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Judicial Review, Rights and National Security: The Balancing Act

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Abstract

This study is concerned about state security measures, risk strategies around these measures, the tension created by these measures with established rights and due process, and, in particular, the role of the courts as an independent check on the state's powers. The historical example of the *War Measures Act* and Japanese-Canadians demonstrates a race-based security risk assessment, that public opinion is largely differential to the state's authority and the courts are employed after the fact to justify and legitimate repression. The Gouzenko Affair that follows suggest the judiciary did not hesitate to participate in prosecutorial activity with little regard for formal claims of independence. The question is how much has changed with current national security measures and the perceived security risks flowing from the events of September 11th, 2001.

The *Anti-Terrorism Act* and the *Immigration and Refugee Protection Act* provisions are examined and suggest that although security risks are handled in a more refined and subtle fashion, themes continue. Security crises justify compromise of established rights and due process. Suspects are targeted by these processes and are identified on the basis of race or ethnic background. The courts are still complicit in the administration of security measures in a manner that belies formal claims of judicial independence.

Table of Contents

Chapter 1

National security has become a prominent issue of concern since the terrorist attacks in New York on September 11th, 2001. However, national security issues are of great concern whenever there is political crisis around public safety and this area is one of the main focal points in the modern state's preoccupation with risk. When national security cases are considered by the courts, important decisions must be made around the balance between broad public interests and individual and political rights. The courts' role in protecting rights is further complicated because the relationship between national security measures and public interests are unclear or contentious. Further, critics question whether protections for judicial independence and impartiality are sufficient to guarantee a non-partisan resolution of these complex issues.

In a collection of essays published in response to Bill C-36, now the *Anti-Terrorism Act*, David Dyzenhaus[1] raises questions about the role of judges in national security cases and the influence of government on judicial independence in crises. Dyzenhaus states "at the same time, cabinet ministers, most notably the Minister of Justice, are warning judges that they might have to rethink their approach to adjudication in the wake of September 11th."[2] Dyzenhaus further suggests that the government is signaling the judiciary must change their interpretation of the *Charter of Rights and Freedoms*, at least as it relates to the approach to section 1[3] of the *Charter of Rights and Freedoms*[4], where judges are asked explicitly to weigh alleged rights violations against public interests. The potential for undermining civil liberties is real and present should the judiciary choose to uphold legislation that is in conflict with the *Charter of Rights and Freedoms*.

Lorraine E. Weinrib[5] discusses the *Anti-Terrorism Act*, Bill C-36, as Canada's legislative response to the terrorist attacks on September 11th, 2001 and the potential *Charter* challenges that could ensue. Weinrib explains that the government would prefer a judicial review of legislation because "the Supreme Court of Canada would apply a less rigorous standard of review to Bill C-36 [now the *Anti-Terrorism Act*]."[6] Courts not only consider whether there is an infringement of a *Charter* right but also under section 1 of the *Charter*, determine whether the infringement of said right was justifiable. As we shall see, Canadian courts have often proved more deferential to government security concerns than individual rights.

Kent Roach[7] discusses the danger that a charter-proof and crime-based response to terrorism could pose to the country. Roach feels that the government pride in charter-proof legislation does not necessarily mean that the *Anti-Terrorism Act* is a good piece of legislation. Further, Roach explains that there is far too much reliance on a crime-based approach to terrorism.[8] Gary T. Trotter[9] agrees and explains that the provisions that the *Anti-Terrorism Act* created are completely unnecessary because existing laws already confront these issues. Further, he explains that the new provisions, such as peace bonds and stricter bail conditions, will not protect us from terrorists. Trotter states that the legislation merely provides the public with a false sense of security.[10] This begs the question: can the judiciary balance individual right and public interest if the legislation is "charter-proofed"?

These interpretations suggest a wide range of concerns raised the recent Anti-Terrorism measures in Canada. This study focuses on the role of judicial review in the context of the state's concern about risk. How does the judiciary deal with cases of

national security and further, what involvement does the judiciary have in relation to national security measures? What are the protections of judicial independence and how is judicial impartiality maintained? I will address national security measures in a risk society and the role of the judiciary in ensuring that rights are protected and balanced with the state's perceived need for effective measures.

To this end, some of the legislation that specifically addresses national security will be explored in the context of an emergent risk society. The *War Measures Act*[11] and its successor, the *Emergencies Act*[12] will be examined as a direct historical context for a critical analysis of the *Anti-Terrorism Act*[13]. The Anti-Terrorism Act is a piece of legislation which amends provisions in the *Criminal Code of Canada*, the *National Defence Act*, the *Canada Evidence Act*, the *Official Secrets Act* (now known as the *Security of Information Act*), as well as other legislation to supplement emergency powers. The history of the *Anti-Terrorism Act* and the debate surrounding Bill C-36, now the *Anti-Terrorism Act*, will be addressed to map the formation of the current legislative environment that the judiciary must work within.

The *Anti-Terrorism Act* allows for preventive arrest and closed investigative hearings which undermines established constitutional safeguards, such as *habeas corpus* and the principle of open hearings to the public and challenge Canadian notions of procedural fairness. Following an examination of the debates around the *Anti-Terrorism Act*, the possible applications of the *Anti-Terrorism Act* will be explored. To this end, the relationship between the *Charter of Rights and Freedoms* and the *Anti-Terrorism Act* and the relationship between the *Emergencies Act* and the *Anti-Terrorism Act* will be considered to attempt to understand the impact that the legislation will have on judicial

review and independence. Closed hearings and other departures from established due process place judges close to the government's enforcement of law. This concern looms large in a related legislative sphere: the judicial role in issuing security certificates under the *Immigration and Refugee Protection Act* which will be explored in the final part of this study.

From the wide array of national security cases in Canadian history, I have decided to utilize the examples of Japanese-Canadian internment and the case of Igor Gouzenko because of their parallels with recent events and for the concern these events raise about the role of the judiciary in national security crises. State security measures and judicial responses during World War II and the immediate post-War period provide an excellent and relevant historical context for the exploration of issues of race and judicial independence in national security cases. Japanese-Canadian internment and the Gouzenko Affair not only provide insight into issues of race and judicial independence in national security cases, they also exhibit remarkable parallels to the current state of affairs. Current concerns strongly resemble issues raised by state security measures and judicial responses during World War II and the immediate post-war period.

When exploring the treatment of Japanese-Canadian internment, one can see that Canadian residents were mistreated and abused by the state. The *War Measures Act* allowed the Canadian government to detain Japanese-Canadians for an indefinite period of time because of a potential threat of harm. The state had the ability to commit these injustices because of the unchecked executive emergency powers provided to them by the *War Measures Act*. Further, there was virtually no judicial review and the ineffectiveness of the courts is underscored by virtue of the fact that redress was not provided until 1988

and only then through legislative means. The Japanese-Canadian experience shows how race becomes a factor in Canada when there is a perceived heightened risk in the community.

Igor Gouzenko is not merely significant because of the proximity to the Japanese-Canadian experience but because this case allows for the study of the Taschereau-Kellock Royal Commission. The Commission's operation raised serious questions about the limits of judicial independence, particularly the separation of the judicial branch from executive power of the state during security crises. Two Supreme Court justices perform an investigative role in the Commission to determine wrongdoing amongst 'spy-ring', a role which is typically left to the police. Furthermore, it begs the question whether lower court justices were making a different determination than a Supreme Court Justice.

Since the 1980's, there have been many important legal developments that affect national security responses and form a more immediate connection to the *Anti-Terrorism Act*. The *Emergencies Act* was implemented as a replacement for the *War Measures Act* and was informed in significant part by the abuse of emergency powers during World War II and later application of the *War Measures Act* during the October Crisis of 1970. The *Emergencies Act* was meant to amend the emergency powers of the state in a manner that would be less intrusive on rights. Also, the *Charter of Rights and Freedoms* was implemented in 1982, which entrenched individual rights.[14] Finally, the *Immigration and Refugee Protection Act* was amended to allow for the issuing of security certificates. Security certificates have come to be relied upon to a much greater degree since 2001 as a measure to deal with perceived security risks. As previously mentioned, the issuing of

security certificates place judges close to the government's enforcement of law and raises concerns about judicial independence.

On the broadest level, this study is concerned about state security measures, risk strategies around these measures, the tension created by these measures with established rights and due process, and, in particular, the role of the courts as an independent check on the state's powers. The historical example of the *War Measures Act* and Japanese-Canadians demonstrates a crude blanket race-based security risk assessment. Public opinion is largely deferential to the state's authority and the courts are employed in an after the fact justification and legitimization of repression. The Gouzenko Affair that follows suggest the judiciary did not hesitate to participate in prosecutorial activity with little regard for formal claims of independence. The question is how much has changed with current national security measures and the perceived security threats flowing from the events of September 11th, 2001.

