source for the "criminal nexus" to involve the RCMP in the Kathrada case. That said, though one might take offense at Kathrada's comments, it is difficult to see how they reach a level of a crime under section 319.

Nevertheless, the BCCLA is opposed to the idea that controversial – even possibly hateful – statements by religious leaders can be the sole cause for attracting not only police investigations based on censorship provisions in the criminal law but the full scrutiny and "daily" surveillance by the Integrated National Security Enforcement Team. The Kathrada case raises the fear that INSET has decided to institute national security investigations of controversial religious leaders who make controversial statements. While Great Britain's Prime Minister Tony Blair has urged reforms to criminalize mere statements that encourage or glorify terrorism (remember one man's terrorist is another's freedom fighter), Canada's own INSETs appear to be taking the matter into their own hands even without the benefit of such legislation. Of course, there may be so much more that INSET knows that we don't, but again no civilian agency currently has the authority to review INSET's actions, a matter that is in dire need of remedy.

(e) Recommendations For Reform

1. Further to our submissions in Part I of this brief, given public information available with respect to the deployment of Integrated National Security Enforcement Teams in B.C., the BCCLA again recommends that the definition of "terrorist activity" and "national security" be drafted more narrowly as set out in Part I.

2. Subject to our submissions in Part V of this brief, the BCCLA recommends that the House Subcommittee and the Senate Special Committee recommend the creation of a National Security Review Committee that would have jurisdiction to review the conduct of the RCMP and its INSET in the Barbarash, Arrow, Rampanen, West Coast Warrior Society, Thul, Aramesh and Kathrada cases.

PART 4: SECTION 38 OF THE CANADA EVIDENCE ACT

(a) Introduction: The Government's Right to Silence

One of the many innovations of the *Anti-Terrorism Act* was to create a comprehensive regime for retaining the secrecy of information held by government that would, if released publicly, harm national security. In an era when the enemies of the "War on Terrorism" operate clandestinely to wreak maximum harm, effective counter-terrorism initiatives will require varying degrees of stealth and secrecy to fight back. For example, identifying valuable sources in public could seriously harm national security.

Thus, as a general proposition, the BCCLA does not quarrel with the government's need to maintain the secrecy of certain information in certain circumstances. In our submission, we will refer to government's claims to the secrecy of national security information as "state secrecy privilege" or "national security confidentiality".

Notwithstanding this legitimate government objective, civil libertarians' concerns regarding national security confidentiality stems from recognition that governments, even democratic ones, are by nature overly-cautious about releasing any information that touches on national security. Urged on by national security agencies like the RCMP and especially CSIS, which has a strong culture of secrecy, the natural tendency of the all too human political players who comprise government is towards secrecy in areas as sensitive as national security. This drive for secrecy in the national security field overwhelms the fact that the public release of information may pose little risk of harm to national security. It also often overwhelms the fact that not disclosing this information will create a substantial risk of harm to a criminally accused's right to a fair trial and full answer in defence, a risk of deportation to a country that practices torture or avoid accountability for inappropriate practices and policies of our national security agencies.

For the BCCLA, the key to solving this conundrum will be to legislate adequate substantive rules and procedural mechanisms to permit the state to sequester information that is truly

necessary for national security while also protecting individuals' access to information necessary to safeguard their fundamental rights and ensure adequate levels of accountability for our national security and other public agencies. These rules and procedures will require a robust role for the judiciary who must have the authority and resources to conduct review of claims to national security privilege. Further, as guardians of the balance between fundamental rights and state claims to security, the judiciary must also have the authority to make final, binding decisions on government's claims to state secrecy privilege. Finally, reforms are urgently needed to create a sufficiently adversarial process that will ensure that the claims for national security confidentiality are thoroughly challenged and tested. This process must include ensuring that parties, or, representatives acting on their behalf, seeking disclosure have access to information in question, access to government arguments on the facts and the opportunity to challenge for disclosure before a judge.

(b) The Mechanics of Section 38

The provisions of section 38 of the *Canada Evidence Act* (section 38 to s. 38.16) create a comprehensive process for dealing with requests for public disclosure regarding information over which the government claims national security confidentiality. The provisions require every participant to a proceeding or official in relation to a proceeding to notify the Attorney General of Canada when there may be "potentially injurious information" or "sensitive information" disclosed as part of the proceeding.[109] Proceedings may be criminal matters, security certificate hearings under the *Immigration and Refugee Protection Act*, civil litigation or any other type of matter. Potentially injurious information is "information of a type that, if it were disclosed to the public, could injure international relations, or national defence or national security." Sensitive information is "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard." Once notice is given, participants and officials can not release any information and are bound to secrecy regarding the notice and any matter pertaining to it

[109] Section 38.01 and following of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 38; 2001, c. 41, ss. 43, 141.

unless the Attorney General authorizes disclosure in writing regarding the notice.[110] Information can also be disclosed by a disclosure agreement though that agreement is also subject to secrecy.[111]

Within 10 days after receiving notice about potentially injurious information or sensitive information (the "Information"), the Attorney General must notify the person(s) who gave notice regarding their decision with respect to disclosure or he may apply to the Federal Court, Trial Division for an order regarding disclosure of the Information.[112] If the Attorney General does not forward a decision regarding the disclosure of the Information within 10 days to parties that originally gave notice, he must apply for an order from the Federal Court, Trial Division regarding its disclosure.[113] If a party, other than a witness, that must disclose the Information in a proceeding does not receive notice of the Attorney General's decision within 10 days, he must apply to the Federal Court for an order regarding disclosure.[114] If a party wishes to disclose the Information in a proceeding does not receive the Attorney General's decision within 10 days, he may apply to the Federal Court for an order regarding disclosure.[115] All such applications are confidential and shall not be publicly disclosed.[116] Once the Court receives an application from any party, it shall hear representations from the Attorney General regarding interested parties to identify who should be given notice of the application and any hearing. A hearing regarding the application is not mandatory but is subject to the discretion of the Court.[117]

After a hearing, a judge may authorize disclosure of the Information if she concludes that the disclosure would not be injurious to international relations, national defence or national security.[118] Even if she finds that the disclosure would be injurious, she may order its disclosure or a portion or summary of the Information if the public interest in disclosure outweighs the

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[110] Section 38.02, s. 38.03.
[111] Section 38.031 and section 38.02(1)(d).
[112] Section 38.03(3), s. 38.04(1).
[113] Section 38.04(2)(a).
[114] Subsections 38.04(2)(b).
[115] Section 38.04(2)(c).
[116] Section 38.04(4).
[117] Section 38.04(5).
[118] Section 38.06(1).

public interest in non-disclosure.[119] A judge may consider any evidence that is "reliable and appropriate" even if it would not otherwise be admissible under Canadian law.[120] A judge may also confirm by order the prohibition on disclosure. Orders may be appealed to the Federal Court of Appeal[121] and then to the Supreme Court of Canada.[122] All hearings on original applications or appeals shall be in private and are confidential as are the records of such hearings.[123] Regardless of the level of court, all judges must hear submissions from the Attorney General *ex parte* (without the other parties present) if the Attorney General so wishes.[124]

Notwithstanding an order by any court authorizing public disclosure of any Information, the Attorney General of Canada may issue a certificate prohibiting the disclosure of the Information for the purpose of protecting information obtained in confidence from or in relation to a foreign entity or for the purpose of protecting national defence or national security.[125] In other words, the Executive has an absolute veto over the determination of any court to authorize public disclosure.

Section 38 also contains provisions that seek to protect the rights of a defendant in a criminal prosecution or other proceedings by permitting the presiding judge to make an order that would be appropriate in the circumstances while upholding the prohibition on disclosure of Information, including dismissing charges, staying charges or finding against a party on any issue relating to the Information.[126]

These provisions have received some judicial consideration. In particular, two cases are important precedents: *Canada (Attorney General) v. Ribic* [2005] 1 F.C.R. 33 (FCA) ["*Ribic*"] and *Ottawa Citizen Group Inc. v. Canada (Attorney General)* [2004] F.C.J. No. 1303 (FC) ["*Ottawa Citizen*"]. In *Ribic*, the appellant Ribic was criminal charged with forcible

[119] Section 38.06(2).
[120] Section 38.06(3.1).
[121] Section 38.09.
[122] Section 38.1.
[123] Section 38.11 and 38.12.
[124] Section 38.11(2).
[125] Section 38.13.
[126] Section 38.14.

confinement while he was a member of the Serb forces in Bosnia. As part of his defence, he sought disclosure of information via the testimony of two witnesses who were party to information regarding national security. Ribic did not challenge the constitutionality of section 38. The Federal Court of Appeal recognized that s. 38 creates a statutory ban on disclosure and the review by the court is not judicial review of the Attorney General's decision but an assessment whether disclosure should be made in light of the provisions. The Court established a three-part test:

(1) is the information relevant in that it may reasonably be useful to the defence following the *Stinchcombe*[127] and *Chaplin*[128] tests;

(2) would the disclosure of the information be injurious to international relations, national security or national defence; and

(3) does the public interest in disclosure outweigh the public interest in non-disclosure.

The Court noted that steps (1) and (2) require the Court to examine the information.

With respect to the second part of the test, the Court noted that it must give considerable weight and deference to the submissions of the Attorney General who "assumes a protective role *vis-à-vis* the security and safety of the public" and not second-guess or substitute its opinion for that of the Executive. If the second part is satisfied, the party seeking disclosure bears the onus of proving that the public interest scale is tipped in its favour. With respect to the third part of the test, the Court found that disclosure would only be justified when the information established a fact crucial to the defence (which the Court identified as a less stringent test) or the information may be necessary to establish the innocence of the accused (which the Court identified as a more stringent test).[129]

After its rendering its judicial interpretation of section 38, the Federal Court of Appeal reviewed disclosure orders of the Federal Court, Trial Division. In doing so, the Court of Appeal noted and endorsed the unusual procedure adopted in *Ribic* to assist the Trial Division in determining the nature of the evidence of the two desired witnesses. A lawyer with the

[127] *R v. Stinchombe*, [1991] 3 S.C.R. 326 (SCC).
[128] *R. v. Chaplin*, [1995] 1 S.C.R. 727 at 740 (SCC).
[129] *Ribic* at paras. 22-27.

Attorney General of Canada not involved in the prosecution agreed to put questions to the witnesses on the basis of a list of questions from counsel for Ribic with follow up questions after consultation between these counsel. The BCCLA will comment further on this procedural innovation not contemplated in s. 38 itself yet endorsed by the Court of Appeal.

By way of background, *Ottawa Citizen* was related to the now notorious case of the RCMP investigation of Juliet O'Neil, a reporter for the *Ottawa Citizen*, after the publication of her articles on Maher Arar including quotes from a secret government source that alleged that Mr. Arar had trained in an Afghanistan terrorist camp. As part of a hearing in relation to sealing of warrant information under s. 487.3 of the *Criminal Code of Canada* before the Ontario Court of Justice relating to the RCMP investigation, a section 38 proceeding arose in relation to disclosure of documents that were in possession of the Ontario court.

Ottawa Citizen is noteworthy for Federal Court Chief Justice Lutfy's outspoken comments about the confidentiality provisions of section 38's provisions. Chief Justice Lutfy adjourned the section 38 application until the matter was resolved in the Ontario Court of Justice. However in a "*Post scriptum*", Lutfy C.J. noted that the level of confidentiality required under s. 38 prohibited him from even acknowledging publicly that it was seized of a section 38 proceeding despite the fact that those proceedings had been publicly acknowledged by the Ontario Court of Justice. In Lutfy C.J.'s words, the section 38 legislation "can lead to unintended, even absurd, consequences."[130] At the end of the *post scriptum*, Lutfy C.J. notes that his comments "may be relevant to those involved in the review of the anti-terrorism legislation. They may wish to consider whether certain provisions in section 38 unnecessarily fetter the open court principle."[131]

[130] *Ottawa Citizen* at para. 35.
[131] *Ibid*, at para 45.

(c) Criticisms of Section 38

(i) Definitions

The definitions regarding information are overly broad. First, "sensitive information" is defined so broadly that much of the information held by the Department of Foreign Affairs, for example, will be subject to a privilege since most, if not all, of it relates to international relations and likely the government seeks to safeguard this information. This definition reaches too far and will capture within section 38's parameters too much information that should not be subject to state secrecy privilege. Moreover, because information that is "sensitive information" is also potentially injurious information and thus protected in any event, the inclusion of this category within section 38 is superfluous. This broad definition, combined with the secretive nature of section 38 proceedings and the absolute veto power of the Executive (discussed below), makes this provision untenable in a free and democratic society.

Second, information that could be injurious to "international relations" should never be subject to a privilege where the fundamental rights of individuals to fair trials or proceedings or public accountability is at stake. Concerns that Canada might be embarrassed in the eyes of its international allies or that international relations might be injured should not usurp fundamental rights and public accountability especially when such interests are more often purely economic. While it may be that an injury to international relations can have severe economic consequences, unless those consequences amount to a threat to national security, they should not be the basis for state secrecy privilege. If they do amount to a threat to national security, then there is no need for the category of "international relations". Currently, with this definition, it would be possible for the Executive branch of our federal government to keep secret any information relating to the softwood lumber dispute with the United States for the next 15 years. That is unacceptable in a free and democratic society.

We also adopt the submissions of Amnesty International to the Senate Committee reviewing the *Anti-Terrorism Act* who note that the inclusion of "international relations" in section 38 does not conform with Article 14(1) of the *International Covenant on Civil and Political Rights*

which permits exceptions to the rule of public trials only for "morals, public order (ordre public) or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Recommendation:

1. The BCCLA recommends that the section 38 of the *Canada Evidence Act* be amended to remove the inclusion of "sensitive information" and that harm to "international relations" be excluded from the definitions.

(ii) *Court Discretion to Hold Hearings*

Under subsection 38.04(5), the Federal Court of Canada has the discretion to determine whether a hearing is necessary upon an application for an order requiring disclosure. Furthermore, the Federal Court has the discretion with respect to who may make representations at a hearing.

The BCCLA submits that the Court should not have this broad discretion. Parties seeking disclosure should have a right to a hearing and the right to make representations. The interests of fairness require that those parties who seek public access to information and the public in general must be able to make their case to the Court for public disclosure. Courts, who must be vested with the safeguarding of fundamental rights and public accountability, must be able to hear the case, both for and against, disclosure.