With the *Charter of Rights and Freedoms*, constitutional rights and judicial review of public measures alleged to violate these rights are more explicit and more easily operationalized. Our political culture is arguably less deferential. At the same time, risk assessment and the technologies of surveillance are more sophisticated. The *Anti-Terrorism Act* and the *Immigration and Refugee Protection Act* provisions examined here suggest that although security threats are handled in a more refined and subtle fashion, themes continue. Security crises justify compromise of established rights and due process. Suspects are targeted by these processes and are identified on the basis of race or ethnic background. The courts are still complicit in the administration of security measures in a manner that belies formal claims of judicial independence. Similar patterns

are therefore demonstrated with a different spin. If historical experience is to be taken seriously, we should be concerned.

Theoretical and Methodological Considerations

Methods

Legal and historical research was conducted for the purposes of this study on the role of the judiciary in ensuring that rights are protected and balanced with the state's perceived need for effective measures in the current climate of heightened awareness of national security measures. Legal research traditionally uses cases and statutes as authoritative sources, which are used for the practical purposes of dispute resolution. Although, cases and statutes are important, they provide insufficient information about why laws are passed, the policy considerations around their administration, and how these laws are experienced. Therefore, a range of secondary sources and governmental documents will be considered to provide insight and elaborate analysis of issues about judicial review of national security measures.

This study places emphasis on setting out a historical context. Historical research allows, not only for the interpretation of the political climate, institutional responses and policies, and the effects of laws on individuals and society at a particular time. Historical parallels can also help us to assess ongoing institutional patterns and the potential for legal repression during subsequent security crises. In other words, relevant historical context puts us in a position to evaluate the current situation and concerns arising from a meaningful, evidence-based standpoint.

All historians must be wary of teleological judgement. It must, also be acknowledged that a range of interpretations of the events is possible, some of which may

be found to be more compelling, but none being definitive. Historical parallels suggest similarities but not the exact same fact situation; many changes may have occurred during the intervening time. These limitations can be balanced by understanding the changes that may have occurred, such as the introduction of the *Canadian Charter of Rights and Freedoms*, and by expressing said similarities and differences clearly.

Primary sources, such as legislation and orders-in-council, will be addressed and well as the secondary sources of academic articles and debates concerning legislation, such as the *Anti-Terrorism Act* and legal concepts, such as judicial independence.

Theories of Judicial Independence and Judicial Review

The question of judicial independence or impartiality has concerned scholars and the public for many years. "The formal guarantees of judicial independence and impartiality evolved through the British constitutional history were "security of tenure" and an institutional development of the "separation of powers" doctrine."[15] In 1701, the *Act of Settlement* was instituted, which stated that judges no longer held office at the pleasure of royalty but instead, held office according to good behaviour as determined by a unanimous resolution of both Houses of Parliament. This meant that judges could no longer be summarily removed for displeasing the government. Judges continued to be active members of government cabinets, coming into political controversy in matters like advising the Crown in seditious libel prosecutions, until the beginning of the 19th century in England when separation of powers doctrine was entrenched. The practice of extra-judicial opinions provided to government and the perception of direct judicial involvement in government policy and responses was scaled back, although not eliminated altogether. In British North America, intense controversies concerning

partisan, government manipulated judiciary continued until responsible cabinet government and Confederation where separation of powers (1848) and security of tenure (1867) were entrenched.

The modern elaboration of the formal protections can be found in the *Judges Act*. The Canadian Judicial Council, as an institution administering the *Judges Act*, "hears complaints about federally appointed judges, disciplines or issues warnings to them when warranted, and in extreme cases of judicial misbehaviour, prepares recommendations to Parliament for dismissal."[16] These elements of judicial independence are better described as protections than guarantees. Partisanship is always an issue when judges are involved in public policy formation (such as Royal Commissions and section one reviews under the *Charter of Rights and Freedoms*) and, of course, the very appointment of judges can be politically contentious.

The model of impartiality for judicial recruitment is currently in use in Canada. Neil Boyd notes that:

> "The most necessary prerequisite for judicial office is legal training which must be accompanied by some degree of moral probity and respectability; the judge does not campaign for office on the basis of a policy program, but rather is selected for his legal ability, as adjudged primarily by his peers in the profession; once in office, the judge has tenure for life until retirement age, subject only to removal for misbehaviour: the latter ground for impeachment should never include substantive results in particular decisions."[17]

In this model, as in other models of judicial recruitment, the chosen judges bring certain political beliefs to the courts, which will inevitably inform the decision rendered.[18] There is currently controversy over proposals to increase legislative review of judicial appointments to the Supreme Court of Canada. It is difficult to support that concept that the judiciary are value-neutral, impartial arbiters, in an empirical sense. It is

likely more accurate to state that Canadian judges are able to act independently from political forces if appointed to their positions.[19]

Judicial independence, from a power analysis, is judicial autonomy. "An actor has power when a particular outcome is desired and causes that outcome to transpire. By extension, the actor (like a judge) has independence or autonomy when he or she consistently has power over the relative outcome."[20] Only when judges can remain separate from the executive powers of the state can judicial independence or autonomy be maintained. Judicial independence facilitates the maintenance of human rights or civil liberties.[21] However, when national security measures are examined historically, serious questions are raised about judicial independence, even despite the formal protections of it. The role of judicial review in the area of national security poses the challenge of balancing public interests and individual rights. The judiciary's independent role becomes challenged and the very notion of judicial independence is called into question in national security cases.

Judges, in national security cases, must not only attempt to balance rights and effective measures but they are, also occasionally, called to participate in and assist investigation functions raising concerns about the proper separation of powers and the perception of impartiality. Moreover, it is argued that cases of national security must remain secret and closed in order for measures to be effective resulting in some compromise of the principle of transparent justice through public proceedings. It is thought that by preserving secrecy effective responses are enhanced and the information cannot be used by other security threats. The confusion of adjudicative and investigative functions, the threat to judicial independence and secrecy all call into question basic

formal claims within our constitutional system and raise disturbing questions about protection of rights.

The judiciary is meant to be the impartial arbitrator in all cases that come before the courts. The judiciary provides checks and balances for the courts therefore, ensuring that justice is done. However, when judges must play multiple roles in cases, such as investigator and judge, judiciary independence or autonomy cannot be maintained as politics and personal sentiment play a role in the decisions. In times of heightened risk, the judiciary loses its independence because of the conflict with the political environment.

Furthermore, cases that go before the courts are meant to be a matter of public record but in the cases of national security, the information is kept secret for purposes that might never be known to the public. Therefore, the public must be able to rely on the judiciary to maintain the balance between individual rights and public interests. The judiciary must manage the risk that the public believes is present while still upholding rights.

Political and Social Theory

Understanding the judiciary and its formal relationship to legislative and executive institutions of the state is but one conceptual aspect of the issues examined here. There are more critical analyses of law and the role of the courts but broader political and social theory offers a fuller range of concepts. A broader theory of the state and state actors is more helpful to inform analysis and make sense of this research. There are a number of critical theories that can be utilized to make sense of the larger political dimensions of state responses. Foucault's ideas of surveillance and ethical self-regulating

and Marxist notions of ideology are examples. This thesis pursues theoretical debates around risk, which to certain extent can accommodate notions such as governmentality (Foucault) and ideology.

Risk Theory

Within the context of risk, the actions of the state concerning national security measures can be usefully understood theoretically. Risk is the probability that something negative will occur. In the case of national security, the threat of an activity occurring will be something large, like the terrorist attacks in the United States of America on the World Trade Centre or when Pearl Harbour was bombed during World War II. These events may appear unlikely but there is great concern when the loss of life can be so great and when state sovereignty could be in jeopardy.

Often risk is seen as "occurring probabilistically, with greater or lesser likelihood."[22] "A law concerned with risk control rejects a discrete demarcation between actions regarded as extreme and those regarded as normal."[23] In the case of national security legislation, the limitation of risk is key. Therefore, as we will see, individuals who conduct themselves in a relatively "normal" fashion, such as travelling to visit family in their home country of Afghanistan, may be considered terrorists.

Ulrich Beck argues that we live in a risk society. Beck believes that "the discourse on risk begins where trust in our security and belief in progress ends. It ceases to apply when the potential catastrophe actually occurs."[24] Beck believes that "central to the political analysis is the distinction between risks and threats."[25] Beck further explains that the contemporary threats to society are "(1) not limitable, either socially or

temporarily; (2) not accountable according to the prevailing rules of causality, guilt, and liability; and (3) neither compensable nor insurable."[26]

I agree that the risk society is upon us. Risk discourses saturate our discussions before and after an event because society wishes to limit the possibility of a "bad" event from occurring. Canadian legislation from the *War Measures Act* to the *Anti-Terrorism Act* have shown that the perception of risk to the state has become far more omnipresent and far-reaching. Fear is everywhere. Risk even colour-codes society, which is best illustrated through the terrorist alerts the office of Homeland Security issues in the United States. Furthermore, everyone could possible be a risk to national security. However, Beck distinction between a risk and a threat is far more ambiguous. A threat often is seen as a probability that something will occur whereas a risk is a mere possibility of something occurring. Depending on the situation, a threat and a risk could be insurable, compensable and limitable.

We are in a risk society that is qualitatively different from what has preceded it but the troubles we encounter are nonetheless quite similar resulting in political and ideological solutions masked in a rhetoric of risk and the construction of outside enemies, including people residing in Canada. Risk is as powerful today as a state rhetorical device as it always has been historically in times of crisis. Legislative language, however, has changed over time to reflect a more nuanced view and expectation of rationalistic calculation in targeting who is risky.

The modern state is increasingly relying on actuarials to determine the risk of an event occurring. "Actuarial methods aggregate individual experience to predict and plan for risk. They are becoming more prevalent in all part of society."[27] The modern state is

attempting to predict uncertainty, in the sense that terrorist activities by their very nature, thrive on the fear of officials. The question that arises is: have legislative developments concerning anti-terrorism in Canada reflected an erosion of judicial independence in light of heightened risk sensitivity in an emergent risk society?

Actuarials allow the opportunity to classify individuals into groups when calculated together determine the level of risk and to make decisions to limit risk. Therefore, the threat of activity occurring becomes an essential element of the calculable risk. Actuarial decision making, in association with risk are based on statistical probabilities and calculations of risk and in relation to national security, the calculation of the threat to national security. "Actuarial reasoning about risk gives rise to distinctive techniques for managing risk. Risk management is forward-looking, predictive, oriented to aggregate entities and concerned with the minimization of harms and costs, rather than with the attribution of blame or the dispensation of individual justice."[28] This is a lofty goal for national security because it is difficult to predict terrorist activity, which thrives on fear and uncertainty.

Risk management technologies have been deemed too have become so powerful that they now overcome older class cleavages. There is a notion that argues "risk management replaces punishment, and governance is based on risk dispersal rather than class rule."[29] Rigakos and Hadden, however, question the notion that capitalism has transitioned from "class rule for profit and expiative punishment for the governance of the wayward individual."[30] Class rule and group management may actually be emphasized by risk society because the calculation of risk is political and is therefore class or racially based.[31] Risk further complicates the existing societal divisions and

therefore exacerbates existing conflicts in society.[32] Accordingly, an emphasis on this risk thinking is therefore traceable to the rise of capitalism itself, but in my opinion, the everyday acceleration of risk thinking and actuarial management has qualitatively transformed, as Beck suggests after World War II.

These classifications or risk management techniques, creating discrimination and discrepancies, can unfairly target some groups in the system for many reasons including disproportionately allocating risk to these groups. The discretionary nature of the risk management by determining who is a risk allows for considerable error. The tools used to determine risk can be unfairly slanted towards a certain group of people. Actuarials claim objectivity[33] and yet, in the case of terrorism after September 11th, those people from an Arab country or who have visited an Arab country are considered to be a risk and targeted. Can objectivity in this situation be claimed?

Sujit Choudhry[34], Audrey Macklin[35] and Ed Morgan[36], in their respective articles, discuss the effect that Bill C-36, now the *Anti-Terrorism Act*, will have on minority groups. Sujit Choudhry discusses racial profiling. Racial profiling could be considered a risk management tool. Audrey Macklin discusses border control. Ed Morgan addresses the questions of whether Canadian law has been favouring foreign policy interests and lacking in due process as the United States has done in relation to immigration laws. All of these authors in their own way are dealing with the issue of risk and racism in their respective topics.

Actuarial techniques and practices enter every aspect of our lives because these techniques and practices have become a staple of rationality where social costs and benefits are considered.[37] The rationality is associated with the balance between

protecting the public and protecting the individual.[38] The public must be protected from harm and the security of the whole is more important than the protection of an individual's freedom.

The *Anti-Terrorism Act* and other legislation concerned with national security is more likely to assume that the risk is high and err on the side of caution. The *Anti-Terrorism Act* allows for the arrest and detention of individuals without knowing the reason for the detention. "... People seem to think that it goes without saying that if we want to have more security we will just have to lose something from our democratic rights...."[39] Individuals have been required to take on more responsibility for their own safety and management of risk and therefore, assume that to do so means that some of our democratic rights must be relinquished.

Risk enters into every aspect of our lives and therefore, is considered by the courts. "The concern of the courts is how best to fashion broader incentive to maximize social welfare"[40] and therefore, must consider the risks because this is a concern for the public. Risk management mechanisms are used to control behaviour and in the case of national security, as a means to detain individuals who are perceived to be a threat, while violating their rights. When considering security certificates, indefinite detention, and other provision relating to the prevention of terrorism, the judiciary must balance the possibility that an individual will commit an act of terrorism while still considering the individual rights of the suspected terrorist. As we will see, the judiciary is placed in a precarious position with information remaining secret. Further, the "suspected terrorist" is not charges with any crime and can be held indefinitely or deported to limit the risk that the individual poses to society.

David Schneiderman[41] explores Ulrich Beck's notion of a risk society[42] in so far as the government deals in risk management and perpetuates the notion of risk.[43] Mariana Valverde[44] also explores the concept of risk, assessment and the range of solutions that ultimately create a different risk. Valverde states that at the root of Bill C-36, now the *Anti-Terrorism Act*, the experts are interested in state security and not citizen security, and therefore, are not necessarily the best at choosing methods for the minimization of risk of politically motivated crimes, like the terrorist events of September 11th, 2001.[45]

Conclusion

Today, the state perceives national security to be at risk. I will argue that ultimately the state is attempting to control risk and in doing so, creates an outside enemy, those who the public need to be protected from, namely those of Arab descent. The state through the various pieces of legislation argues that "they" are the problem and we must control these activities by not allowing certain rights. The judiciary has the ability to address the inequality and the targeting of minorities but ultimately, upholds the legislation.

The great injustice occurs not only with Canadian citizens but immigrants or residents of Canada who have come to Canada for many varied reasons. Therefore, the relationship between the *Immigration and Refugee Protection Act* and the *Anti-Terrorism Act* must be addressed. The *Immigration and Refugee Protection Act* does not necessarily protect the rights of immigrants and refugees. The *Anti-Terrorism Act* and the potential threat of terrorist activity has become of greater concern than the individuals

living in Canada. Eventually, society must consider the needs of the residents of Canada, regardless of their citizenship and address the injustices that occur.

The judiciary must uphold the fundamental constitutional principles and the public expectation that all people must be treated with respect and dignity. Judicial review, in national security cases, provides unique problems because the balance between public interests and individual rights can be difficult to achieve. This balance is more difficult to achieve when political pressure is high. Therefore, in national security cases, judicial independence may be called into question and so, minority groups may be adversely affected in the process. Events, such as Japanese-Canadian internment, should never occur in Canada again but until these issues are addressed the likelihood that minority groups will be adversely affected are high.

This study addresses concerns about state security measures, risk strategies around these measures, the tension created by these measures with established rights and due process, and, in particular, the role of the courts as an independent check on the state's powers. The *War Measures Act* and Japanese-Canadians demonstrates a race-based security risk assessment. Public opinion is largely driven and influence by authority and the courts maintain and legitimate repressive activities after the fact. The case of Igor Gouzenko that follows suggests the judiciary will participate in prosecutorial activities with little regard for formal claims of independence without hesitation. The question now is how much has changed with the legislative developments in Canada in the heightened risk sensitivity emerging from the events of September 11th, 2001.

The *Charter of Rights and Freedoms* allows constitutional rights and judicial review of public measures alleged to violate these rights to be more explicit and more

easily operationalized. Our political culture is arguably less deferential to usurping these rights. At the same time, risk assessment and the technologies of surveillance are more sophisticated. The *Anti-Terrorism Act* and the *Immigration and Refugee Protection Act* provisions examined in this study suggest that although security threats are handled in a more refined and subtle fashion, themes continue. Security crises justify compromise of established rights and due process. Suspects are targeted by these processes and are identified on the basis of race or ethnic background. The courts are still complicit in the administration of security measures in a manner that belies formal claims of judicial independence. Similar patterns are therefore demonstrated with a different spin. If historical experience is to be taken seriously, we should be concerned.

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[16] *Ibid.* at 111.
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[26] *Ibid.* at 2.
[27] Jonathon Simon, "The Emergence of a Risk Society: Insurance, Law and the State" (1987) 95 Socialist Review 61 at 62.
[28] David Garland, "Governmentality and the problem of crime: Foucault, criminology, sociology" (1997) 1(2) Theoretical Criminology 173 at 182.
[29] George S. Rigakos and Richard W. Hadden, "Crime, capitalism and the 'risk society': Towards the same olde modernity?" (2001) 5(1) Theoretical Criminology 61 at 62.
[30] *Ibid.* at 62.
[31] *Ibid.* at 62.
[32] *Ibid.* at 73. Please note: Rigakos and Hadden focus on risk in relation to class while I maintain that this principle could apply to any division in society such as race.
[33] Simon, *supra.* note 27 at 62.
[34] Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), (Toronto: University of Toronto Press, 2001) at 367-381.