Recommendation:

2. The BCCLA recommends that section 38.04(5)(b) of the *Canada Evidence Act* be amended to require the Federal Court (and any appeal court) to hold a hearing with respect to any application for an order regarding disclosure. Furthermore, section 38.04(5)(d) should be amended so that any party seeking disclosure has the right to make representations at a hearing.

(iii) *Standard for Admissibility of Evidence/Exclusion of Any Evidence Tainted by Torture*

Section 38.06(3.1) permits a court to receive evidence that is "reliable and appropriate" even if it would otherwise be inadmissible in Canadian law. This standard is inappropriate. Though we understand the necessity of a relaxed standard, we believe that the basic test for admissibility of evidence – relevancy – should be used as part of this test. We recommend that the test be "relevant and reliable".

It is also important that section 38 provide explicit direction to courts and national security agencies that any information that has been obtained through the use of torture is inadmissible with respect to claims of national security confidentiality. This absolute rule should be applicable to information that is the subject matter for disclosure under section 38 but also other information that would support the claim for non-disclosure by the government. In matters of intelligence, Canadian security agencies understandably rely upon foreign intelligence sources. Testimony at the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (the "Arar Inquiry") indicates that we have signed 247 agreements with foreign intelligence agencies.[132] Where foreign intelligence sources reside in advanced democratic states, there is less concern that foreign intelligence will have been obtained by torture – though the examples of Abu Ghraib and Guantanamo Bay remind us to be vigilant even with ostensibly advanced Western democracies. However, when foreign intelligence is obtained via regimes that are known to practice torture, there should be a presumption that the information was obtained through torture. This issue is of central concern in the current Arar Inquiry which we will refer to in more detail below.

Recommendation:

3. The BCCLA recommends that section 38.06(3.1) of the *Canada Evidence Act* be amended to limit admissible evidence to that which is "relevant and reliable". Furthermore, this section should be amended to state explicitly that any evidence obtained by torture is inadmissible and that where the source of evidence is from a foreign intelligence agency in a country known to practice torture, the evidence is presumptively unreliable.

[132] Testimony of Ward Elcock, former Director of CSIS, 21 June 2004.

(iv) *Federal Executive Veto Power*

Section 38.13 provides an absolute veto power to order non-disclosure of documents for 15 years once a court orders disclosure. This means that even if the Supreme Court of Canada considered an appeal regarding disclosure of information and found that the public interest in disclosure outweighed the public interest in the privilege, the federal Executive could override the finding of the Supreme Court of Canada to prohibit disclosure. We note that this absolute veto power can also skew the strategies of parties seeking disclosure. Given that a government can ultimately exercise a veto power even when a party is successful in persuading a court to order disclosure (very difficult in itself), and given the prohibition on public discussion of the proceedings which preempts public and media scrutiny over a matter, there is strong incentive not to challenge or appeal a government's claim to national security confidentiality. This may explain the Arar Commission's decision to not proceed to federal court to challenge the federal government's refusal to agree to the release of a summary of information concerning CSIS as part of the Inquiry.[133] This Inquiry's mandate requires that it follow section 38's procedure relating to any disagreements regarding public disclosure of evidence. We will discuss in more detail the experience of the Arar Inquiry below with respect to secret hearings.

The BCCLA acknowledges that this absolute veto is tempered somewhat in criminal or other proceedings by section 38.14 which provides authority for a court to dismiss or stay proceedings. However, we note that this provision is permissive and not mandatory. This is inappropriate if there is any significant prejudice to an accused where non-disclosure would result in a less than fair trial. If the absolute veto power is retained, then the permissive language of section 38.14 should be made mandatory thus ensuring that no individual is convicted or faces negative sanctions without access to information that could assist them in their defence.

Recommendations:

[133] See the Arar Inquiry's press release: http://www.ararcommission.ca/eng/ReleaseFinal_dec20.pdf

4. The BCCLA recommends that the *Canada Evidence Act* be amended to authorize the courts to make final determinations regarding whether information subject to a claim of state secrecy privilege should be disclosed or not.

If the above recommendation is not implemented, then the BCCLA recommends in the alternative that the Act be amended to require criminal charges be stayed or dismissed or that the information in question is not admissible in any other proceeding when a court finds that the information should be disclosed but the government issues a certificate to prevent the disclosure of information.

(v) *Secret Hearings*

Section 38.11 provides that hearings shall be in private and that the federal government shall have the right to make submissions *ex parte*. In addition, there are a variety of provisions that require the maintenance of confidentiality regarding any matter that arises under section 38. These provisions effectively make hearings under section 38 secret hearings. Note that a court does not have the authority to order hearings be public nor order that the government's submission be made before all the parties in an open court room after hearing representations from government *ex parte*.

These provisions with respect to closed court rooms and *ex parte* hearings effectively negate several important principles of a system of justice premised on the rule of law. First, the principle of an open court, which the Supreme Court of Canada has recently reaffirmed in *Vancouver Sun (Re)*[134], is effectively eliminated. Thus, section 38 prevents the public accountability of the courts and enhancement of confidence in the judiciary (and the judgement of the Executive) by precluding open access to courtrooms involving section 38 proceedings. Second, the right of accused persons to fair trials and other proceedings is severely undermined by the elimination of any possibility of an adversarial proceeding to test the evidence that the government relies on in its claim for non-disclosure of information. Furthermore, by precluding access by parties seeking disclosure and permitting the government an unqualified right to make *ex parte* submissions on the merits, the legislation severely and unjustifiably compromises the constitutional right to a fair trial.

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[134] [2004] 2 S.C.R. 332 at paragraphs 23-27 (SCC).

Michael Ignatieff, in his recent work *The Lesser Evil*, takes square aim at secret hearings being incompatible with a free and democratic society:

> "It is never justified to confine or deport an alien or citizen in secret proceedings. Openness in any process where human liberty is at stake is simply definitional of what a democracy is. … A democracy in which most people don't vote, in which many judges accord undue deference to executive decisions, and in which government refuses adversarial review of its measures is not likely to keep the right balance between security and liberty. A war on terror is not just a challenge to democracy; it is an interrogation of the vitality of its capacity for adversarial review."[135]

With respect to the closed courtroom requirements of section 38, the Federal Court in *Ottawa Citizen* noted:

> "Even where the representatives of the Attorney General of Canada, the parties seeking access to the secret information and their counsel were all present, the hearings were secret. During these sessions, no secret information was disclosed. The need to exclude the public from those sessions was not obvious. The need for privacy during all sessions of a proceeding involving secret information has been successfully challenged in the context of the *Privacy Act*, R.S.C. 1985, c. P-21: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at paragraphs 52-60."[136]

The experience of the Arar Inquiry is instructive in relation to the government's desire for and use of state secrecy privilege to avoid public scrutiny. The BCCLA is an intervenor at the Factual Inquiry. As noted above, after the federal government refused to agree to a public release of documents regarding CSIS as proposed by Commissioner O'Connor, the Arar Commission was faced with the prospect of proceeding to Federal Court where it and the federal government could argue about whether the public interest in disclosure outweighed the public interest in maintaining confidentiality. This process would have required a considerable delay in the work of the Inquiry especially if appeals were pursued. At the end of such a process, if disclosure was ordered by a court, the federal government would still be able to issue a certificate under section 38.13 of the *Canada Evidence Act* to prevent disclosure. Given this outcome, the Arar Commission instead amended its procedures to effectively preclude the use of summaries until their hearings were over thus effectively preventing access by Mr. Arar, the

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[135] Michael Ignatieff, *The Lesser Evil – Political Ethics in an Age of Terror*, (Toronto: Penguin, 2004) at 12.
[136] *Ottawa Citizen* at para. 43.

intervenors and the general public to the vast majority of documentary and *viva voce* evidence given at the ostensibly public inquiry.[137]

It is important to note that Commissioner O'Connor, an Associate Chief Justice of Ontario, had gained considerable expertise in matters pertaining to national security. First, he had been hearing testimony for almost six months, most of it *ex parte* regarding RCMP and CSIS actions. Second, he had the resources of Commission Counsel and staff to draw on in assisting him to ascertain whether information could be released without harming national security. Third, he had further assistance in making this judgement from *amicus curiae* counsel Ron Atkey, Q.C. who had been the Chair of the Security Intelligence Review Committee, the civilian oversight body for CSIS, in the 1980s. Finally, Mr. O'Connor, Commission counsel and *amicus* counsel all had the benefit of actually having full access to all information in dispute as well as the submissions of the government regarding harm. Other than the federal government of course, all judged that the summary of CSIS information could be released without injury to international relations, national security or national defence. It remains to be seen whether a new dispute arises regarding the public disclosure of information in the release of the Commissioner's "interim" report which is due to be released in the spring of 2006. Despite the high level of public interest in whether and how Canadian officials may have been complicit in Mr. Arar's torture, we believe that the unjustified problems that the Arar Inquiry has had in conducting a *public* inquiry relate directly to the problems of the secrecy inherent in section 38. The Arar Commission's particular experience with section 38 provisions, demonstrates that the provisions in s. 38 make true judicial review considerably nugatory**.**

In addition to the problems of secret hearings and a lack of adversarial process, the legislation imposes strict confidentiality on all parties involved in the process. The absurd result of such extreme measures is that the Federal Court of Canada was precluded from publicly acknowledging that it was seized of a section 38 proceeding despite the fact that this was publicly acknowledged in the Ontario Court of Justice in *Ottawa Citizen*, a problem Chief Justice Lutfy has publicly identified this problem as noted above.

[137] See the press release of the Arar Commission announcing its new procedures: http://www.ararcommission.ca/eng/ProcedureApr7.pdf

To remedy these problems, the BCCLA submits that there are three solutions. First, the decision as to whether a matter should ultimately be heard in private with *ex parte* representations should be left with the presiding court to decide according to the rules endorsed in *Vancouver Sun (Re)*. Though the government should always have the option of making original *ex parte* submissions to argue that the hearing and submissions on the merits should also be *ex parte* to protect national security, the court, exercising its proper role to safeguard the administration of justice, independence of the judiciary, fundamental rights and national security must be authorized to make the final determination regarding whether or not to permit an open court and *ex parte* submissions.

Second, the BCCLA further submits that it is important to distinguish between the open courtroom principle and the principle of ensuring a fair trial by having access to all evidence that is relevant to a determination in order to provide a full defence. This is a distinction not currently made under section 38. It may be possible to disclose all the information to the affected parties yet preserve national security confidentiality by not ordering full public disclosure in an open court room. That is, it may be appropriate in some cases for a court to order disclosure of information to an accused or party seeking access (while ordering them not to disclose it further) yet not permit full public disclosure. This would assist in keeping secret information while ensuring a fair hearing. Though this compromise is not ideal, it is preferable in circumstances that do not permit a perfect solution that reconciles fundamentally irreconcilable objectives. We note that such a compromise would not be appropriate where there is significant concern regarding the inappropriate conduct of national security agents.

Finally, the BCCLA believes that a system involving security-cleared lawyers to advocate on behalf of the party or parties seeking public disclosure should be created when the court is persuaded by the government to hear submissions on the merits on an *ex parte* basis. These "special advocates" would have complete access to all information in question and would have standing to adduce evidence and argue with respect to disclosure at all *in camera* hearings where the federal government argued for non-disclosure. Their task would in fact to be to argue

for disclosure of information in all matters as well as to argue for non-deportation based on the information over which privilege is claimed.

The Federal Court of Appeal in *Ribic* endorsed the Federal Court Trial Division's improvisation to permit a variation of this idea. The BCCLA submits that *Ribic* stands as precedent for security-cleared lawyers accessing potentially injurious information. The Court of Appeal in *Ribic* cited with approval the House of Lords decision in *Reg. v Shayler*, [2002] 2 W.L.R. 754 which advocated for "special counsel to represent the interests of the person seeking disclosure." In *Ribic*, at issue was whether the defence could examine in chief witnesses who might disclose sensitive or potentially injurious information as part of their testimonies. Though it did not happen in this case, the Federal Court of Appeal recognized that the disclosure of videotaped evidence of witnesses would be a more ideal solution than mere expurgated transcripts of their testimony.[138] With respect to documents, the BCCLA believes that a security cleared lawyer should also have access to the full documents to test the case for disclosure.

A precedent for a system of security-cleared lawyers as "special advocates" exists in Britain in relation to the operation of the Special Immigration Appeals Commission (SIAC). SIAC originally had jurisdiction only with respect to immigration and refugee claims where national security privilege would arise. SIAC's jurisdiction has now been extended to cover appeals arising from a government certification that a particular person is a "suspected international terrorist" and from an order of the Secretary of State depriving someone of their British citizenship status where the Secretary of State seeks to rely on information that he believes should not be made public. However, SIAC's jurisdiction has been diminished given the House of Lords recent decision that the provisions of the *Anti-Terrorism, Crime and Security Act 2001*, that permits the indefinite detention of alleged terrorists violated European law.[139]

In the spring of 2005, Great Britain's House of Commons Constitutional Affairs Committee undertook hearings to review the operation of the Special Immigration Appeals Commission, including the use of special advocates. The evidence tendered by various witnesses to this

[138] *Ribic*, at paras. 53-56.
[139] *A (FC) and Others (FC) v. SSHD*, [2004] UKHL 56.

review provides important guidance with respect to the creation of a similar system in Canada.[140] In particular, the evidence of a group of special advocates based on their experience[141] as well as the evidence of Justice, a British-based human rights and law reform organization that acts as the British section of the International Commission of Jurists[142], is particularly important for rectifying the limitations of a special advocate system. Their evidence points to the need for a variety of safeguards to enhance a system of special advocates including:

(a) independent appointment – the Attorney General of Canada should not be responsible for appointing special advocates on behalf of parties seeking disclosure given the apparent conflict of interest; furthermore, parties seeking access should be able to choose among a pool of special advocates;

(b) training – the task of special advocates is a unique one and requires specialized knowledge not necessarily available without experience or instruction from those so experienced including access to closed rulings;

(c) support and access to independent expertise – to be effective, special advocates will need assistance in cases that often have voluminous materials; these individuals must also be security cleared; furthermore, special advocates should be able to retain independent experts to provide advice to them and to courts regarding technical matters otherwise only CSIS/RCMP advice will be treated as expert; and

(d) procedures for taking instructions – lawyers do not function without taking instructions from their clients; in the context of national security, special advocates would be severely restricted in their ability to argue for disclosure without information from the party seeking disclosure; the restriction on no communication between special advocate and party seeking disclosure should be reviewed to maximize input while safeguarding the confidentiality of information.