[35] Audrey Macklin, "Borderline Security," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), (Toronto: University of Toronto Press, 2001) at 383-404.
[36] Ed Morgan, "A Thousand and One Rights," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), (Toronto: University of Toronto Press, 2001) at 405-417.
[37] Beck, *supra.* note 25 at 64.
[38] *Ibid.* at 66.
[39] Mariana Valverde, "Governing Security, Governing Through Security," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), (Toronto: University of Toronto Press, 2001) at 83.
[40] Priest, *supra.* note 22 at 218.
[41] David Schneiderman, "Terrorism and the Risk Society" in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), (Toronto: University of Toronto Press, 2001) at 63.
[42] *Ibid.* at 64-65.
[43] *Ibid.* at 67-69.
[44] Valverde, *supra.* note 39 at 83-92.
[45] *Ibid.* at 88.

Chapter 2

There are many national security crises in Canadian history, from the expulsion of the Acadians through to the October Crisis of 1970 and a great number of sedition and treason trials as well as the application of other national security laws. I have chosen to explore Japanese Canadian internment and the Gouzenko Affair as the most appropriate and telling parallels with current concerns.

In the case of Japanese Canadians, we see the operation of Canada's main modern national security law, the *War Measures Act* (revised in 1987 and now known as the *Emergencies Act*), and its racist administration, which made ethnic status the basis for security risk. We also see the limits of judicial review in such circumstances on matters such as detention without trial, compensation for property confiscated, deportation and political rights.

The Gouzenko Affair involves another modern national security measure, the *Official Secrets Act* (now known as the *Security of Information Act* resulting from amendments created by the *Anti-Terrorism Act*). Disturbing questions about the role of the judiciary in security matters are raised in the secret Royal Commission set up to investigate the alleged spy ring. This resulted in a number of prosecutions and the affair had a wide chilling effect on the public services and opened the Cold War. Most importantly for the purpose of this study, the involvement of two Supreme Court judges, Taschereau and Kellock, in the Commission's secret investigations and recommendations raise serious questions about judicial independence during security crises.

Japanese Canadians and the *War Measures Act*

Japanese-Canadians faced great adversity during and after World War II because of orders in council implemented by the government to remove those persons of Japanese descent living within 100 miles of the Pacific coast. Japanese-Canadians were interned[1], all possessions were seized, lands and possessions were sold, and a number were later "repatriated" or deported. "The Japanese Canadians, who were so forcibly torn from their communities and dispossessed, has become strangers in their own native land, Canada."[2]

The internment of Japanese Canadians flowed from the official legitimization of racism fueled by the perceived threat that the 'Japanese' posed after the bombing of Pearl Harbour. One of the primary reason, according to the government was that Japanese Canadians were interned to protect them from racial violence, a classic illustration of blaming the victim. Miki and Kobayashi are closer to the mark in stating that "the war itself offered the opportune moment for many powerful politicians, business and labour groups, and individuals in British Columbia, to attack the social and economic base of the thriving Japanese Canadian community, under the guise of national security."[3]

Prior to the Second World War in British Columbia, there was strong Anti-Asian sentiment. There was a "long history of discrimination resulting from Canadian social norms that cast Asians in the role of second-class citizens. Stripped of their political rights, Asians had traditionally been politically castrated targets for the rhetoric of B.C. politicians seeking scapegoats for the province's ills."[4] The Japanese attack on Pearl Harbour allowed the intolerant of B.C. society and the politicians who sought their support to revive every racist attitude and charge against Japanese Canadians. Japanese

Canadians were economically well established and were developing a unique market that was thriving.[5]

Anti-Asian sentiments were evident, particularly on the West Coast but could also be seen in government policies, such as the Chinese "Head Tax" and the *Narcotics Control Act.* "The government documents also reveal that the racism that determined the fate of Japanese Canadians was present in both an active and a passive form: the overt, active racism of British Columbia politicians and the passive, often unconscious racism of the federal cabinet as a whole."[6] The overt racists promoted the extraordinary measures against Japanese-Canadians during and after World War II but the silent compliance of the federal cabinet was also necessary to put the orders in council into effect.[7]

Assimilation was supported and promoted not only by the government but also by Japanese-Canadians themselves. Many Japanese-Canadians were encouraged to move to central and eastern Canada where discrimination was thought to be less severe.[8] However, once in eastern and central Canada, Japanese-Canadians discovered that most people did not know about the internment of Japanese-Canadians and many "usually assumed that the federal government had valid reasons for its actions."[9] The government's policy on Japanese-Canadians had everything to do with race. In one publicity campaign in June of 1944, "the government unwittingly publicized the plight of Japanese Canadians"[10] by "attempting to disenfranchise 'all persons whose racial origin is that of a country at war with Canada.'"[11]

The *War Measures Act* was emergency executive-enabling legislation which could employed in a time of war or situations where government perceive a serious

security crisis (termed "apprehended insurrection" as was the case of the October Crisis, 1970). It gives governments exceptional powers to deal with security threats in a manner that minimizes or neutralizes the need for legislative or judicial accountability. Section 3 of the *War Measures Act* explains the powers granted to the governor in council.

> "3. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council extend to all matters coming within the classes of subjects hereinafter enumerated, namely,
>
> (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
> (b) Arrest, detention, exclusion and deportation;
> (c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;
> (d) Transportation by land, air, or water and the control of the transport of persons and things;
> (e) Trading, exportation, importation, production and manufacture;
> (f) Appropriation, control, forfeiture and disposition of property and of the use thereof."[12]

Sections 3, 4, and 5 of the *War Measures Act* could only by utilized after a proclamation of the Governor in Council declaring war, invasion or insurrection, real or apprehended. This declaration of war, invasion or insurrection must be taken to Parliament but Parliament need only ratify the declaration of the emergency.[13] Cabinet was then provided with free rein to pass whatever orders in council were deemed necessary to deal with the emergency, including all items mentioned in section 3 of the *War Measures Act*. By utilizing this act, government had wide power to over-ride established constitutional protections such as *habeas corpus* and due process. Orders in council were implemented and there was absolutely no parliamentary review.

The *War Measures Act*[14] provided the legal foundation and operationalized the government's repressive actions to suppress the perceived threat from Japanese Canadians. The *War Measures Act* effectively transferred legislative powers from Parliament to the Governor in Council and Cabinet. Parliament had little idea as to what was happening on the West Coast because Parliament was not privy to the information about the Orders in Council. Parliament was reassured all was well and that national security was being protected. Legislative accountability was effectively minimized because government orders were not subject to direct Commons approval where questions could be raised as to the appropriate course of action.[15]

How did such a remarkably potent repressive law become a permanent feature of our national security law? F. Murray Greenwood argues that

> "the passage of the *War Measures Act*, virtually without comment, provides a major example of what I think is a recurrent tendency in Canadian history, in times of crisis or perceived crisis, to enact legislation which interferes with civil liberties more seriously than comparable British legislation and to enact it with very little scrutiny."[16]

Executive enabling legislation of this nature has tended to be temporary, limited in duration to wartime or serious emergencies as in similar British or American laws whereas in Canada, it has been a permanent measure. Britain implemented a general statute known as the *Defence of the Realm Act, 1914* or *D.O.R.A.* as it was commonly known.[17] "Unlike the Canadian *Act, D.O.R.A.* expressly stated its grant of power would exist only "during the continuance of the present war" (section 1)."[18] Greenwood explains that the Canadian government has a tendency to pass drastic security legislation in times of crisis without examining the effects on civil liberties or examining the elastic language used.[19]

The *War Measures Act* gave cabinets the full authority to amend established principles of laws and rights or liberties, including the presumption of innocence and *habeas corpus* while claiming to uphold the public good. Many of the Japanese-Canadians were British subjects and yet, were required to register as enemy aliens, surrender boats to confiscation, relocate to a camp, internment and repatriation. The *War Measures Act* gave cabinet "virtually unlimited power to legislate for the 'security, defence, peace, order and welfare of Canada.'"[20] All Parliament was required to do was to ratify the declaration of war or apprehended insurrection. Once ratification was complete, cabinet was given carte blanche to pass any executive order in council to deal with the emergency to serve a defence or security purpose. Orders in council were not subject to parliamentary scrutiny. Essentially, Parliamentary legislative authority was delegated to cabinet. No critical questions had to be faced on the floor of the House of Commons. The opposition party was unable to question the orders as they took shape.

No appeal of the *War Measures Act* had been successful and there were many who believed that any case presented to the courts by Japanese-Canadians would result in the same conclusion. The judiciary's role was arguably minimized in many aspects because of the inability to deal with rights arguments. Before 1982 and the implementation of the *Charter of Rights and Freedoms*, rights arguments could only be raised indirectly. The Supreme Court of Canada and the Judicial Committee of Privy Council largely addressed issues of jurisdiction. Constitutional arguments therefore focused on jurisdiction and Parliamentary authority rather than individual rights.