We note that the special advocates and Justice advocated for the creation of an Office of Special Advocates that would assist with many of these tasks including assisting in ensuring a level of accountability where there is not the traditional solicitor-client relationship as well updates on disclosures of previously privileged information in foreign jurisdictions that would undermine claims to privilege domestically.

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[140] See: http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323we01.htm
[141] See: http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323we11.htm
[142] See: http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323we13.htm

Notwithstanding the creation of such a system, where special advocates still could not communicate openly with the party seeking disclosure, the BCCLA warns that this system will not provide complete rectification for parties seeking disclosure of information. In December 2004, special advocate Ian MacDonald Q.C. resigned his position because he concluded that his efforts were providing a fig leaf of legitimacy to a process that was illegitimate especially in matters relating to indefinite detention which are analogous to Canada's security certificate process.[143] We note that the standard of proof the government needs to meet in deportation under the *Immigration and Refugee Protection Act* is significantly less than the standard in criminal matters. According to Mr. MacDonald, there is an incentive for national security agents not to turn mere intelligence -- that may or may not be accurate, but which provides a reasonable basis for a claim that someone poses a threat to national security and thus subject to deportation – into evidence of a crime such that charges can be laid through more intensive criminal investigations. Why would CSIS turn over information to the RCMP to pursue a criminal investigation or why would the RCMP pursue such an investigation when they've got sufficient information to deport an individual even though the quality of this information will be considerably more suspect than required for a criminal charge? Both agencies have scarce resources and must prioritize those resources. Why would they do anything more than necessary to rid themselves of a problem?

While this approach might make sense from CSIS's or the RCMP's perspective, the problem of this approach for those subject to deportation and from a fairness point of view is that the quality of evidence is greatly compromised. National security agents will not pursue potential evidence as rigorously as if they needed to secure a criminal conviction.

Recommendations:

5. The BCCLA recommends that the *Canada Evidence Act* be amended to authorize the courts to exercise their traditional discretion as to whether a section 38 proceeding should be heard in private and whether *ex parte* submissions are appropriate according to the evidence and the relevant jurisprudence.

[143] Personal communication between Murray Mollard, BCCLA and Ian MacDonald, Q.C. of Two Garden Court Chambers, 2 Garden Court, Temple, London, England, 6 July 2005.

The BCCLA further recommends that the *Canada Evidence Act* be amended to permit a court to hear a section 38 proceeding in private between *all* interested parties with full disclosure of all evidence.

The BCCLA further recommends that the *Canada Evidence Act* be amended to create a system of "special advocates" to argue for disclosure of information when a court is persuaded to hear submission from the government on an *ex parte* basis. Special advocates would have complete access to all evidence subject to a claim of national security confidentiality. A comprehensive system must be developed to ensure appropriate appointments, training and support, access to independent advice and appropriate rules with respect to instructions.

(vi) *Standard of Proof*

Ribic is notably for the Federal Court of Appeal's interpretation of the appropriate test to apply on applications for disclosure under section 38. Recall this a three part test:

(1) is the information relevant in that it may reasonably be useful to the defence following the *Stinchcombe*[144] and *Chaplin*[145] tests;

(2) would the disclosure of the information be injurious to international relations, national security or national defence; and

(3) does the public interest in disclosure outweigh the public interest in non-disclosure.

In applying the third part of this test, the Court found that disclosure would only be justified when the information established a fact crucial to the defence (which the Court identified as a less stringent test) or the information may be necessary to establish the innocence of the accused (which the Court identified as a more stringent test). In adopting this standard the Court relied on a two cases. The less stringent test (crucial fact) was adopted from a civil case: *Jose Pereira E Jihos, S.A. v. Canada (Attorney General)* (2002), 299 N.R. 154 (FCA). For the more stringent test, which the Court in *Ribic* suggested it preferred, the Court relied on a criminal case: *R. v. Leipert*, [1997] 1 S.C.R. 281 which considered when information could be released if it would reveal the identity of an informer: only when the information was necessary to establish the innocence of the accused.

[144] *R v. Stinchombe*, [1991] 3 S.C.R. 326 (SCC).
[145] *R. v. Chaplin*, [1995] 1 S.C.R. 727 at 740 (SCC).

The BCCLA submits that the adoption of this very high standard by the Court in *Ribic* is inappropriate in all cases involving national security confidentiality because it may often be the case that the national security aspect at risk is considerably less than the identity of a domestic or foreign intelligence source. If the risk of harm to national security is lower because of the nature of the information in dispute, then the bar for disclosure should not be so high. It will be impossible to enunciate a precise formula that will be appropriate in all cases as the Federal Court of Appeal in *Ribic* sought to do. But it would be patently unjust for the law to stand on the basis of *Ribic* as we are certain that it will be difficult to meet in many cases yet not necessary to meet to protect national security.

Recommendation:

6. The BCCLA recommends that section 38.06 of the *Canada Evidence Act* be amended to include a section 38.06(2.1) which would state: "In assessing whether the public interest in disclosure outweighs the importance the public interest in non-disclosure, the judge must consider all relevant evidence including, but not limited to, the precise nature of and seriousness of harm to national security if the information were disclosed, and the precise nature of and seriousness of prejudice to the party or parties seeking disclosure if the information were not disclosed."

PART 5: SECURITY CERTIFICATES

(a) Introduction

The *Anti Terrorism Act* did not alone conjure up all the challenges to accountability and balanced power, but it exacerbated and codified them. The BCCLA respectfully suggests that it is to some extent necessary to look beyond the ATA to recommend comprehensive solutions to systematic failings in the area of national security. The BCCLA believes that no assessment of the appropriate balance between national security and individual liberty would be complete without a close look at one of the most important pieces of the national security puzzle: the Security Certificate.

Security Certificates are documents issued under the *Immigration and Refugee Protection Act* (the "*IRPA*") that enable the deportation of permanent residents, refugees, and temporary visitors from Canada without substantive judicial review. Security Certificates initiate a process lacking the procedural safeguards that justify the exercise of judicial and executive authority in a democratic state, including the right to disclosure of the case, the right to confront and cross-examine one's accusers, the right to a public trial, and the right of appeal. Deportees are stripped of the right to reasonable bail and are subject to lengthy terms of pre-trial incarceration during their mostly futile battles to remain in Canada. In exceptional circumstances, deportees may face torture or execution in their destination country upon deportation.

(b) A Brief Sketch of Security Certificates

Security Certificates are intended to be a fast-track process for expelling dangerous persons from Canada. The procedural framework governing Security Certificates is set out in detail in the *IRPA* and has been the subject of judicial elaboration[146]. Unlike other legislation injurious

[146] The process is discussed at length in *Jaballah v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 640. Aspects of the rights to appeal and other procedural obligations of the Minister of Citizenship and Immigration were

to civil liberties, Security Certificates are not a result from the attacks on the World Trade Centre in New York. The current provisions under the *IRPA* are nearly identical to the provisions under its precursor, the *Immigration Act*.

The process can be broken down into the following five discrete stages, the details of which are set out below:

1. Investigation and Report by CSIS.
2. The Certificate is Signed and Filed.
3. Review of Detention
4. Application to Minister for Protection from Death and Torture
5. Federal Court Hearing into the Reasonableness of the Certificate.

Stage 1: Report of CSIS Investigation Forwarded to the Minister and Solicitor General

In the first stage of the process, the Canadian Security Intelligence Service ("CSIS") gathers information on the alleged security risk. The information may be derived from Canadian law enforcement agencies, outside security agencies, the public domain, or from CSIS's own surveillance and investigation. In the case of the high-profile or notorious persons seeking refugee or permanent resident status, CSIS may well have assembled an intelligence brief before the person's refugee claim is initiated.

Once assembled, the CSIS brief is delivered to the Minister of Citizenship and Immigration and the Solicitor General of Canada for their review.

Stage 2: The Certificate is Issued and Filed with the Federal Trial Court

Stage two of the process involves the issuance and filing of the Security Certificate by the Minister of Citizenship and Immigration and the Solicitor General of Canada[147]. The Minister

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dictated by the Supreme Court of Canada in *Suresh v . Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.

[147] An Order in Council passed on December 12, 2004 transferred the responsibility for issuing Certificates to the Deputy Prime Minister, who is also the Solicitor General, which eliminated the protection of having two individuals

and the Solicitor General may issue a Certificate if they are both satisfied the person is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

Factors to be considered in determining whether a person is a threat to national security are set out in s.34 of the *IRPA*. The factors include past, present or future engagement in espionage or acts of subversion against a democratic government, institution or process, or instigation or the subversion by force of any government, engagement in terrorism, constituting a danger to the security of Canada, engaging in acts of violence or holding membership in a group planning the subversion of a democracy. Factors to be considered in assessing violations of human or international rights, and serious or organized criminality are set out in ss.35-37 of the *IRPA*.

If the Minister and the Solicitor General believe the relevant national security factors are present, they must both sign a certificate under subsection 77(1) of the *IRPA* stating that based on a security intelligence report they certify that the person is inadmissible on grounds of security. The certificate must set out the general grounds for inadmissibility. Under subsection 77(1) foreign nationals and permanent residents can be issued with a certificate, but not citizens.

Under subsection 82(2) of the *IRPA* foreign nationals named in a certificate must be detained without a warrant. Permanent residents cannot be detained without warrant on a Certificate; the Minister and Solicitor General must issue an arrest warrant under subsection 82(1) which may be issued when the Ministers have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal. The detention warrant is subject to a judicial review under subsection 83(1) within 48 hours of the initial detention, and is subject to a mandatory review every six months thereafter under subsection 83(2).

Under subsection 77(1) the certificate must then be filed with the Trial Division of the Federal Court for a consideration of the reasonableness of the certificate. The information upon which

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endorse the Certificate. Since that time, the Government recanted and promised to reinstate the requirement to have the Minister and Solicitor General endorse the Certificate. Prior to 1995, Security Certificates were issued by the Security and Intelligence Review Committee: see *No Right of Appeal: Bill C-11, Criminality and the Human Rights of Permanent Residents Facing Deportation*, John A. Dent, Queen's Law Journal (2002) 27 Queen's L.J. 749-784.

the Certificate is based must also be delivered to the Federal Court. The effect of the referral of the certificate to the Federal Court is that all refugee or immigration proceedings under *IRPA* are adjourned and fresh immigration and refugee proceedings cannot be commenced under the *Act* until the judge makes a determination on the certificate.

Stage 3: Review of Detention

The third stage of the Security Certificate process is a review of the detention of the person named in the Certificate. Section 83(2) provides that not later than 48 hours after the beginning of the detention, the designated judge must commence a review of the reasons for continued detention. Section 83(3) provides that a judge shall order the detention be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.

The criteria for continued detention are narrower than the criteria for inadmissibility. During the review of the deportee's detention, the judge may hear evidence in the absence of the deportee, refuse disclosure of information to the deportee[148], deny cross-examination, and rely on evidence that would otherwise not be inadmissible. There is no appeal from a decision extending the detention of the person named in a Security Certificate.

There are no provisions for release comparable to s.515 of the Criminal Code, which allow for the release of even the most dangerous individuals on surety bail or cash deposit. Jaballah's example is instructive: he was denied interim release notwithstanding 14 individuals were prepared to act as sureties.[149] The right not to be denied reasonable bail without just cause is guaranteed under s.11(e), but applies only to persons charged with an offence. The Federal Court has circumvented this protection by asserting that Security Certificates are an aspect of immigration law and do not involve an offence. A detaining judge is thus empowered to disregard the existence of safeguards, such as multiple sureties, which could reduce or eliminate the purported risks of interim release.

[148] *Jaballah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 420
[149] *Jaballah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 420.

Stage 4: Application for Protection under Subsection 112(1) of the IRPA

The fourth stage of the Security Certificate process provides the person subject to a Certificate with the option of initiating an "Application for Protection" with the Minister of Citizenship and Immigration under subsection 112(1) of the *IRPA* on the basis that he or she is a person in need of protection[150]. A "person in need of protection" is a person who if returned to their country of nationality or their former habitual residence would face a substantial risk of death, torture, or to cruel and unusual treatment or punishment.

However, even if the Minister finds that the person will face a risk of death or torture, the application for protection can be refused under subsection 113(d) of the *IRPA* if the nature and severity of acts committed by the applicant or of the danger that the applicant constitutes to the security of Canada warrants a refusal. The determinations are at the discretion of the Minister and are subject to a high standard of judicial review and the Minister's exercise of discretion is given judicial deference[151].

Applications for Protection are often subject to long administrative delays during which the person named in the Certificate languishes in solitary confinement. These delays expose uniformed optimism of the government as it asserts Security Certificates to be a shortcut to deportation. The life of Mahmoud Jaballah, for example, was whittled away by thirteen months in solitary while awaiting a Ministerial decision on whether he would be tortured or killed by the Egyptian government upon his deportation.[152]

Stage 5: Federal Court Hearing into the Reasonableness of the Certificate

The fifth stage of the Security Certificate process involves a mandatory judicial determination by a Federal Court Judge as to whether the Certificate is reasonable. Section 76 of the *IRPA*

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[150] An application for protection can be launched at any point prior to a finding by a Federal Court judge that the security certificate is reasonable. On the request of the person listed in the certificate, a judge, or on the request of the Minister of Citizenship and Immigration, the presiding judge must suspend the proceedings in respect to the proceedings under subsection 79(1) of the *IRPA*. Once the Judge has found that the certificate is reasonable subsection 81(c) dictates that the person can no longer apply for protection, although any existing application may continue.
[151] *Suresh v . Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3
[152] *Canada (Minister of Citizenship and Immigration) v. Jaballah*, [2003] F.C.J. No. 1274 (F.C.A.)

provides that the judge to preside at the hearing will be either the Chief Justice of the Federal Court or a Federal Court judge designated by the Chief Justice.[153]

Along with the Certificate, the Minister and Solicitor General must provide the Court with the information upon which the judge must evaluate the reasonableness of the certificate. Upon filing with the Federal Court, the designated Judge must examine the evidence in private within seven days of the referral. The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.