In 1946, the Judicial Committee of Privy Council deemed the law a valid exercise of the federal government's jurisdiction over Peace, Order and Good Government. *The*

War Measures Act could be utilized to take any rights away from citizens and others, if they were deemed a "danger" to broader public in terms under the rubric of Peace, Order and Good Government. On these narrow, formalistic grounds, the Judicial Committee of Privy Council condoned these actions.[21] They were the legitimate exercise of federal power where the Parliament had delegated responsibility for security measures to the government cabinet. The Judicial Committee of Privy Council did, however, strike down other discriminatory post-war measures that were not passed under the authority of the *War Measures Act.*[22]

Some German and Italian Canadians were affected by the *War Measures Act* during this period, but comparatively a very small proportion. Members of the Communist Party were also affected by wartime orders in council from 1939 onwards. These measures were ended in 1942, although controversy resurfaced with Party members in the immediate post-war period with the Gouzenko Affair. Unlike the uneven application of security measures to these perceived threats, all Japanese Canadians were affected by the *War Measures Act* orders in council. These orders had a comprehensive impact on their lives with an escalating series of measures that included compulsory registration as of anyone of Japanese race with the Royal Canadian Mounted Police (RCMP) as enemy aliens, the confiscation of boats, the confiscation of property, relocation and internment without trial and attempts at repatriation and deportation. Some of these orders continued after the end of the war. Race appears to have played a direct role in the official perception of Japanese Canadians as a security risk.

Persons of Japanese race were first required to register as enemy aliens with the Royal Canadian Mounted Police three months before the bombing of Pearl Harbour.

"The government itself feared treasonable and hostile activities on the Pacific coast, particularly the passing of information from coastal lookouts and fishing boats."[23] Further, fishing boats were confiscated because of concerns from the military and public opinion.[24] After the attacks on Pearl Harbour, Japanese Canadians were required to re-registered and were interned into various camps across the country. In a state of risk and crisis, widespread internment is logical. It is a simple cost-benefit analysis. The benefits of internment and registration far outweigh the costs that could have occurred if Japanese-Canadians were to turn on their adopted homeland.

Japanese Canadians were detained without trial because of the power provided to Minister of Justice "to order the arrest and internment of any person suspected of being an enemy of the state. He was empowered to deny the rights of *habeas corpus* and public trial."[25] Japanese Canadians did not pursue cases concerning the legal question of *habeas corpus* because "In Re Sullivan, it was decided that habeas corpus was unavailable to persons detained under Regulation 21."[26] In subsequent cases, namely Re Gray[27], the court determined that the Defence of Canada regulations were *intra vires*. Japanese Canadians, therefore, focused their attentions on repatriation orders.

Repatriation was forced upon Japanese-Canadians and many Japanese-Canadians left Canada to go back to Japan. However, there was a fight against repatriation by people who felt that Canada was now their home. The Cooperative Committee circulated a petition that denounced repatriation and the restrictions on Japanese-Canadians. Further, the Cooperative Committee wished to show that not all Canadians were anti-Japanese and that many Canadians were extremely disturbed by the wartime treatment of Japanese-Canadians.[28]

The judiciary was not used to combat the unjust treatment of Japanese-Canadians during the period of the war. Many problems were related to attempting a court case to fight the deportation orders-in-council. First, a reference to the Supreme Court "required the consent of the federal government, and it did not prevent the government from deporting Japanese-Canadians while the case was in progress."[29] The judiciary cannot become involved in cases that do not make it to the courts. The limits of constitutional references and powers delegated to the government under the *War Measures Act* made it almost impossible for Japanese-Canadians to have their case heard by the courts.

The Japanese-Canadians did eventually take their case to the Supreme Court where lawyers found themselves arguing that the *War Measures Act* only allowed the government to deport an alien to their home country but did not allow the government to deport citizens of Canada.[30] The lawyers for the government argued that the *War Measures Act* allowed for the deportation of "both citizens and aliens and to strip the deported citizens of their Canadian status without interference from the courts."[31]

The justices unanimously declared the deportation of Japanese aliens and naturalized Japanese Canadians legal.[32] However, there was judicial division, which embarrassed the government in relation to the deporting of Nisei[33] and deporting the unwilling dependents of male deportees.[34] Although, the judiciary did declare the deportation of Japanese-Canadians legal, the judiciary also represented the division amongst Canadians in their decision about who should be deported. The judiciary had to attempt to balance the needs of the public with the concerns of private citizens. Canada's Japanese were still forced to return to Japan so the judiciary did not achieve a balance.

The government then encouraged voluntary repatriation to Japan and dispersal across Canada at an accelerated rate. Japanese-Canadians ran into many difficulties that made it almost impossible to stay in Canada, such as finding a home or a room to rent.[35] Repatriation was still encouraged by the government as the best option for Japanese-Canadians because of the adversity that had to be faced in Canada. However, the majority of Canadians did not support the idea of deportation therefore, the policy was both politically unnecessary and unwise.

The Judicial Committee of Privy Council considered the case of repatriation and as previously stated, was limited to considering decisions surrounding jurisdiction. Individual rights could only be addressed indirectly. The Privy Council determined that the orders in council concerning repatriation and deportation were *intra vires* of the Governor in Council.[36]

Japanese-Canadians decided to seek compensation and civil rights from the government because "Canada's Japanese minority realized that their wartime experiences must not be ignored."[37] Japanese-Canadians felt that the government must restore their civil liberties, acknowledge the injustices they suffered for the range of issues coming out to the orders in council and pay compensation for their losses so that wartime myths of Japanese disloyalty would not be perpetuated.[38] In terms of risk management and assessment, compensation is a cost that must be analyzed when making decisions. Paying compensation Japanese-Canadians is a cost which the state did not consider when deciding take measures against them.

The federal government did not grant Japanese-Canadians substantive compensation in any form until 1988 and the redress package included steps to amend the

War Measures Act. The government, supported by the courts, maintained the view that the measures against Japanese Canadians were a legitimate exercise of government powers during the wartime emergency. In risk actuarials, internment is a legitimate way to limit the risk posed by Japanese-Canadians, even if it is discriminatory.

Discrimination against Japanese-Canadians continued in the post-war period. "On 24 January 1947 Prime Minister King explained that restrictions on the movement of Japanese Canadians to and within British Columbia were being continued only to ensure the success of the resettlement program."[39] The *War Measures Act* orders could only be issued during the war and continue in effect during such time. Separate legislation, temporary emergency transition powers, were passed by Parliament to limit the freedom of movement of Canada's Japanese was limited long after the war had ended and peace had been proclaimed. Provincial legislatures tried to extend the discrimination, notably the British Columbian government's attempt to deprive Japanese-Canadians of the right to vote. In the one positive ruling by the courts, this measure was ruled *ultra vires* provincial powers by the Judicial Committee of Privy Council.

The government continued to restrict Japanese-Canadians freedom of movement by proposing Bill 104, in April 1947, to extend the life of the *National Emergency Powers Act* for another year. Many fought against the extension of the order-in-council which denied Japanese-Canadians freedom of movement.[40] Parliament and many Members of Parliament were in support of the Bill and claimed that the security of British Columbia required the exclusion of Japanese-Canadians and the limits on Japanese-Canadians had no underlying racial prejudice. Repatriation requests, from Japanese-Canadians to the Canadian government, were used as proof of the loyalty of

Japanese-Canadians to Japan and not to Canada. As previously mentioned, repatriation was encouraged by the government but Japanese-Canadians had great difficulty surviving in the atmosphere created by the orders-in-council. The government, with the orders-in-council created an atmosphere in Canada that meant that Japanese-Canadians could not survive, they could not find homes or jobs. The basic necessities for survival could not be found by Canada's Japanese and so they requested to return to Japan with hopes of better circumstances. All of these measures would limit the possible risk that Japanese Canadians posed. However, the state's perceived notion that Japanese-Canadians posed a national security risk was based on discrimination, as discussed.

The government, including Prime Minister King, did not want to acknowledge injustices they committed where Japanese-Canadians were concerned because this would leave the whole wartime experience of Canada's Japanese open to the charge that the government had been unjust, an admission the government was not prepared to make.[41] Therefore, the government would not open orders-in-council to a public inquiry. However, many felt that there had been losses incurred by Japanese-Canadians and therefore, some compensation should be provided to Japanese-Canadians. By admitting wrongdoing, the state would have to pay compensation and would pay politically.

The government could not afford to address all the forms of direct loss and could not appear to be admitting that the actions of the state were wrong. [42] A Royal Commission was recommended to address the issue of Japanese-Canadian losses. "Under the new terms [the terms of the royal commission], compensation would be paid only in cases where neglect or lack of care by the Custodian or his staff could be legally proved, an impossible task."[43] The royal commission would also include any property

disposed of or stolen while in the custody of the Custodian or of an agent appointed by him. The limited terms of reference of the Royal Commission meant there was not danger that the findings would be embarrassing to the government.

A British Columbian Justice, Henry Irving Bird was appointed as the presiding judge of the Royal Commission.[44] This particular royal commission was unique in that no commission had ever been required to investigate so many claims, for so many different types of property being sold under unusual circumstances and owned by people who were scattered all over the country.[45] The commission also had to deal with complicated legal questions and the difficulties associated with assigning value to property abandoned when Japanese-Canadians were forcibly remove and then sold, one to four years later.[46]

The commission was headed by a justice who decided on matters with the law in mind, as can been seen by decisions concerning definition of terms and determination of compensation for loss. However, the extensive process was headed by the justice who could potentially hear a claim in court for damages for injustices while at the same time, determining the value of the property.