If a certificate is determined to be reasonable, it is conclusive proof that the permanent resident or foreign national named in it is inadmissible to Canada and the Certificate is deemed to be a removal order that is in force without the necessity of holding or continuing an examination or an admissibility hearing.

On the face of the statue, the person named in the Security Certificate has a right to be involved in the reasonableness hearing. Section 78(i) states that the judge shall provide the person named with an opportunity to be heard regarding their admissibility.[154] However, the evidentiary and procedural limitations on the deportee's participation make it clear that this is a 'hearing' in name only.

Designation of Judges

The inquiry into the reasonableness of a Security Certificate may only be conducted by the Chief Justice of the Federal Court or a Federal Court judge designated by the Chief Justice.

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[153] In *R. v. Zundel*, [2004] O.J. No. 2087, the Ontario Court of Appeal held that a person named in a Security Certificate cannot transfer jurisdiction from the designated Federal Court Judge to a judge of the Superior Court of a Province by resorting to an application for a writ of *habeas corpus*. The OCA found that Zundel did not demonstrate that there was no adequate alternative forum to hear his constitutional challenge to the Security Certificate regime. Zundel's complaints about undue delay and pre-hearing detention in solitary confinement did not persuade the OCA.

[154] In *Chiarelli v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 711, the Supreme Court of Canada held that the predecessor Security Certificate regime, which did not provide the deportee with an opportunity to be heard, comports with the principles of fundamental justice under s.7 of the Charter. Sopinka, J. wrote that Parliament was not required to hold any hearing into the matter whatsoever, and that the process adequately balanced the competing interests of the State and individuals. The decision has been criticized: see *No Right of Appeal: Bill C-11, Criminality and the Human Rights of Permanent Residents Facing Deportation*, John A. Dent, Queen's Law Journal (2002) 27 Queen's L.J. 749-784 at para.39. As *Chiarelli* involved a Certificate issued on the basis of prior conviction for serious criminal offence (with due process attending the conviction), it is arguable that it has no application to an inadmissibility certificate for which there is no underlying due process protection.

Although administrative judges usually retain control over the schedules of other judges, it is unusual for a statue to appoint the Chief Justice of a court to hear cases or appoint cases. Under *IRPA* and its precursor, the *Immigration Act*, persons who are a risk to Canada's national security are precluded from attaining Convention Refugee status, but this determination is usually made by an Immigration Tribunal rather than by two Federal Ministers.

The provision suggests by implication that the legislative intended to distinguish between appropriate and inappropriate judges. Federal Court judges are appointed by the Governor in Council. The legislative designation of a specific judge to sit on review of a Ministerial decision seems to undermine to some extend the appearance of judicial independence[155].

Disclosure of Information

The disclosure of information to a person named in a Security Certificate and their counsel is severely curtailed by the *IRPA*. Under subsection 78(h) the judge must provide the person named in the certificate with a summary of the information or evidence in advance of the hearing, "that enables them to be reasonably informed of the circumstances giving rise to the certificate". However, subsections 78(b), (e) and (h) restrict the Judge from providing the person with any information that, in the opinion of the judge, "would be injurious to national security or to the safety of any person if disclosed." To this end, the designated judge reviews the protected information and hold one or more hearings in which only the representatives of the Ministers and their counsel are present.[156]

The requirement to reasonably inform a person named of the circumstances giving rise to the Certificate falls far below the scrupulous standard of disclosure in criminal cases. Subject to certain exceptions, a person accused of a Criminal Code offence must be informed of the case against them, and must be provided by the prosecutor and investigators with all relevant information, even if the information is exculpatory.

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[155] The argument that legislative designation of judges signals at least a perceived loss of judicial independence was rejected in *Jaballah v. Canada*, [2004] F.C.J. No. 420.

[156] See*Re Charkaoui*, [2003] F.C.J. No. 1815, in which the designated judge refused to disclose even the dates on which he and the Ministers' representatives and counsel had met in secret to deal with the case, on the basis that it was conceivable that the information could be turned to subversive ends. The ruling is in keeping with the Federal Court's propensity to err on the side of secrecy.

Even on the degraded standard of disclosure in Certificate cases, there is a tension between the statutory imperatives. The requirement that the deportee be 'reasonably informed of the circumstances giving rise to the certificate' carries the potential to conflict with the requirement that the judge withhold information believed to be injurious to national security. In some cases at least, the disclosure of some information will be considered necessary to reasonably inform a person named in a Certificate, and the information must be withheld for national security reasons. In those circumstances, which are likely not infrequent, the judge will no doubt err on the side of national security, and the potential deportee will not be reasonably informed on the circumstances giving rise to the certificate.

Section 78(f) provides the Minister with an extraordinary entitlement to demand the return of information from the designated Judge if the Judge intends to provide the information to the person named in the Certificate. In those circumstances, the judge is precluded from considering that information in determining whether the Certificate is reasonable. The effect of the provision is that the Minister retains editorial discretion over the summary of the evidence provided to the deportee, provided the Minister is prepared to forgo reliance on that information at the hearing.

Several lawyers for persons named in certificates including Rocco Galati in the *Jaballah* case have argued that the information contained in the summary is so vague as to render this right meaningless. An opportunity to respond can not be acted upon in a meaningful way if the summary mostly contains allegations but not any of the substantive evidence upon which they are based.

Evidence Taken In Secret

If the Minister of Citizenship and Immigration or the Solicitor General request that all or part of the information or evidence should be heard in the absence of the person named in the certificate and his/her counsel, subsection 78(e) requires the judge to exclude the person named in the Certificate and his or her counsel if the judge is of the opinion that its disclosure would be injurious to national security or the safety of any person. Members of the public are, of course, also excluded from the hearing.

The Rules of Evidence

There are no effective barriers to the admissibility of evidence. The rules of evidence are intended to prevent consideration of evidence which is irrelevant or unreliable. Under subsection 78(j) the judge does not have consider the rules of evidence in making a determination as to the reasonableness of the certificate; the judge is free to consider any evidence that the judge considers to be "appropriate". The criterion of 'appropriateness' is too vague to serve as a rigorous and fair appraisal device in this context.

However, at least the judge in the case is able to see and question the evidence presented to support the certification by the Ministers. The judge is not required to base his or her decision on summaries provided by CSIS and is free to give dubious evidence as much or as little weight as s/he determines is appropriate.[157] The decision must ultimately be based on materials placed in front of the judge even though the person named in the certificate may not be able to see the evidence.

Charter Protections

Legal challenges against security certificates have been launched on the basis that the regime violates fundamental rights protected under the *Canadian Charter of Rights and Freedoms* and that it does not respect Canada's international obligations, including under *the International Covenant on Civil and Political Rights*.

To date, the courts have upheld the process on the basis that detainees held under the *IRPA* are entitled to a diminished level of *Charter* protection. In *Ahani* v. *Canada (T.D.),* [1995] 3 F.C. 669, and again in *Re Charkaoui*, [2003] B.C. 1419, the Court adopted a contextual approach to section 7, stating that the imperatives of immigration policy must govern the context. In particular, the rights of non-citizens who do not have an unqualified right to enter or remain in the country must be balanced against national security issues, such as the prevention of terrorism and the protection of informants, must be balanced in favour of the latter.

[157] Indeed, in the *Zundel* case, according to the designated judge, "a great deal of the Crown evidence is hearsay": *Zundel v. Canada*, [2004] F.C.J. No. 1581 (F.T.C.) at para.24

Standard of Review

The standard of review imposed on the designated Federal Court judge is not difficult to meet. The Minister must merely show that the decision to issue the Certificate was "reasonable". Where the Certificate was issued on the basis of national security, the test to meet is not onerous. The Supreme Court of Canada defined in *Suresh v. Canada*, [2002] 1 S.C.R. 3 at para 90 what constitutes a "danger to the security of Canada":

> … a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious" in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

Taken together, the designated judge could find a Certificate was reasonably issued if there is an objectively reasonable suspicion that a foreign nation was indirectly threatened. This standard arguably ensnares any vocal political dissident, including such currently fashionable activists as Nelson Mandela, the Dalai Lama, and Martin Luther King. There is an obvious potential for a chilling effect on political expression or action by non-citizens of Canada.

Right of Appeal

The determination of a judge that the Certificate is reasonable is final and may not be appealed against or judicially removed.[158] Similarly, a Certificate deemed to be a removal order cannot be appealed against.[159]

There is no right of appeal from interim decisions, such as temporary detention orders or interlocutory orders. Despite the absence of express statutory provisions preventing such appeals, the Federal Court of Appeal has restricted itself from engaging in a review of a decision of the Federal Trial Court to uphold the continued detention of a permanent resident under the *IRPA*.[160] Similarly, a determination by a designated judge as to what information

[158] *IRPA*, s.80(3)
[159] *IRPA*, s.81(b)
[160] *Re Charkaoui*, [2003] F.C.J. No. 1593, 2003 FCA 407.

should be disclosed in the context of a hearing into the reasonableness of a security certificate is not subject to appeal at the Federal Court of Appeal.[161]

Protracted Detention

Security Certificates give rise to protracted detentions, often in solitary confinement. Currently, a number of individuals have been in pre-hearing custody for many months: Mohamma Mahjoub has been held since June 2000; Jahmound Jaballah has been detained since August 2001; Adil Charkaoui has been detained since May 2003; Hassan Almrei has been held for more than three years in solitary confinement; Mohamed Harkat, held since December 2002.

The Security Certificate process, designed as an expedited form of deporting inadmissible non-citizens from Canada, would appear to have failed in avoiding lengthy pre-hearing detentions.

(c) Security Certificates as Secret Hearings

A review of the procedural framework of Security Certificates lead inexorably to the conclusion that Security Certificates are a form of secret proceeding to deport individuals whose presence in Canada is deemed to be undesirable. While there are other imperfections built into the process, the core problem[162] is that of unaccountable and secret deportation proceedings.

The BC Civil Liberties Association has long been an opponent of secret trials and hearings. Our demand for open and public courtrooms is grounded in the fundamental concept of democracy that the citizens, collectively, exercise the function of sovereign by ruling themselves. This ideal requires citizens to retain the ability to observe, deliberate on, and call into account both elected and unelected representatives of the legislative, judicial, and executive branches of government.

This interest of the democratic citizenry underlying the principle of open courtrooms is elevated to constitutional status by section 2(b) of the *Charter*. As noted by La Forest, J. in *CBC v. New Brunswick*:

[161] *Zundel v. Canada*, [2004] B.C.J. No. 608 (F.C.A.)
[162] In addition to the intolerable fact that potential deportees are subject to indefinite detention.

> The principle of open courts is tied inextricably to the rights guaranteed by s.2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings.... The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'etre of the s.2(b) guarantees.[163]

In *Vancouver Sun (Re)*, the Supreme Court of Canada recently held that the open courtroom principle applies even in the context of terrorism-related investigative hearings under s.83.28 of the *Criminal Code of Canada.* The Court stated:

> The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the hearing under s.83.28(5)(e). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. This conclusion is supported by the choice of Parliament to have investigative hearings of a judicial nature; these hearings must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand.[164]

The submission of citizens to the authority of unelected executive and members of the judiciary is not an article of faith or a product of blind trust. Submission to public authorities is based on an understanding that public and open procedures guarantee the impartiality and reasonableness of the decisions made by those authorities. Absent public scrutiny of the decisions of public officials, and absent the accountability facilitated by publicity, there remains no direct basis for submission to authority.

The claim of national security in the context of Security Certificates tests the commitment of Canadians to the open courtroom principle. The claim that national security requires that justice can only be found in the shadows of a closed courtroom is a discomforting one that it is not subject to public verification.

The impoverished state of justice in closed courtrooms is manifest in the case of Ernst Zundel.[165] Zundel was arrested on February 19, 2003 when making a refugee claim in Canada

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[163] Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 at para.23

[164] *Vancouver Sun (Re)*, [2004] 3 S.C.R. 478 (S.C.C.) at para.38

[165] Zundel is reviled for his anti-Semitic comments, for publicly lauding Hitler, and for his denials of the Jewish Holocaust. He has never been convicted under Canada's hate speech legislation, but he has been successfully sued for contravening Human Rights legislation. The BCCLA believes that the wilful attempt to promote hatred against an identifiable group is immoral, but we also argue that the expressions that form such attempts must be protected from legal sanction or obstruction. See *The Keegstra Case: Freedom of Speech and the Prosecution of Harmful Ideas*, 1985

after being deported from the United States for overstaying his visa. On May 1, 2003, the Minister of Citizenship and Immigration and the Solicitor General of Canada signed a certificate alleging that Zundel is a threat to national security. The issuance of the certificate has halted his refugee claim pending a Federal Court's review of the reasonableness of the certificate and Zundel was quickly detained.

The Ministers certified that Zundel was inadmissible on security grounds. Specifically, they certified inadmissibility on the basis of engaging in terrorism, being a danger to the security of Canada, engaging in acts of violence that would or might endanger the lives or safety of persons in Canada, and being a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in espionage or subversion of a government by force or terrorism.

The Government is alleged that Zundel is a risk to Canada's national security although he had never openly espoused violence and indeed encouraged the non-violent dissemination of his opprobrious ideas. The government claimed that Zundel was 'linked' to various groups and individuals that have used violence in the past and he was alleged to be the patriarch of the white supremacist movement in Canada. Zundel denied that he ever advocated violence and denied participation in violent racist groups.

The challenge to the open courtroom principle, and the challenge to executive and judicial accountability, comes in the government's assertion that most of the evidence establishing Zundel as a threat to national security could be disclosed neither to Zundel nor to the general public, because the disclosure itself would threaten national security. The Honourable Judge Blais, designated to preside over the hearing into the reasonableness of the Certificate, put the difficulty as follows in determining whether Zundel's continued detention was warranted on the basis of national security[166]:

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at http://www.bccla.org/positions/freespeech/85keegstra.html and *Censorship: Hate Literature*, 1969 at http://www.bccla.org/positions/freespeech/69hatelit.html.