The appointment of judges to head a Royal Commission is not necessarily bad but there are dangers and the Bird Commission serves a good illustration. The appointment of a court justice to a commission, which involves such controversial and political issues, can be contentious matter, especially when it can involve participation in government policy. Advocates say that "no one is better suited for the job – judges are excellent fact finders, totally independent and generally respected in the community."[47] Whereas, the critics say that "appointments to royal commissions compromise independence of judges

and leave already overburdened courts even more shorthanded."[48] Separation of powers means that there is no mixture of the executive and the judiciary. The judiciary is meant to remain free from politics and political controversy, no meddling with of the executive with the judiciary; each branch is independent.[49] Laskin explains that while uncomfortable with the short-term appointment to various assignments by the government, she understands the need as long as the judge completes the report and then is finished with the assignment.[50] Judges have to monitor their involvement in the political arena and limit their participation to only those matters relating to their role as a judge.[51] "The Judge must remain and be see to remain impartial."[52] A judge cannot compromise this fundamental principle of justice in Canada.

The commission heard arguments and determined settlement options. As previously mentioned, the idea that the judiciary is separate from the executive powers of the state is essential. The judiciary must not only be separate from the state but must also appear to be separate from the state. The questions arise: was Justice Bird influenced by the government and did he remain autonomous?

Justice Bird suggested that he should draft a list of cases that he felt had no claim, when it was determined that to argue each case individual might last several years. Justice Bird overstepped his bounds as the justice hearing the cases because he cannot make determinations of no claim when he had not heard any evidence. He had entered into the process with a preconceived notion of which cases were appropriate for the commission and which cases were inappropriate. Justice Bird had made a decision before hearing evidence and had determined what the outcome of the case would be.

Claimants' counsel was vehemently opposed to this suggestion and therefore would not agree to this mode of expediency.

In 1946, after hearing considerable evidence, the Bird Commission considered compensation for Japanese Canadian for losses related to property alone. Losses were calculated based on the difference between the sale price and the actual market value at the time of sale. However, often the losses were greater than estimated because properties deteriorated after they were vacated and during the war, prices were lower.[53] Justice Bird ultimately, categorized all claims to the commission and the categories were brought together as joint submissions for decision, only special cases were determined individually.[54] Justice Bird's behaviour is an example of how judges can be influenced by a combination of factors, including personal wants and needs.[55]

Japanese Canadians were dissatisfied with the calculation for compensation provided by the Bird Commission but were unable to pursue further compensation until 1988 when compensation was provided by the Mulroney government.

On May 20, 1986, the National Association of Japanese Canadians (NAJC) proposed seven recommendations to the federal government. The recommendations included:

1) an official acknowledgement of the injustices suffered by Japanese-Canadians during and after World War II;
2) that citizenship be reinstated to Japanese-Canadians who were expelled from Canada;
3) that the records of Japanese-Canadians convicted of crimes under the *War Measures Act* be cleared;
4) that each living Japanese-Canadian affected by the injustices of World War II be granted $25 000 compensation;
5) that the Japanese-Canadians community be awarded $50 million to strengthen the social and cultural well-being of the community;
6) that the *War Measures Act* be amended in such a manner to prevent similar injustices from occurring;
7) that a Japanese-Canadian human rights foundation be founded to foster human rights.[56]

On April 14, 1988, the Ottawa Redress Rally was held to draw attention to the plight of Japanese-Canadians during wartime because the government had not responded to the complaints of Japanese-Canadians.[57] On September 22, 1988, settlement with the Canadian government was reached. The government fulfilled all of Japanese-Canadian's demands with some variation in the amount of compensation. For example, Japanese-Canadians were given $21 000 in individual redress versus the $25 000 requested. One major request was met which was the amended of the *War Measures Act*. The *War Measures Act* was repealed in 1988 before the settlement was reached with Japanese-Canadians and the *Emergencies Act* was proposed to Parliament.

The Bird Commission provided recommendations to the government and the government paid the compensation suggested. "The matter, as far as the government was concerned, was closed. In the absence of strong public demand, there was no political need for the government to compensate the innocent victims of its politically inspired policies."[58] There was a cost to the internment of Japanese-Canadians. Concerns about judicial independence raised by the Bird Commission become even more evident with the Royal Commission that was associated with the Gouzenko Affair.

The Gouzenko Affair and the *Official Secrets Act*

During the same immediate post-war period, Igor Gouzenko presented materials to the Canadian government, which showed that Russian spies were working in Canada. "On September 7th, 1945,..., Gouzenko turned over to the Royal Canadian Mounted Police a number of papers from the Embassy relating to espionage activities of certain members of the Embassy, and made disclosure of the facts within his knowledge relating to the matter."[59]

A Royal Commission was established to investigate the allegations presented by Igor Gouzenko. Two Supreme Court Justices, Robert Taschereau and R. L. Kellock, were appointed to the commission to take evidence.[60] In the Taschereau-Kellock Commission, two judges of Canada's highest court were to investigate the allegations and determine whom, if anyone should be indicted. This confusion of prosecutorial and judicial function clashed with long-standing established constitutional principles, notable the importance of separation of powers to the impartial administration of justice. From the 19th century onwards, only the Judge Advocate in court martial proceedings combined prosecutorial and judicial functions and civilians were rarely tried by such procedure except where war or insurrection made the regular administration of justice impossible.

The basic guarantees under the criminal proceedings were not guaranteed to those people facing the commission. The hearings were held *in camera* and any person brought before the commission had no right to bail or to counsel.[61] Taschereau and Kellock were required to take on a role normally left to the police and crown prosecutors, appearing to do the work of the executive. Therefore, the two Supreme Court Justices departed from the normal role of the judiciary, seriously compromising impartiality and the image of a separation of power.

Following the Gouzenko case, some elements of the press and the opposition party denounced the denial of habeas corpus to suspected spies and were concerned with the departure from regular court proceedings.[62] Furthermore, the press accused the government of gross violations of human rights in the "secret trials."[63] "Sometimes Justices Kellock and Taschereau dropped their impartiality and also pressed witnesses very sternly."[64] Furthermore, counsel and commissioners regularly pushed for

information concerning "who knew whom and whether that person was or was not sympathetic to leftist beliefs."[65] This behaviour can only have a negative impact on the image of the judiciary and the basic principles of impartiality and separation of powers. Taschereau and Kellock appeared to be doing the work of the executive. As Friedland argues, once the judiciary appears to be doing the work of the executive; their image is forever tarnished.[66]

The Taschereau-Kellock began its operations in secret the day after the appointment of Robert Taschereau and R.L. Kellock. "From February 6 to 13, the Royal Commission functioned behind closed doors reviewing the evidence brought by Gouzenko from the Soviet embassy. Gouzenko's oral evidence began on February 13 in sessions that proceeded through the day and into the evening; by February 14, the commissioners had heard enough to justify advising the government that many of those named in the documents and testimony should be taken into custody."[67]

None of the names of those people arrested were revealed however, it was stated that some of those incarcerated were more heavily involved than others, in the activities in conflict with the *Official Secrets Act*. "In the views of Justices Kellock and Taschereau ... the agents had not been motivated by pecuniary reasons (although small payments often were made) but by a desire to serve the interests of "humanity," embodied in the professed goals of the Soviet Union and Marxist ideology."[68]

"Justices Kellock and Taschereau spoke at length about Igor Gouzenko. They had been impressed ... with the manner in which he gave his evidence, and they stated that they had no hesitation whatever in accepting his evidence as factual."[69] Taschereau and Kellock provide opinions that cannot help but influence those who make decisions

concerning the cases. The lawyers for the detainees cannot truthfully argue that the information is incorrect because two Supreme Court Justices have already stated they believe the information to be correct. If there were to be an appeal, the cases would be seen by the two Supreme Court Justices who determined who should be charged in the first place.

The commissioners discussed the legal questions they had to face in their inquiry and justified their actions on grounds of the hostility of witnesses and on the necessity of eliminating the Soviet espionage system in Canada because it could further spread into the government.[70] The commission recommended that all security measures be coordinated to prevent Communist infiltration and also that the information collected by the Royal Commission not be presented to the public.[71] Friedland argues that convictions could be obtained without these provisions in serious espionage cases. Also, he argues that the provisions violate the spirit of the Bill of Rights (which was in place at the time of writing).[72]

The justices believed that information should be kept secret from the Canadian public even though trials are meant to be open and transparent to the public. The Commission, and by extension two judges of our highest court were providing directives to the lower courts that this information should be dealt with in a particular manner.

A further problem that taints the administration of justice in this case was that the evidence was stolen from the embassy. Therefore, the government was not able to present the court with evidence, nor did the government want to present the court with the evidence presented in secret to the Royal Commission. Consequently, if the accused did not provide a full and voluntary confession, there was often little evidence that the courts

could use to determine their case. A judge might never see one of these cases if the accused did not admit to his/her crimes. The Royal Commission allowed the government to sidestep the Canadian legal system and two Supreme Court Justices were included in the process.