[166] *Re Zundel*, [2004] F.C.J. No. 60

"Mr. Zundel's activities have in large part been public. In the context of these public endeavors, Mr. Zundel has never advocated violence…

However, there are reasonable grounds to believe that Mr. Zundel is a danger to national security or to the safety of any persons. Although Mr. Zundel has virtually no history or direct personal engagement in acts of serious violence, his status within the White Supremacist Movement is such that adherence are inspired to carry out his acts in pursuance of his ideology. The Ministers believe that by his comportment as leader and ideologue, Mr. Zundel intends serious violence to be a consequence of his influence…

Mr. Zundel was questioned about a number of people who are part of a dangerous and violent movements, here and abroad, and in every instance, he characterized the relationship as basically superficial, transient, without consequence, and with no funding involved.[167] There is too much evidence to ignore what is obvious. What I have seen in camera[168], and what I heard in Court from Mr. Zundel, are completely at odds. Mr. Zundel wields much more power within the right-wing, extremist and violent movement known as the White Supremacist Movement (however, defined, the only concern for me being the danger it represents to society) than he lets on. He would have us believe that he is only interested in ideas, and that others use his ideas as they see fit, a situation for which he cannot be responsible.

The information made available to me paints an entirely different picture… the evidence points to his own direct involvement with groups he pretends to know very little about…

In various decisions dealing with the security certificate or the related detention, this Court has had to grapple with the problem of a person who presents externally the profile of a peaceful citizen, while maintaining contacts with individuals or groups that are known to be terrorists or to advocate violence. As I stated in *Re Ikhlef*, [2002] F.C.J. No. 352, at para. 57: "Tell me who your friends are, and I will tell you who you are". Mr. Zundel states that this kind of reasoning is to make him "guilty by association". I agree that one must be careful to not confuse acquaintance and complicity. But once again, the test here is one of reasonable belief, and I believe the test has been met. In fact, surpassed. Mr. Zundel represents a threat that far exceeds guilt by association…

The Ministers have provided considerable evidence, that cannot be disclosed for reasons of national security, that Mr. Zundel has extensive contacts within the violent racist and extremist movement. Mr. Zundel stated in his testimony that he know the following people slightly, or had professional contacts with them, or had interviewed them as a reporter. Information showed, rather, that he had dealt with them a great deal more, in some cases had funded their activities, and generally had maintained much closer ties than what he had admitted to in his examination or cross-examination. [Blais, J. provides a list of names of racists from Canada and abroad]…

Thus, while overtly condemning the use of violence, he covertly condones it by maintaining his contact and credibility with groups that advocate and engage in violent acts."

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[167] The procedure underlying Zundel's testimony ensured that he was unable to view or directly respond to the evidence brought forward against him. That is not to say that he would have had a satisfactory response if given an opportunity to speak directly to that evidence – but under the Certificate regime, the public could never know.

[168] The phrase "in camera" refers to a courtroom into which entry is denied. In this context, it refers to a courtroom that is closed to both the public and to the person named in the Security Certificate.

It is plain that the Honourable Judge Blais detained Zundel on the basis of evidence to which he and the Minister alone were privy. Through his ruling, Judge Blais advises the public that Zundel misrepresents himself, and that the truth, as revealed by the secret evidence, is that Zundel is a threat to national security.

Aside from the secret evidence heard in the closed courtroom, there is evidence that would suggest that Judge Blais' conduct of the case is not beyond reproach. On October 21, 2004, the *Globe and Mail* reported that Zundel's lawyers, Peter Lindsay and Chi-Kun Shi accused the Honourable Judge Blais of running an error-plagued deportation hearing that "cheapens and degrades" the justice system. Lindsay and Shi labelled the judge's approach as "misguided and unchecked", and he was derided as unable "to even understand simple submissions". Mr. Lindsay was quoted as saying, "the public case goes far beyond guilt by association… It is guilt by contact. I don't say this easily, but it makes McCarthyism look reasonable".[169] Commentary of this type by a lawyer should not be taken lightly – the profession does not often engage in careless and flamboyant criticism of the judiciary. Further, there have been three unsuccessful applications by Zundel's lawyers to have Blais recuse himself on the basis of a reasonable apprehension of bias.[170]

On November 5, 2004, the *Globe and Mail* reported that in 2001, the U.S. Federal Bureau of Investigation closed its file on Zundel after deciding he was not a security threat. The FBI file was released as a result of a US freedom of information request. On its face, the FBI file is at odds with the conclusions drawn from the secret evidence by the designated judge.

The disparity between the public record and the secret record in Zundel's case brings the problems with secret trials into sharp relief. Zundel and his lawyers, and possibly the FBI, ask the public to believe one version of the truth. The Minister and Solicitor General ask the public to believe another version of the truth. The secret hearing conducted pursuant to a Security

[169] Globe and Mail, Thursday October 21, 2004, Kirk Makin

[170] The last of these applications for recusal was appealed to the Federal Court of Appeal. A three member panel of the Court of Appeal determined that an appeal based on a reasonable apprehension of bias is an exception to the privative clause precluding an appeal from a determination that a security certificate is reasonable, found that the trial judge's refusal to recuse himself was reasonable, and dismissed the appeal: *Re Zundel*, [2004] F.C.J. No. 1982

Certificate does not provide adequate procedural safeguards to ensure accountability and inspire confidence in the judicial result.

Zundel's case is not alone in raising questions about the integrity of the Security Certificate process. In *Re Jaballah*, [2003] 4. F.C. 345, the Court was confronted with a second Security Certificate, issued after the first Certificate was quashed. In that case, Mr. Gelati, counsel for Jaballah criticized the proceedings, saying that he was incapable of advising his client as he did not know the case to be met, and stating that that proceedings in Jaballah No. 1 were an investigative, interrogatory, and evidentiary basis for Jaballah No. 2. Gelati withdrew as counsel on the basis that the proceedings were incompatible with his barrister's oath "not to pervert the law but in all things to conduct myself truly and with integrity". In that case, the Security Certificate was found reasonable, partly on the basis of an inference that Jaballah must be a senior members of Al-Qaida since there was (untested) information that he had contacted other members of Al-Qaida.

In *Re Ikhlef,* [2002] F.C.J. No. 352, Justice Blais upheld a Security Certificate on the reported basis of associations between the respondent and members of Al Qaida. The respondent testified that he had been given an unfortunate nickname and the alleged associations and contacts were a case of mistaken identity. Justice Blais ordered the man deported on the basis of evidence that he deemed to be undisclosable on the grounds of national security and safety of persons.

In *Re Charkaoui*, the person named in the Certificate also filed a motion seeking disqualification of the designated judge, on the basis that the judge ushered the case along at a the Minister's tempo without regard for the need for the defence lawyer to prepare, on the basis that the judge failed to consider evidence tendered by the named person, and on the basis of delayed disclosure of key evidence the dissemination of which presented no danger to security.[171] That application was dismissed.

[171] *Re Charkaoui*, [2004] F.C.J. No. 757 (F.T.C.)

Those with a commitment to procedural fairness feel repulsion towards secret evidence and one sided arguments because both of them subvert the adversarial process that is designed to penetrate into the truth of the matter at issue. The same holds for the rules of evidence, hearsay, involuntary confessions, and other prohibited evidence has been disallowed in our courts because it is simply unreliable. The fast-track of Security Certificates eliminates these protections, and facilitates judicial reliance on degraded forms of evidence.

Secret trials and secret evidence provoke the BCCLA, as civil libertarians committed to the idea of judicial and executive accountability, to adopt a critical stance. The Minister and the designated Federal Court justice appeal to our faith in their assessment of the evidence, they ask us to embrace a process almost without procedural safeguards. They ask us to believe that justice is done when justice is not seen to be done. No person who believes in the value of judicial and ministerial accountability could, in good conscience, sign on to this "just trust us" approach to protecting our democratic traditions.

Secret trials, including secret hearings conducted into the reasonableness of Security Certificates, are unacceptable for in a democracy. Even when national security is purportedly at stake, judicial processes must retain a set of procedural safeguards adequate to satisfy a reasonable sceptic that judicial authority is not being misused. Similarly, the exercise of executive powers must be accountable to the public and subject to forms of judicial review and public disclosure.

(d) Immediate Trial or Release of "Secret Five" Detainees

The BCCLA respectfully suggests that the Senate and House Committees immediately advocate for an end to the inhumane and indefinite Security Certificate detentions of Hassan Almrei, Mohammed Harkat, Mohammad Mahjoub, and Mahmoud Jaballah.

The ongoing detention of these men is of such ethical and cultural magnitude as to demand immediate rectification. Their detention is an assault to the Canadian conscience. Given the treatment of the detainees, it is not much to ask that current detainees be granted access to reasonable (even heavily supervised) bail while awaiting a hearing and while awaiting

deportation. The real risk posed by these detainees, each having spent three or four years in solitary confinement, could scarcely rise to the level of a national threat.

Recommendations:

The BCCLA urges the House Subcommittee and the Senate Special Committee to advocate for their immediate release or public trial to test the government's allegations of national security threats.

The BCCLA further urges these committees to advocate that Adil Charkaoui's alleged involvement in violent political agitation be put to the test of a public trial without further delay.

(e) Recommendations for Legislative Reform

The BCCLA submits that Security Certificates are an unacceptable and unjust process. Security Certificates result in indefinite detention of individuals without trial. Security Certificates permit deportation to torture. Security Certificates allow the use of information derived from torture. Security Certificates countenance secret hearings without due process. Security Certificates in their present form represent one of the harshest form of oppression and injustice in Canada.

The BCCLA submits that the Security Certificate provisions under the *Immigration and Refugee Protection Act* are in dire need of a drastic overhaul. Amendments proposed by the BCCLA would forbid reliance of information obtained by torture, require the unconditional cessation of the practice of deportation to torture, prevent indefinite detention, maximize public disclosure of evidence, and enhance judicial oversight of the process. These legislative reforms, however, are of diminished importance; ongoing inhumane and indefinite detention is the more pressing and urgent concern.

Recommendations:

1. The government should pass legislation that implements our international human rights treaty obligations to prohibit the deportation of individuals to places wherein they face the risk of torture.

2. The government should strengthen rules of evidence and administrative law to forbid reliance in any form by any court or agency on information that is derived from torture.

3. The government should strengthen rules of evidence to admit only evidence that is "relevant and reliable", instead of admitting evidence that is deemed "appropriate".

4. The government should modify secrecy provisions to allow the government to rely on secret evidence only in cases of "imminent threat" and only for renewable time-limited periods.

5. The government should require accelerated appeals to the Supreme Court of Canada (bypassing the Federal Court of Appeal) on the following issues:

a. Whether and to what extent evidence may be withheld from the accused, his or her counsel, or the public; and

b. Whether a person may be detained or deported on the basis of secret evidence.

If Security Certificate detentions are truly of the highest national importance then the service of our highest Court should be engaged to deal with the extraordinary encroachments on due process. Given the history of Security Certificates, we would anticipate a relatively small number of appeals which would not unduly burden the Supreme Court of Canada. Immediate appeals to the Supreme Court of Canada are not unprecedented. Appeals involving publication bans, for example, bypass the Provincial Courts of Appeal pursuant to s.40 of the *Supreme Court Act*.

6. The government should amend the legislation to require reasonable bail in accordance with section 515 of the *Criminal Code of Canada* and s.11(e) of the *Canadian Charter of Rights and Freedoms* for persons awaiting deportation or deportation hearings or who cannot be deported due to a risk of torture.

7. The government should create a regime involving security-cleared lawyers to:

a. Review all secret evidence;

b. Advocate to maximize disclosure of evidence to the person facing deportation and to the public;

c. Advocate against deportation of the person named in the Certificate;

d. Have access to all relevant information, whether it helps or harms to person sought, even if the government does not intend to rely on the information at the deportation hearing.

Detailed recommendations regarding this proposal are found in our Part III of our submissions dealing with s.38 of the *Canada Evidence Act.*

The BCCLA believes the aggregate effect of the reforms proposed above will strike a fresh and healthy balance between the interests of national security and government secrecy on one hand, and due process and democratic accountability of public institutions on the other hand. We recognize that our proposed reforms may introduce greater complexity and expense into Security Certificate proceedings, but these complex and expensive reforms provide the minimum level of protection necessary to counterbalance the extraordinary power to rely on secret evidence said by the government to be necessary to the preservation of national security.

PART 6: ACCOUNTABILITY OF NATIONAL SECURITY AGENCIES

Introduction

> "Openess in any process where human liberty is at stake is simply definitional of what a democracy is. The problem is not defining where the red-line lies, but enforcing it. A democracy in which most people don't vote, in which many judges accord undue deference to executive decisions, an in which government refuses open adversarial review of its measures is not likely to keep the right balance between security and liberty. A war on terror is not just a challenge to democracy; it is an interrogation of the vitality of its capacity for adversarial review."[172]

Following September 11, 2005 there has been tremendous appetite on the part of the Executive branch of government for expanding its capacity with respect to countering terrorism and protecting national security. The *Anti-Terrorism Act* is the legislative centerpiece for expanding this capacity. But legal provisions only tell part of this story. Funding for agencies that undertake national security activities like the RCMP and CSIS have increased significantly in order for those agencies to deal with the perceived new threat posed by international terrorism after September 11, 2001. These agencies have undertaken their own internal restructuring, policy development, amendments to operating guidelines and new training to address what they perceive as the "terrorist" environment. In addition, new agencies like the Canadian Border Service Agency have been created that will play a significant role in national security agencies. Meanwhile, elected officials have consistently warned that Canada is not immune to terrorist attacks and have made national security a governmental priority. In sum, there has been a complete reinvigoration of the national security establishment to address concerns in a post September 11 world.

Regrettably, the BCCLA submits that there has not been the same reinvigoration of mechanisms for civilian oversight and review of national security agencies' activity to ensure adequate accountability and the protection of the rule of law and fundamental freedoms. The time has come to rectify this imbalance.

The BCCLA submits that there needs to be substantial reform to ensure the accountability of national security activities through the following means:

1. Judicial Review

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[172] Michael Ignatieff, *The Lesser Evil – Political Ethics in an Age of Terror*, (Toronto: Penguin, 2004) at 12.