Although, as we have seen the *Emergency Transition Act* continued some of the provisions of the *War Measures Act* into the post-war period and empowered the Royal Commission, the most relevant legislation here, as indicated above, is not the *War Measures Act* but the *Official Secrets Act*. The Royal Commission allowed the members to investigate violations of the *Official Secrets Act* without the regular rules and regulations of a court. The *Official Secrets Act* was aimed to prohibit and control access to and the disclosure of sensitive government information and offences include espionage and leakage of government information. The sensitivity of information meant that proceedings involving spying (section 3) or leakage (section 4 wrongful communication of information) could go in camera, compromising the principle of public trials and open justice. Seventeen convictions and over twenty cases considered under the *Official Secrets Act* as a result of the work of the Royal Commission.[73]

The *Official Secrets Act* is a difficult and complicated piece of legislation because "it deals with two separate, although sometimes related, concepts, espionage (section 3) and leakage (i.e., the improper disclosure of government information) (section 4)."[74] Section 3 of the *Official Secrets Act* is broad, particularly the subsection dealing with communicating information to a foreign power, which is where most cases of espionage are prosecuted.[75] Section 3 provides what is in effect a reverse onus and presumption of guilt; the accused must demonstrate that their purpose was innocent. The Crown must

not show any particular evidence that the accused is guilty and can introduce evidence concerning the accused's character, which is not permitted in a criminal case.[76]

Section 4 permits an enormous intrusion into access to information and freedom of the press, having a chilling effect on the public service and the press, as demonstrated by the handful of prosecutions since Gouzenko. As we will see in the next chapter, the *Official Secrets Act* has been amended by the *Anti-Terrorism Act* but its contentious provisions, criticized by government commissions (Mackenzie and McDonald) and by the Law Reform Commission of Canada have not.

Our focus here is on the role of the judiciary. Two Supreme Court Justices, by virtue of their activities, demonstrated partisan involvement in a government investigation and appear to have little hesitation in confusing prosecutorial and judicial functions. Taschereau and Kellock, through their activities with the Commission, demonstrated clear bias, favouring the government's policy to protect national security rather than protecting individual rights. Further, Taschereau and Kellock actively participated in the investigation and search for evidence, which cause the line between judge and lawyer to be blurred.

M. L. Friedland argues that relying too heavily on the judiciary leads to harm to the image of the judiciary and therefore, make the judiciary less effective in other areas of law.[77] Furthermore, Friedland argues that the judiciary may seem to be an arm of the government if the judiciary repeatedly upholds the position of the government. "This is particularly so when the hearing in many cases will be conducted in whole or in part in closed or, as it will be labeled, "secret" sessions."[78] The judiciary must be concerned with its image and appearance of impartiality and separation from the executive to

maintain the public's trust in the judiciary and must act in a way to justify the trust that the public places in the judiciary.

Conclusion

The examples of Japanese-Canadian internment and the Gouzenko Affair provide salient examples for the situation today. The *War Measures Act* highlights the tendency of Canadian governments to pass sweeping race-based measures to deal with perceived risks. The wide-ranging emergencies powers found in the *War Measures Act* have a direct impact on rights. The Japanese experience demonstrates how damaging and discriminatory such measures can be to perceived alien groups in an openly racist manner. The *Official Secrets Act* demonstrates how government secrecy in the interests of national security can give rise to similar procedural expedients and violations of constitutional principles.

Furthermore, the Japanese experience elucidates the limited judicial role of judicial review during and immediately following such crisis. Perhaps rights arguments under the *Charter of Rights and Freedoms* would change the situation today, a matter which will be explore in subsequent chapters. The Bird Commission also illustrates judges may become involved in processes that compromise their independence and impartiality. The Gouzenko Affair highlights these concerns even more vividly: how confusion of judicial and enforcement or prosecutorial functions put judicial independence in serious jeopardy. The Kellock-Taschereau Royal Commission explicit violation of principles of separation of powers and impartiality seriously compromised even the perception of judicial independence. The judiciary's role becomes transformed into an arm of government and the rule of law is usurped by the conflicting roles.

On a larger scale, the events of the 1940's demonstrate a crude race-based assessment of security risks. Sweeping arbitrary measures were abetted by a compliant public (reflecting a traditional deference to authority) and judiciary. The courts were employed in an "after the fact" justification or legitimization of measures. The willingness to abandon formal claims around judicial independence in security crises is further underscored with the Gouzenko Affair. How much has this changed since the advent of the *Charter of Rights and Freedoms* in 1982? We turn to this in the following chapter.

[1] Please note: Japanese Canadians were technically not interned because that would have been a violation of International law. Japanese Canadians were being detained at the pleasure of the Minister of Justice. However, I will refer to Japanese Canadian detainment as an internment. Japanese Canadians were essentially interned and interment is how this period in time is commonly seen.
Roy Miki and Cassandra Kobayashi, *Justice in our Time: The Japanese Canadian Redress Settlement.* (Vancouver: Talonbooks, 1991) at 24.
[2] *Ibid.* at 16.
[3] *Ibid.* at 17.
[4] Ann Gomer Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War.* (Toronto: James Lorimer & Company, 1981) at 161.
[5] *Ibid.*; Miki and Kobayashi, *supra.* note 1; Forrest E. LaViolette, *The Canadian Japanese and World War II.* (Toronto: University of Toronto Press, 1948).
[6] Sunahara, *supra.* note 4 at 3.
[7] *Ibid.* at 3.
[8] *Ibid.* at 132.
[9] *Ibid.* at 133.
[10] *Ibid.* at 133.
[11] *Ibid.* at 133.
[12] *War Measures Act* (Revised Statutes of Canada, 1970, c. W2) at s. 3.
[13] *Ibid.* at s. 6.
[14] *Ibid.*
[15] Miki and Kobayashi, *supra.* note 1 at 25.
[16] F. Murray Greenwood, "The Drafting and Passage of the War Measures Act: Object lessons in the Need for Vigilance," in W.W. Pue and B. Wrights (eds.), *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) at 295.
[17] *Ibid.* at 292.
[18] *Ibid.* at 292.
[19] *Ibid.* at 295.
[20] Sunahara, *supra.* note 4 at 137.
[21] *Cooperative Committee on Japanese Canadians and Another and Attorney-General for Canada and Another.* (1947) A.C. 87 (J.C.P.C.)
[22] One example of the Judicial Committee of Privy Council striking down legislation is *Attorney General of British Columbia and Attorney-General of Canada.* (1924) A.C. 203 (J.C.P.C.)
[23] Patricia Peppin, "Emergency Legislation and Rights in Canada: The *War Measures Act* and Civil Liberties" (1993) 18 Queen's Law Journal 129 at 162.
[24] *Ibid.* at 162.
[25] *Ibid.* at 158.
[26] *Ibid.* at 171.
[27] *Ibid.* at 171.
[28] Sunahara, *supra.* note 4 at 134.
[29] *Ibid.* at 136.
[30] *Ibid.* at 138.
[31] *Ibid.* at 138.
[32] *Ibid.* at 139; *Cooperative Committee on Japanese Canadians and Another and Attorney-General for Canada and Another.* (1947) A.C. 87 (J.C.P.C.)
[33] Nisei are second generation Japanese, the Canadian born children of the Issei. Issei are the "pioneers from Japan who chose Canada as their home. Japanese males immigrated from about 1877 to 1907, and most women came after 1908. Those who came after World War II are called "new immigrants," or 'shinijusha.'" Miki and Kobayashi, *supra.* note 1 at 19.
[34] Sunahara, *supra.* note 4 at 139.
[35] *Ibid.* at 141.
[36] *Cooperative Committee on Japanese Canadians and Another and Attorney-General for Canada and Another.* (1947) A.C. 87 (J.C.P.C.)
[37] Sunahara, *supra.* note 4 at 147.
[38] *Ibid.* at 147.