2. Parliamentary Review
3. Independent Review
4. Accountability through Journalistic Freedom and Civil Society Organizations

(a) Judicial Review

The judiciary must be an essential cornerstone of guarding against improper conduct and unjustified excesses of national security agencies. The International Commission of Jurists (ICJ) strongly supports the central role the judiciary must play in providing an important check on the excesses of governments' efforts to combat terrorism and protect national security. The ICJ is a Geneva based organization of lawyers, judges, legal academics and students devoted to "promoting international law and principles that advance human rights."[173] Current Commissioners include Justice Ian Binnie of the Supreme Court of Canada and Michele Rivet, President of the Quebec Human Rights Tribunal. The ICJ's Past President is former Supreme Court of Canada justice Claire L'Heureux-Dube. Current Canadian section membership includes Ed Ratushny, Chief Justice of Canada Beverley McLachlin, Michel Bastarache and Louis Le Bel, among other eminent jurists in Canada. In August 2004, the ICJ passed the Berlin Declaration: the ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism which outlines eleven principles including:

> "2. *Independent Judiciary*: In the development and implementation of counter-terrorism measures, states have an obligation to guarantee the independence of the judiciary and its role in reviewing state conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply."[174]

The BCCLA has made considerable recommendations for reform with respect to section 38 of the *Canada Evidence Act* which would ensure a much more vigorous role for the judiciary in reviewing claims to national security. We urge the House Subcommittee and the Senate Special Committee to consider other ways to enhance the role of the judiciary in providing an important check on the activities of national security agencies to ensure that they are able to pursue legitimate national security and counter-terrorism work while providing adequate review authority for the judiciary.

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[173] Cristin Schmitz, "ICJ seeks world-wide limits on anti-terrorism measures", *The Lawyers Weekly*, Vol. 24 (17 September 2004).

[174] http://www.icj.org/news.php3?id_article=3503&lang=en

Related to judicial accountability is the need for open courtrooms which enhance the ability of media to call to account both the judiciary and our national security apparatus. The BCCLA will discuss this principle in more detail below.

(b) Parliamentary Review

Recent Efforts to Enhance National Security Accountability via Parliament

In early 2004, the federal government tabled a discussion paper regarding the creation of a parliamentary committee on national security.[175] This discussion paper suggested that a parliamentary committee's overarching purpose should be to improve the effectiveness of Canada's security arrangements which it would best achieve by focusing more on the strategic levels of policy, administration and expenditures rather than on operational aspects which would be best left to a specialist review agency like the Security Intelligence Review Committee or the Communications Security Establishment Commissioner.

In May of 2004, an Interim Committee of Parliamentarians on National Security was created to review the discussion paper, undertake research and consultations with a view to providing feedback to the Minister of Public Safety and Emergency Preparedness. In October 2004, the Interim Committee submitted their report to Anne McLellan.[176] A majority of members of the Interim Committee recommended that a "Parliamentary Intelligence Committee" (PIC) be created as an "innovative joint committee of Parliament" with four members from each of the House and Senate. The PIC's mandate should be broader than that proposed by the Minster's discussion paper including reviewing the effectiveness of the intelligence community, compliance with the *Charter of Rights and Freedoms* and ensuring fiscal responsibility. Members of the PIC would have access to classified information and secrecy would be assured through security clearances, oaths and Privy Councilor status for members. The PIC would report to Parliament annually regarding its work. PIC members would be appointed by the Prime Minister with concurrence from the Leader of the Opposition with respect to the appointment

[175] "A National Security Committee of Parliamentarians A Consultation Paper to Help Inform the Creation of a Committee of Parliamentarians to Review National Security", online: http://www.psepc-sppcc.gc.ca/publications/national_security/pdf/nat_sec_cmte_e.pdf
[176] Online: http://www.pco-bcp.gc.ca/docs/Publications/cpns/cpns_e.pdf

of opposition members. In order to ensure stability and continuity, the PIC would continue operations through dissolutions and prorogations of Parliament. The PIC would be able to authorize secondments and exchanges of staff with the intelligence community. No similar recommendation is made with respect to staff with experience in civil liberties and human rights. SIRC and other review agencies would continue to report to their responsible Ministers but they would also work through the PIC who would be their "principal interlocutor in Parliament.[177]

In April 2005, Minister McLellan responded to the Interim Committee's report with a commitment to draft legislation that would create a "National Security Committee of Parliamentarians" (NSCP).[178] The Minister's vision for this committee is considerably narrower than that recommended by the Interim Committee. The NSCP would not duplicate the work of other independent review agencies like SIRC or the RCMP CPC – notwithstanding that the CPC does not have a national security review role as we shall see below. Instead, the focus of this committee will be policy, administration and fiscal matters and any other security or intelligence matter referred to it by the government:

> "The Committee's work would help to ensure that the policies, resources and legislation are in place for the fulfillment of national security goals and objectives and to identify required ongoing improvements to the effectiveness of Canada's national security system."[179]

The NSCP would consist of up to nine Parliamentarians appointed from the House and Senate and from the government and opposition. Members would have limited access to classified information and would be required to take an oath to swear to secrecy. The committee would be assisted with expert staff who would be security cleared. The committee would report to the Prime Minister who would table their reports in Parliament.

The Minister's announcement also recommitted the government to "engaging with Canadians in a long-term dialogue on matters related to national security" through the recently formed Cross-Cultural Roundtable on Security and a new National Advisory Council on National Security.

BCCLA Commentary

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[177] *Ibid.*, at 13.
[178] Online: http://www.psepc-sppcc.gc.ca/publications/news/2005/20050404-3_e.asp
[179] *Ibid.*

Given the information available in the above cited documents, it is clear that current federal government, through Minister McLellan, and the Interim Committee have very different visions with respect to the mandate of a Parliamentary committee regarding national security. The Interim Committee's vision calls for a significantly more engaged committee that is able to assess operational matters and that has both effectiveness and respect for human rights as part of its mandate. The Minister's vision would limit the committee to a role responsible for more macro-oversight of the field of national security with a mandate to review legislation, policy and resource effectiveness. There appears to be no specific role to ensure that the national security apparatus respects the rule of law and human rights.

The BCCLA believes that Minister McLellan's proposal for a National Security Committee of Parliamentarians is a seriously deficient vehicle for promoting the accountability of national security agencies and reviewing national security legislation, policy and practice for accordance with the rule of law and human rights. To be fair, it is deficient because it does not purport to have this mandate. The BCCLA remains to be convinced that either the Cross-Cultural Roundtable on Security or a new National Advisory Council on National Security will play any significant role in protecting civil liberties given Minister McLellan's past defence of the ATA and the need to wage war on terror.

Nor is the BCCLA convinced that the Interim Committee's recommendations would be effective in promoting the accountability of national security agencies and protecting civil liberties and human rights. We say this not because we do not believe that they were sincere in recommending such a mandate for the committee but rather we are concerned that a dual mandate to promote the effectiveness of our national security policies, law and agencies is not ultimately compatible with a mandate to promote the rule of law. We also worry that a committee that has a dual mandate (effectiveness & respect for rule of law/*Charter*), each open to interpretation and emphasis by different committee members, partisan political action by members becomes much more possible. This would ultimately render the committee ineffective. That said, it is a preferable option to that promised by Minister McLellan.

Recommendation:

The BCCLA recommends that the House Subcommittee and Senate Special Committee further advocate for the creation of an effective Parliamentary committee that will have, at least as one its mandates, to promote the respect for the rule of law, civil liberties and human rights in the activities of our national security agencies.

(c) Independent Civilian Review

In addition to judicial and parliamentary mechanisms for accountability, independent civilian review agencies must play an important role in reviewing the activities of national security agencies. The BCCLA submits that the current regime of accountability through the use of independent agencies that report to Parliament is both dated, as in the case of the Security Intelligence Review Committee, or non-existent, as in the case of the RCMP's national security work. The outgoing Chair of the Commission for Public Complaints Against the RCMP, Shirley Heafey, has publicly stated on numerous occasions that her agency is ignored by the RCMP when she seeks to undertake investigations or reviews of complaints that involve national security:

> "The RCMP will tell us nothing about matters involving national security so, despite the clear mandate given by Parliament, there is no effective civilian review of the national security activities of the RCMP."[180]

Just as the national security establishment has been reinvigorated, the BCCLA submits that the time has come for a thorough reinvigoration of the capacity for civilian review and oversight of national security activities via independent agencies in order to provide vigorous protection of civil liberties, human rights and due process.

The creation of an independent authority as a watchdog to monitor the activities of anti-terrorism measures and agencies is another principle that is supported by the International Commission of Jurists (ICJ):

> "9. *Remedy and reparation*: States must ensure that any person adversely affected by counter-terrorism measures of a state, or of a non-state actor whose conduct is supported or condoned by the state, has an effective remedy and reparation and that those responsible for serious human rights violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures." [181]

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[180] Jeff Sallot, "Mounties avoiding oversight, complaints commissioner says", The Globe and Mail, October 1, 2005.
[181] Online: http://www.icj.org/news.php3?id_article=3503&lang=en

The BCCLA submits that any independent organization whose mandate is to review the activities of national security agencies will only be able to adequately achieve their mandate if they receive adequate funding. The BCCLA notes that current funding for the Commission for Public Complaints Against the RCMP (CPC) precludes automatic review of any RCMP in-custody death of a civilian.[182] A public official for the CPC has described their funding as being so insignificant that the total amount would not qualify as a rounding error in federal government accounts.[183] The government will need to ensure that independent review agencies receive adequate funding to achieve their mandate.

Below, we discuss the creation of two independent agencies to ensure an appropriate balance between security and civil liberties/human rights: the National Security Review Committee and the Office of the Civil Liberties Ombudsman. Our submissions reproduce, with a few minor amendments, our submissions to Mr. Justice Dennis O'Connor, Commissioner of the Arar Inquiry, regarding his Policy Review mandate to make recommendations regarding a new review mechanism for the RCMP's national security activities. The BCCLA has been invited to appear before Mr. O'Connor during public hearings with respect to the Policy Review in November 2005 in Ottawa. Our entire submissions to the Arar Inquiry's Policy Review can be viewed at: http://www.bccla.org/othercontent/05ararpolicy.htm We urge the House Subcommittee and the Senate Special Committee to adopt these recommendations in their report.

Recommendation:

(i) National Security Review Committee

The BCCLA recommends that the Arar Commission recommend that the government of Canada create a new National Security Review Committee (NSRC)) that has jurisdiction and adequate authority to review all federal and provincial agencies engaged in national security and counter terrorism work.

(a) National Security Review Committee Jurisdiction and Authority

The NSRC would have the following characteristics and powers:

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[182] Personal communications between BCCLA officials and CPC officials regarding a policy for automatic review of RCMP in-custody deaths.

[183] *Ibid.*

- Officer of Parliament: As an Officer of Parliament, the Chair of the National Security Review Committee would report directly to Parliament rather than just to a Minister responsible. This would ensure greater independence and is consistent with other review agencies including the Privacy Commissioner of Canada, the Information Commissioner of Canada and the Auditor General of Canada. This would also be consistent with the fact that this Committee would review the national security work of a variety of federal agencies rather than just one agency or Ministry. The CPC and SIRC currently only report to the Minister of Public Safety and Emergency Preparedness Canada.

- National Security Jurisdiction: The National Security Review Committee would have the mandate to review not only the national security work of the RCMP and CSIS, but also the variety of other federal agencies that are engaged in national security work including but not limited to: the Canadian Border Services Agency, Citizenship and Immigration Canada, the Department of Transport, Department of Foreign Affairs, and the Financial Transactions and Reports Analysis Centre of Canada.

- Members and Staff: The most important appointment will be the Chair of the National Security Review Committee. Like SIRC, a committee would normally include other appointments though the BCCLA has no strong position on whether a number of members need be appointed. However many appointments are made, they should be non-partisan, made by the Prime Minister's Office and vetted by an all-party Parliamentary National Security Committee. The appointment process should be transparent and qualifications for membership should be published. As staff of the National Security Review Committee will do the bulk of the detailed work of the Committee, they will need to be experts in their field, highly trained and motivated. The NSCR should publish the names and biographies of its staff in annual reports and on the website.

- Access to Information and Subpoena Powers: Much like SIRC, the National Security Review Committee and its staff would have legal authority to have access to and receive copies of all information in the custody or control of the agency subject to review. In addition to complete document access, the Committee would have the authority to subpoena any individual to compel testimony or produce documents. In order to ensure the security and integrity of information subject to national security privilege, the Committee and its staff would have top level security clearance and other safeguards.

- Authority to Receive, Initiate, Investigate and Determine Complaints: The National Security Review Committee would be responsible for all aspects of complaints including receiving, initiating, investigating and determining the merits of a complaint. With respect to investigations, the Committee would have the authority to delegate an investigation to the agency subject to review. Upon review of the findings and conclusions of the internal investigation, the Committee could accept the conclusions, undertake its own investigation or hold a hearing with respect to allegations of misconduct. After a hearing, an arbitrator would make findings with respect to misconduct and decide upon an appropriate level of discipline/corrective action.[184]

[184] This authority exists under the police complaint process in British Columbia. See B.C. *Police Act*, R.S.B.C., 1996, c. 367, sections 60-61.

- Public Education: NSRC should conduct an ongoing and robust program of outreach informing the public about its mandate and authority including the complaint process.

- Mandate to Audit: We are in agreement with the Canadian Civil Liberties Association that, the National Security Review Committee would not only have the authority to undertake proactive audits of the agencies subject to its jurisdiction, it would have a legislative obligation to undertake such audits. Given the nature of national security work, the BCCLA expects that much of the work of subject agencies will go undetected by citizens and individuals. Unlike, RCMPs general policing work, there will be less direct interaction with people. People subject to questionable practices may not be in a position to actually make a complaint. Therefore, NSRC must have audit authority. In order to achieve the audit mandate, the Committee would have to receive adequate resources to undertake this work. It is the experience of the BCCLA that when review agencies are not adequately resourced, responsibilities and authority that require pro-active measures often get left behind while the organization reacts and responds to those responsibilities it *must* meet. A legislative obligation to undertake and report on audits as well as adequate resources to achieve this mandate would go a long way to rectifying this problem.

  The BCCLA submits that a new NSRC would replace the current SIRC. The BCCLA takes no position on how best to create NSRC but we would expect that current SIRC Committee members and staff would be one prime source, among others, for qualified candidates for NSRC personnel.

(b) Rationale for Single Review Agency for All National Security Work

In making our recommendation for a National Security Review Committee, the BCCLA considered that two factors were of particular importance: (1) the fact that national security intelligence and investigation work is being done by a variety of federal agencies, in cooperation with some provincial agencies, spread over various Ministries and (2) the significant degree of integration of this work between agencies and personnel. Given these factors, the BCCLA believes that a system for review of national security work will require an agency that has jurisdiction to overcome institutional boundaries.

Some suggest that the McDonald Commission envisioned a neat distinction between CSIS undertaking intelligence work in the national security field while leaving the RCMP to be responsible solely for undertaking criminal law enforcement investigations regarding national security offences. In this scheme, the RCMP would not conduct security intelligence work itself. Even if that reading of the McDonald Commission's recommendations is correct (some suggest it is not), the BCCLA always expected CSIS and the RCMP to be working so closely that any fine distinction between the two agencies' jurisdictions would ultimately become blurred. After all, what kind of case would not be a matter of crime prevention/detection concern legitimately within the purview of the RCMP if the matter raises a threat to national security? We doubt the RCMP was ever ready to simply leave all the intelligence detecting work they did prior to the McDonald Commission to CSIS and wait for their phone call. The rise of "intelligence led" policing by the RCMP in national security work has clearly confirmed that the RCMP have reoccupied this field, if

they actually ever left it at all. This current state of affairs is further confirmed by the submission of other parties and intervenors, particularly the submission of the RCMP itself.[185]

Aside from the fact that the RCMP is clearly undertaking intelligence related work in the area of national security, it is very difficult to discern the boundaries between where the work of CSIS ends and the RCMP begins. Some of the very limited public testimony regarding the distinction between the work of the RCMP and CSIS is revealing in this regard.[186]

But in addition to the RCMP and CSIS, a raft of other federal agencies also have their fingers in the national security intelligence/investigation pie. Agencies like the new Canadian Border Services Agency, Citizenship and Immigration Canada[187], Transport Canada, the Department of Foreign Affairs, the Financial Transactions and Reports Analysis Centre of Canada, not to mention provincial police and municipal police forces involved with RCMP led Integrated National Security Enforcement Teams (INSETs), are all now engaged in national security intelligence and investigation. While these agencies will have MOUs and policy with the RCMP and CSIS in terms of cooperation and sharing information (or should have), the boundaries where one agency's work begins and ends vis-à-vis another's is increasingly difficult to determine. In such circumstances, it is imperative that a review agency be able to straddle those boundaries wherever they may exist.

CSIS and the RCMP share personnel. Where an RCMP officer is seconded to CSIS and then is the subject matter of a complaint or investigation, who should review this officer's conduct? While technically an RCMP officer, CSIS will understandably be reluctant to open its files and cooperate with an investigation by the CPC. But is it appropriate for the SIRC to be making determinations about whether an RCMP officer seconded to CSIS has committed misconduct and what the appropriate corrective action should entail? A single review agency overcomes this serious problem.

CSIS and the RCMP share information as do other agencies involved in national security work. A civilian review agency responsible for ensuring accountability in the area of national security must be able to follow the thread of evidence either forward to its conclusion or back to its inception regardless of whether it originated with the RCMP, CSIS or some other agency. This requires that the civilian agency have access to information for all agencies relevant to a particular matter or file. Just consider the problem if the Arar Commission was limited in its jurisdiction to consider information held only by the RCMP. Indeed, the Arar case simply illustrates in stark relief the fact that any national security matter will cut across agency lines. A review agency will need to go where the evidence takes it rather than bumping into jurisdictional boundaries that frustrate its enquiries. National security review requires a single agency to cover all federal and provincial agencies engaged in national security work.

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[185] RCMP Submission, at 3-14.

[186] In particular, see the testimony of RCMP Deputy Commissioner Garry Leoppky at pages 740-41 and 775-785: http://www.stenotran.com/commission/maherarar/2004-07-05%20volume%205.pdf

[187] A very recent example of this work being undertaken by Citizenship and Immigration Canada is a report entitled "Mail Seizure" by Ray Bowes, an "intelligence analyst" with CIC: Mark Hume, "Fake documents flooding into Canada, report says" *The Globe and Mail* (16 March 2005) A9.

There are a variety of other new initiatives post September 11 that indicate that national security work is becoming more and more integrated across institutional lines. For example, the RCMP along with other agencies including provincial and municipal police created Integrated National Security Enforcement Teams (INSETs). INSETS utilize personnel from across law enforcement and other agencies (including CSIS) to provide front line national security work (intelligence, prevention and investigation). Another example is the work of Integrated Border Enforcement Teams (IBETs) dealing with international borders.

In addition to issues regarding the number of agencies involved in national security work and the degree of integration across agency boundaries of that work, there are other reasons to rationalize a system of civilian review in one office. First, the standards of review and their equal application to all personnel engaged in national security activity should be harmonized across agencies. Second, the RCMP would not be singled out for special attention in this reform measure, nor should it be. Third, a single review agency would avoid jurisdictional rivalries or conflict between different review agencies such as the CPC and SIRC. Finally, and critically, a single review agency will be in a much better position to survey the entire landscape regarding national security work with a review to ensuring adequate accountability. Whereas the perspective of the CPC or SIRC will be understandably focused solely on the agency they review, they will miss the "big picture" that a single review agency would be able to provide to identify issues of concern that cut across jurisdictional boundaries.

The BCCLA notes that even with NSRC, the CPC would continue to provide civilian review with respect to all other RCMP policing. We acknowledge that creating two civilian review systems for the RCMP could pose a challenge. We would expect that the RCMP would rather be subject to only one system of review. However, taking into consideration all the factors listed above, from the perspective of civilian review of national security work, it would be more prudent to proceed with reform in line with our recommendations. We also note that under a system as we propose, the National Security Review Committee would be able to call upon the specific expertise and knowledge of the CPC to assist in the Committee's work regarding the RCMP.

(c) Civilian Review to Make Determinations Regarding Misconduct

The BCCLA submits that the current system with respect to civilian review of the RCMP is deficient because the CPC has only limited power to make recommendations to the Commissioner of the RCMP and the Minister.

In the view of the CPC, this limited authority and the fact that the Commissioner of the RCMP rejected 25% of the critical findings of the CPC and 21% of its recommendations in 2003/04 is actually a sign of "healthy tension" and "true dialogue" between the RCMP and the CPC.[188]

The BCCLA respectfully disagrees. In our view, the best system for civilian review of past conduct requires the power for a civilian agency or an independent process with civilian adjudicators to make determinations with respect to the propriety of conduct. A system that permits the RCMP, or any service agency, to make final determinations with respect to the appropriateness of the conduct

[188] See Submissions of the CPC to the Arar Commission, *supra*, note 2 under the heading "Definitions - The Forms of Accountability and the Forms of Review"

of its officers in particular circumstances is in fact the opposite of true civilian accountability of the police.

The BCCLA draws an important distinction here between determinations with respect to the propriety of specific *conduct* on the one hand and *policy* on the other. The BCCLA submits that the most appropriate body in which decisions with respect to policy must reside is with the Minister of Public Safety and Emergency Preparedness (formerly the Solicitor General) with respect to the RCMP or the appropriate Departmental minister. We base our position on the theory of responsible government in which Ministers of government have responsibility for the agencies under their direction and a responsibility to Parliament as a matter of accountability for those agencies. This latter notion is reflected in section 5(1) of the *Royal Canadian Mounted Police Act* and recent Ministerial Directions regarding the RCMP.[189] Thus, the Minister is responsible for setting broad policy under which the RCMP operates.

This distinction is also notable in legislation under the *Police Act* in British Columbia. Under this legislation, a complaint is classified as either a "public trust" complaint or "service and policy" complaint. The former deals with allegations of misconduct by specific police officers whereas the latter deals with complaints regarding service or policy. Whereas public trust complaints can lead to a hearing by an independent arbitrator for adjudication, policy complaints are ultimately left to the local government police board, a civilian oversight authority, to determine.[190]

That said, the BCCLA submits that the National Security Review Committee should have the authority to review and make public recommendations regarding policies of the RCMP and other agencies with respect to national security. The RCMP should be able to accept or reject such recommendations and indeed there may be a healthy tension here as suggested by the CPC as long as the final determination with respect to policy is made by the Minister as part of her responsibilities to direct the RCMP. In order to ensure that the Minister is held to account for policy decisions, the review agency must make its recommendations public via the Parliament of Canada. In turn, the Minister must have a legal obligation to respond publicly in Parliament to policy recommendations by NSRC.

The BCCLA notes that current provisions of the *Royal Canadian Mounted Police Act* do not provide for policy complaints unlike the B.C. *Police Act*. This absence may sometimes subject RCMP officers to unfairness in that they may be the respondent in a conduct complaint when in fact they are just following RCMP policy. This problem should be rectified both with respect to national security matters but also with respect to all policing undertaken by the RCMP.

(b) Office of the Civil Liberties Ombudsman

The BCCLA recommends that the Arar Commission recommend that the federal government establish the Office of the Civil Liberties Ombudsperson (CLO).

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[189] For a fuller description regarding these Ministerial Directives, see Arar Commission, *Police Independence from Governmental Executive Direction, A Background Paper to the Commission's Consultation Paper*, October 2004 at pages 6-8.

[190] B.C. *Police Act*, R.S.B.C., 1996, c.367, s. 63 and 63.1.

(a) Jurisdiction and Authority for a Civil Liberties Ombudsman

The mandate and authority of the Civil Liberties Ombudsman (CLO) would include:

- Mandate of the Civil Liberties Ombudsman: The mandate of the CLO would be to promote and protect civil liberties, the rule of law and *Charter* values in the context of national security.

- Officer of Parliament: Like the National Security Review Committee, the Civil Liberties Ombudsman would report directly to Parliament in an annual report and in hearings with a Parliamentary Committee on National Security.

- Advise the National Security Review Committee and Government: As an expert in civil liberties, the CLO would be able to provide advice and guidance to the NSRC in its work to review national security agencies as well as the government.

- Audit the National Security Review Committee: The CLO would have access to all information and files of the NSRC. It would *not* have access to information directly from or contact directly with the RCMP, CSIS or other agencies providing national security work. While it may have informal discussions and meetings with these agencies, the CLO is not meant to regulate them directly but rather to be an additional check on the work of the review committee. As such, the CLO could make recommendations to the NSRC regarding the conduct of particular files both in an ongoing way in an advisory capacity or as an *ex post facto* review of files.

- Review Complaints: On the request of government, by a request of a complainant or on its own initiative, the Civil Liberties Ombudsman would have discretion to review the substance of a complaint. To do so properly, it would have access to all relevant information regarding the complaint including the NSRC file and could direct NSRC to obtain further information from the agency subject to the complaint. After reviewing a complaint, the CLO would make recommendations to NSRC and/or government by filing a report with Parliament.

- Law Reform: The CLO would be responsible for reviewing all proposed national security legislation by the federal government and making recommendations regarding law reform in the field of national security when it determines that it is appropriate to do so.

(b) Rationale for a Civil Liberties Ombudsman

By its very nature, national security intelligence and investigation work is shrouded in secrecy. The front line agencies that undertake this work understandably advocate for the utmost protection for national security and national security confidentiality. That is their mandate; they serve to protect. To properly review and obtain access to all classified documentation and information, review agencies naturally are also obliged to maintain this confidentiality. If one reads an annual report from SIRC, this need to maintain confidentiality of national security information is evident. While one has a general understanding of what issues are audited and reviewed by SIRC in a given year, SIRC's public reports are short on details. In the world of national security, it is very much a "trust us" scenario both with respect to front line service agencies like the RCMP and CSIS and review

agencies like SIRC. This is not so much a criticism as a recognition of the sensitive informational context of this particular field.

But in such a clandestine context, how can the public have confidence that the independent agencies set up to safeguard the rule of law and basic rights are doing their job? As noted, SIRC's annual reports provide limited detail regarding SIRC's review and CSIS's work due to national security confidentiality. Subject to acceptance of our submissions in section V below, this may be a continuing barrier to ensuring transparency and public accountability even with a new National Security Review Committee. The problem with such limited disclosure of information is not only that the public is not fully informed about national security activities, it is not informed about the extent and nature of the review of those activities.

If there was a Parliamentary national security committee, this committee would be responsible for reviewing the reports of review agencies and holding hearings into their work and the work of national security agencies in general. But again, such a committee will hold much of those hearings *in camera* and operate under strict confidentiality. Furthermore, we would expect such a committee's mandate to include ensuring Canada's national security apparatus is functioning *effectively*. As such, this committee's task will likely be as much an advocate for more national security as the agencies (RCMP, CSIS) themselves rather than an advocate for appropriate review of national security work.

Given the fundamental civil liberties as stake and the devastating impact errors by national security agencies may have on individuals, the BCCLA submits that a civilian review office or review by a Parliament committee on national security should be augmented with other checks.

Any watchdog that takes its mandate seriously will also be preoccupied with the question of who keeps an eye on them. For example, if one visits the website of the Office of the Auditor General, under the heading "What We Do", one finds the category: "Who Audits the Auditor General?" The website then describes how the Auditor General is itself subject to accountability for the work it undertakes in furtherance of its mandate including meeting with parliamentary committees responsible for public accounts as well as initiating "quality assurance" reviews.[191]

Aside from needing assurances of a check on the watchdogs, one must ask who is advocating for civil liberties within the national security field. The metaphor of a "balance" between national security and civil liberties is often invoked. But to obtain a correct balance, there must be a counterweight. It is evident in today's geopolitical context that the weight of national security is massive and that many powerful interests advocate for this side of the equation. In this context, is it reasonable to expect that review agencies like SIRC or the CPC can provide an adequate counterweight? The BCCLA's experience is that review agencies tend not to operate as an advocate but rather try to strike the right balance.

It is important to pause to note concerns about "captured regulators". A review agency like SIRC works closely with CSIS in a relatively obscure context which, because of its secretive nature, is not subject to the normal scrutiny with which Parliament, the media and ultimately the public is accustomed to in public affairs. There is always a danger for regulators to tend to see the world

[191] Visit the Auditor General's website at: http://www.oag-bvg.gc.ca/domino/other.nsf/html/auqdn_agvg_e.html

more like those they regulate. This danger is more significant in the cloistered environment of national security. The BCCLA is not suggesting at all here that SIRC has failed in its mandate. Indeed, we are not in a position to judge not having access to all relevant information. But that is the point. No one is in a position to judge because of the inaccessibility of access to such information. The BCCLA and other Intervenors before the Arar Commission's Factual Inquiry have some experience on this point. In such scenarios, it is wise to create as many checks and balances as reasonably feasible.

Given this environment, the BCCLA believes that it is time for the federal government to establish a watchdog whose primary mandate is to promote and protect civil liberties, the rule of law and *Charter* values, in the context of national security. Therefore, the BCCLA recommends the creation of the Office of the Civil Liberties Ombudsman to review the work of the National Security Review Committee.

We have outlined the jurisdiction and the authority of the Civil Liberties Ombudsman above. In particular we emphasize that it is body with recommendations powers that seeks to be an additional check on the review agency and thus vicariously on the RCMP, CSIS and other agencies engaged in national security activities. We have sought to structure our recommendations so that it is not a significant additional direct burden on these agencies.

But we wish to add one note about resources for the Civil Liberties Ombudsman. While the CLO must have adequate resources to do its job, the BCCLA is not recommending the creation of a new, large bureaucracy. The Office of the CLO should be relatively small and efficient. It will likely not have the resources to take on every possible civil liberties issue in the context of national security and thus will have to focus its resources on the greatest priorities. The BCCLA does not seek to add yet another significant layer of bureaucracy but we believe that creating an office that has a unique role to safeguard civil liberties is an idea whose time has come.

(d) Accountability via Media and Civil Society Organizations

Freedom of the press is a cornerstone of a free and democratic society and is protected in section 2 of the *Charter of Rights and Freedoms*. The media has a particularly important role to play in ensuring the accountability of national security agencies. Current trends towards codifying expansive governmental authority to shroud national security matters in secrecy in the ATA via provisions in section 38 but also changes to the *Security of Information Act* create tremendous and unjustified barriers to accountability via the media.

In addition to the critical role a free press plays in promoting accountability, the range of civil society organizations, including civil liberties, human rights, religious and cultural non governmental organizations, must be encouraged to continue to advocate for liberty and equality. Despite a distinct lack of resources, these organizations are able to call the government to account and garner the attention of the media and the Canadian public.

One means to promote a robust role for the media and civil society organizations is to ensure that our courts remain open and accessible. With respect to this principle, we again reprise our submission to the Arar Inquiry's Policy Review. We urge the House Subcommittee and Senate Special Committees to adopt the same recommendations.

Recommendation:

The BCCLA recommends that the principle of openness be enshrined in the legal regime for a review mechanism of national security work. This principle would take effect in a presumption that the review of the national security activities of the RCMP, CSIS and other agencies would seek to provide Canadians with detailed information regarding audits and review by the National Security Review Committee unless the publication of such information could jeopardize national security. The government would bear the onus of proving how publication could jeopardize national security.

The work of the BCCLA is rooted in a commitment to the grand and unfinished experiment of democracy. We take this to be the notion that we can live together as fellow citizens under a government that answers to a sovereign people, rather than to a king or council.

The idea of democracy involves much more than the bare right to vote. In a robust democracy, each constituent should have the right to contribute to the governance of the collective to the extent that this right is compatible with the same right of all other constituents.

Information about public affairs is vital to the exercise of our right to contribute to governance. To engage politically, to argue and debate, to think and dispute together, to add our voices to the democratic clamour, we need as much information as can possibly be made available. We need to know what is done by government because it is done in our name and because we bear ultimate responsibility.

The dissemination of information to the public is in some ways already a legislative priority. For example, provincial and federal legislatures have relatively recently passed freedom of information laws, which (with some hotly contested exceptions) allow citizens to request and receive information from government sources. We do not say that all access-

to-information statues are ideal, but we are of the view that Freedom of Information rights are an ongoing source of democratic vitality.

In addition to freedom of information laws, the Courts have long been vigilant in upholding the principle of openness, which ensures that courtrooms remain open to press and public. The open courtroom principle, which antedated the *Canadian Charter of Rights and Freedoms*, was elevated to constitutional status by section 2(b) of the *Charter*: the right to free expression and freedom of the press. As noted by La Forest, J. in *CBC v. New Brunswick*:

> "The principle of open courts is inextricably tied to the rights guaranteed by s.2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings.... The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'etre of the s.2(b) guarantees."[192]

The open courtroom principle is not an ironclad rule. Rather, it is a presumption that a court proceeding will be open to the public unless there are compelling reasons why it should not be open to the public.

As set out in the Supreme Court of Canada decisions in *Dagenais*[193] and *R. v. Mentuck*[194], a limit on the open courtroom, such as a publication ban, should only be ordered to prevent a serious risk to the administration of justice, when other measures will not prevent that risk, and when the benefits of the ban outweigh the risks. In the recent case *Re Vancouver Sun*, the Supreme Court of Canada held that the presumption of open courtrooms applies even in the context of an investigative hearing under the anti-terrorism provisions of the Criminal Code.[195]

In our view, there is no principled reason why the open courtroom principle, designed to promote full and fair discussion and criticism, should not be expanded to embrace a more general principle of open governance. The BCCLA believes that the principle of open governance requires that all information about public affairs should be made available to the constituents of this country unless: (1) the release of the information involves a serious risk; (2) measures other than state secrecy will not prevent the risk; and (3) the expected risk of releasing the information exceeds the expected benefit of its release.

In our submission, this principle of open governance should have as much currency in the area of national security as it has in any other area. Matters of national security are issues that are as critical if not more critical to the citizens of a country as other issues. That is not to say that there should be no state secrets -- but only to assert that secrecy must be rigorously justified by the keepers of those secrets.

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[192] [1996] 3 S.C.R. 480 at para. 23.
[193] *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835.
[194] [2001] 3 S.C.R. 442.
[195] [2004] 2 S.C.R. 332.

The principle of open governance does not create a binary choice for government. All secrecy, including state secrecy, is on a spectrum. At one pole, a true secret is known only by one individual. At the other pole, public information is available to all members of the public.

Public institutions can be located anywhere along the continuum of accountability. Institutions may be accountable directly to the public, to Parliament or its Committees, to semi-public Inquiries, to semi-secret bodies such as SIRC, or they may, as they are in an unknown number of cases, be entirely secretive and unaccountable to anyone.

The BC Civil Liberties Association urges the Arar Commission, in reaching its conclusions on issues of policy, to ensure that any recommendations for institutions comports to the greatest extent possible with the principle of open governance. Open governance is democratic in the most direct sense, in that the citizens have direct and unfiltered access to the information.

The Association appreciates that in some cases it may be considered necessary to create institutions that operate as a surrogate for the public by screening information in the public interest without providing the public direct access to information. Surrogate institutions are less desirable in that they represent a deviation from democracy -- they are consequently more vulnerable to capture by and dependence on other institutions, and are less capable of adopting a multiplicity of perspectives that the public at large. While surrogacy and its accompanying institutionalized secrecy is sometimes necessary, it is certainly less desirable that direct democracy and open governance.

The BCCLA acknowledges that there may be a need for secrecy in certain defined cases or classes of cases. National security often involves clandestine activity, including activities which the public would consider desirable if we knew of them. Many of these activities would not succeed if their workings were exposed to the public.

However, the BCCLA would encourage the Commissioner to undertake a close analysis of the specific areas in which state secrecy may be justified. This is especially true when considering institutional mandates to report, including the critical issues such as the level of reporting detail and the identity of those to whom reports are provided. The BCCLA believes that democratic open governance and direct public accountability should rule unless otherwise proven.

The BCCLA recognizes that it may not be politically plausible to revamp existing systems of secrecy and partial accountability to conform entirely to the values outlined above. We are acutely aware that there is a danger that if agencies like the RCMP and CSIS perceive that they are subject to unreasonable levels of openness regarding their national security intelligence and investigations, they may work to subvert such openness.

However, in our submission democratic values should serve to inform and direct any policy changes that flow from the reflections of the Arar Commission. The public should have access to a maximum of information about the steps taken by police and security operatives,

and claims for secrecy on the grounds of national security need always be scrupulously scrutinized.

Where a restriction on full public disclosure is deemed, after critical review, to be necessary, it is vital that the operations hidden behind closed doors be reviewed by third party bodies that can act as a surrogate for the public. To the extent possible, the criticisms and concerns of these third party bodies should have the same force and effect as though the public itself were raising its demands with a unified voice.

Schedule "A"

Compendium of Specific Recommendations

Definitions

1. The BCCLA recommends that the *Anti-Terrorism Act*'s definition of "terrorist activity" be amended to: *any action that is intended to or can be reasonably be foreseen to cause death or serious bodily harm to persons not actively or directly involved in a dispute with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing an act.*

2. The BCCLA recommends that the House Subcommittee and the Senate Special Committee recommend a comprehensive review of definitions and offences relating to national security including the definition of "threats to the security of Canada" in the *Canadian Security Intelligence Service Act* and the harms listed in section 3 of the *Security of Information Act.*

Canada Evidence Act

3. The BCCLA recommends that the section 38 of the *Canada Evidence Act* be amended to remove the inclusion of "sensitive information" and that harm to "international relations" be excluded from the definitions.

4. The BCCLA recommends that section 38.04(5)(b) of the *Canada Evidence Act* be amended to require the Federal Court (and any appeal court) to hold a hearing with respect to any application for an order regarding disclosure. Furthermore, section 38.04(5)(d) should be amended so that any party seeking disclosure has the right to make representations at a hearing.

5. The BCCLA recommends that section 38.06(3.1) of the *Canada Evidence Act* be amended to limit admissible evidence to that which is "relevant and reliable". Furthermore, this section should be amended to state explicitly that any evidence obtained by torture is inadmissible and that where the source of evidence is from a foreign intelligence agency in a country known to practice torture, the evidence is presumptively unreliable.

6. The BCCLA recommends that the *Canada Evidence Act* be amended to authorize the courts to make final determinations regarding whether information subject to a claim of state secrecy privilege should be disclosed or not.

If the above recommendation is not implemented, then the BCCLA recommends in the alternative that the Act be amended to require criminal charges be stayed or dismissed or that the information in question is not admissible in any other proceeding when a court

finds that the information should be disclosed but the government issues a certificate to prevent the disclosure of information.

7. The BCCLA recommends that the *Canada Evidence Act* be amended to authorize the courts to exercise their traditional discretion as to whether a section 38 proceeding should be heard in private and whether *ex parte* submissions are appropriate according to the evidence and the relevant jurisprudence.

The BCCLA further recommends that the *Canada Evidence Act* be amended to permit a court to hear a section 38 proceeding in private between *all* interested parties with full disclosure of all evidence.

The BCCLA further recommends that the *Canada Evidence Act* be amended to create a system of "special advocates" to argue for disclosure of information when a court is persuaded to hear submission from the government on an *ex parte* basis. Special advocates would have complete access to all evidence subject to a claim of national security confidentiality. A comprehensive system must be developed to ensure appropriate appointments, training and support, access to independent advice and appropriate rules with respect to instructions.

8. The BCCLA recommends that section 38.06 of the *Canada Evidence Act* be amended to include a section 38.06(2.1) which would state: "In assessing whether the public interest in disclosure outweighs the importance the public interest in non-disclosure, the judge must consider all relevant evidence including, but not limited to, the precise nature of and seriousness of harm to national security if the information were disclosed, and the precise nature of and seriousness of prejudice to the party or parties seeking disclosure if the information were not disclosed."

Security Certificates

9. The BCCLA urges the House Subcommittee and the Senate Special Committee to advocate in favour of the immediate release of Security Certificate detainees from custody or an immediate hearing into the reasonableness of the certificates.

The BCCLA further urges the Committees to advocate that Adil Charkaoui's alleged involvement in violent political agitation be put to the test of a public hearing without further delay.

10. The BCCLA urges the government to pass legislation that implements our international human rights treaty obligations to prohibit the deportation of individuals to places wherein they face the risk of torture.

11. The BCCLA proposes that the government strengthen rules of evidence and administrative law to forbid reliance in any form by any court or agency on information that is derived from torture.

12. The BCCLA suggests that the government strengthen rules of evidence to admit only evidence that is "relevant and reliable", instead of admitting evidence that is deemed "appropriate".

13. The BCCLA suggests that the government modify secrecy provisions to allow the government to rely on secret evidence only in cases of "imminent threat" and only for renewable time-limited periods.

14. The BCCLA suggests that the government require accelerated appeals to the Supreme Court of Canada (bypassing the Federal Court of Appeal) on the following issues:

a. Whether and to what extent evidence may be withheld from the accused, his or her counsel, or the public; and

b. Whether a person may be detained or deported on the basis of secret evidence.

15. The BCCLA suggests that the government amend the legislation to require reasonable bail in accordance with section 515 of the *Criminal Code of Canada* and s.11(e) of the *Canadian Charter of Rights and Freedoms* for persons awaiting deportation or deportation hearings or who cannot be deported due to a risk of torture.

16. The BCCLA suggests that the government a regime involving security-cleared lawyers to:

a. Review all secret evidence;

b. Advocate to maximize disclosure of evidence to the person facing deportation and to the public;

c. Advocate against deportation of the person named in the Certificate;

d. Have access to all relevant information, whether it helps or harms to person sought, even if the government does not intend to rely on the information at the deportation hearing.

Accountability

17. The BCCLA recommends that the House Subcommittee and Senate Special Committee further advocate for the creation of an effective Parliamentary committee that will have, at least as one its mandates, to promote the respect for the rule of law, civil liberties and human rights in the activities of our national security agencies.

18. The BCCLA recommends that the House Subcommittee and Senate Special Committee recommend that the government of Canada create a new National Security

Review Committee (NSRC) that has jurisdiction and adequate authority to review all federal and provincial agencies engaged in national security and counter terrorism work, including the RCMP.

19. The BCCLA recommends that the House Subcommittee and Senate Special Committee recommend that the federal government establish the Office of the Civil Liberties Ombudsperson (CLO).

20. The BCCLA recommends that the principle of openness be enshrined in the legal regime for a review mechanism of national security work. This principle would take effect in a presumption that the review of the national security activities of the RCMP, CSIS and other agencies would seek to provide Canadians with detailed information regarding audits and review by the National Security Review Committee unless the publication of such information could jeopardize national security. The government would bear the onus of proving how publication could jeopardize national security.