[39] *Ibid.* at 147.
[40] *Ibid.* at 148.
[41] *Ibid.* at 152.
[42] Sunahara argues that "there were six potential sources of direct losses alone: losses from sales by the Custodian for less than the market value; from theft; from forced sales in a flooded market; from lost revenue; from lost insurance because of uprooting; and from lost income because of uprooting." *Ibid.* at 152-153.
[43] *Ibid.* at 153.
[44] *Ibid.* at 154.
[45] *Ibid.* at 154.
[46] *Ibid.* at 154.
[47] Stephen Bindman, "Judicial Inquiries" in Logan Atkinson, et. al. (eds.), *Introduction to Legal Studies, Third Edition.* (North York: Captus Press, Inc., 2001) at 358.
[48] *Ibid.* at 358.
[49] Bora Laskin, "The Meaning and Scope of Judicial Independence" in Logan Atkinson, et. al. (eds.), *Introduction to Legal Studies, Third Edition.* (North York: Captus Press, Inc., 2001) at 355.
[50] *Ibid.* at 356.
[51] *Ibid.* at 357.
[52] *Ibid.* at 358.
[53] Miki and Kobayshi, *supra.* note 1 at 58.
[54] Sunahara, *supra.* note 4 at 157.
[55] In February of 1949, Bird proposed tentative settlement figures. Compensation varied from as high as 125 per cent for farms to as low as 10 per cent for chattels. Special awards were provided for unusual cases in each category and corporations received an additional amount of compensation. The compensation included awards for fishing vessels, nets and fishing gear, which Bird considered to be outside the terms of reference of the Royal Commission. Further, the compensation package also included the government covering some of the legal costs. The claimants had to pay legal costs that the government refused to cover. *Ibid.* at 157-159
[56] Miki and Kobayashi, *supra.* note 1 at 97.
[57] *Ibid.* at 117.
[58] Sunahara, *supra.* note 4 at 160.
[59] Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public Officials and Other Persons. *Report on Igor Gouzenko.* (1946) at 637.
[60] Robert Bothwell and J.L. Granatstein (eds.), *The Gouzenko Transcripts.* (Ottawa: Deneau Publishers and Company Ltd., 1983) at 11.
[61] Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada.* (Toronto/Vancouver: Clarke, Irwin & Company Ltd., 1983) at 146.
[62] Bothwell and Granatstein, *supra.* note 63 at 16.
[63] *Ibid.* at 16.
[64] *Ibid.* at 16.
[65] *Ibid.* at 16.
[66] M. L. Friedland, *National Security: The Legal Dimensions.* (Toronto: Minister of Supply and Services Canada, 1980) at 118.
[67] Bothwell and Granatstein, *supra.* note 63 at 11.
[68] *Ibid.* at 13.
[69] *Ibid.* at 14.
[70] *Ibid.* at 14.
[71] *Ibid.* at 14.
[72] Friedland, *supra.* note 69 at 45.
[73] *Ibid.* at 144; "The Canadian prosecutions for breaches of the *Official Secrets Act* or for conspiracy to breach the Act are:

(1) *R. v. Rose* [1947] 3 D.L.R. 618 (Que. C. A.), convicted, 6 years.
(2) *R. v. Lunan* [1947] 3 D.L.R. 710 (Ont. C. A.), convicted.
(3) *R. v. Smith* [1947] 3 D.L.R. 798 (Ont. C. A.), convicted.
(4) *R. v. Mazerall* [1946] O.R. 511 (High Ct.), 762 (C. A.), convicted.

(5) *R. v. Willsher* (c. 1946) unreported, convicted.
(6) *R. v. Gerson* [1948] 3 D.L.R. 280 (Ont. C. A.), conviction quashed on appeal.
(7) *R. v. Woikin* (1946) 1 C.R. 224, convicted, 2 ½ years.
(8) *R. v. Boyer* (1948) 7 C.R. 165 (Que. C. A.), convicted.
(9) *R. v. Carr* (1949) unreported, convicted, 6 years.
(10) *R. v. Adams* (c. 1946) unreported, but see (1946) 86 C.C.C. 425 (on application for change of venue), acquitted.
(11) *R. v. Nightingale* (c. 1946) unreported, but see (1946) 87 C.C.C. 143 (a contempt of court conviction upheld on appeal), acquitted.
(12) *R. v. Shugar* (c. 1946) unreported, acquitted.
(13) *R. v. Chapman* (c. 1946) unreported, acquitted.
(14) *R. v. Poland* (c. 1946) unreported, acquitted.
(15) *R. v. Halperin* (c. 1946) unreported, acquitted.
(16) *R. v. Benning* [1947] 3 D.L.R. 908 (Ont. C. A.), conviction quashed on appeal.
(17) *R. v. Harris* [1947] 4 D.L.R. 796 (Ont. C. A.), conviction reversed on appeal.
(18) *R. v. Biernacki* (1961) unreported, but see (1962) 37 C.R. 226 (motion to quash a preferred indictment, charge dismissed at preliminary inquiry.
(19) *R. v. Featherstone* (1967) unreported, convicted, 2 ½ years.
(20) *R. v. Treu* (1978) convicted, 2 years; reversed on appeal; not yet reported.
(21) *R. v. Toronto Sun Publishing Ltd., Creighton and Worthington* (1979) dismissed at preliminary inquiry.

Related cases include:

(1) *R. v. Pochon*; *R. v. French* (1946) 87 C.C.C. 38 (Ont. Hight Ct.)
(2) *R. v. Bronny* (1940) 74 C.C.C. 154 (B.C.C.A.) (under s. 16 of Def. of Can. Regs.)
(3) *R. v. Jones* (1942) 77 C.C.C. 187 (N.S.C.A.) (under s. 16 of Def. of Can. Regs.)
(4) *R. v. Samson* (1977) 35 C.C.C. (2d) 258 (Que. C. A.)"

[74] *Ibid.* at 31.
[75] *Ibid.* at 37.
[76] *Ibid.* at 44.
[77] *Ibid.* at 118.
[78] *Ibid.* at 118.

Chapter 3

As exhibited in Chapter 2, emergency legislation can be employed in such a fashion as to affect basic rights such as *habeas corpus* and the presumption of innocence, and through judicial involvement in applying such measures, compromise the independence of judges and the impartiality of the courts in upholding our rights. The *Emergencies Act* is the current version of executive-enabling legislation, which replaced the *War Measures Act* in 1987.

A brief look at the *Emergencies Act* and an examination of the debate surrounding Bill C-36, now the *Anti-Terrorism Act* completes the map of the current legislative environment, save provisions of the *Immigration and Refugee Protection Act* examined in Chapter 5. The exploration of these pieces of legislation highlights the continued emergence of the risk society. The *Anti-Terrorism Act*, as previously mentioned, is a response to the risk of terrorist activities in Canada and so, supplements emergency and national security powers. It not only amends the *Official Secrets Act* (now the *Security of Information Act*) discussed in the previous chapter, the sweeping provisions of the *Anti-Terrorism Act* also amend sections in the *Criminal Code of Canada*, the *National Defence Act*, the *Canada Evidence Act*, as well as other legislation. To understand the current legislative framework that the judiciary must work within, both the *Emergencies Act* and the *Anti-Terrorism Act* must be explored.

The *Emergencies Act*

The *Emergencies Act* was implemented to replace the *War Measures Act*, discussed at length in the previous chapter, in November 1987, after being introduced in June of 1987. The *Emergencies Act* was heralded as a vastly improved piece of

legislation to correct the problems with the *War Measures Act* and to bring national security measures in line with the *Charter of Rights and Freedoms*. It retains the same legislative model in the form of being an emergency executive-enabling act. Post World War II, emergencies are far more generalized.

The *Emergencies Act* states in section 3 that

> "a "national emergency" is an urgent and critical situation of a temporary nature that
> (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
> (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
> (c) and that cannot be effectively dealt with under any other law."[1]

The *Emergencies Act* actually extends further than the *War Measures Act*, although as we shall see, there are now limits on orders in council and there is enhanced legislative review. It includes emergencies outside "war or apprehended insurrection." The *Emergencies Act* encompasses a public welfare emergency such as a flood or other such natural disaster[2]; public order emergency which "arises from threats to the security of Canada and that is so serious as to be a national emergency"[3]; an international emergency which "means an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and this is so serious as to be a national emergency"[4]; and a war emergency, which "means war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency."[5]

Like the *War Measures Act*, the executive alone, under the *Emergencies Act*, has the ability to declare and deal with an emergency measures. Unlike the *War Measures Act*, which set no time limit for parliamentary ratification, the new legislation provides a strict schedule for parliamentary approval. Within 7 days, a declaration must be presented to both Houses of Parliament.[6] After 30, 60, 90 or 120 days depending on the type of emergency[7], the declaration expires and must be reviewed for the terms to continued or be terminated. Also, the passage of emergency orders are to be reviewed by a parliamentary committee.[8] The prerogatives of Cabinet are therefore to be subject to a limited form of broader parliamentary accountability. Prerogatives are further limited in that the types of orders in council that permitted are specified in each category of the *Emergencies Act* although the War category is still fairly open. Under the *War Measures Act*, orders in council need only serve a defence or national security purpose. The amendments to the emergency legislation mark an advance by limiting cabinet power but the potential abuses are still possible.

Many groups raised concerns about the possible abuses and problems with the *Emergencies Act*. The Canadian Civil Liberties Association (CCLA) felt that the most important recommendation that they could make was to provide the public and M.P.'s with a working paper with respect to the government's intentions and specifically information about the new categories of emergencies.[9] Furthermore, the CCLA, as did all other groups, felt that the definition of emergency was too vague. The CCLA states that in relation to the category of "public welfare emergency," a strike could be considered enough of an

emergency to invoke special powers because the term emergency is not defined.[10] However, this concern was addressed in the final drafting of the *Emergencies Act*.

Also, the definitions of international and war emergencies were raised as concerns because the definition includes an emergency affecting Canada's allies. The definition provides no limit to who an ally might include. "This definition could conceivably be wide enough to include almost every country in the world. There will be precious few places where at least one of our allies does not have some such interests."[11] The problem lies in that any country in world could be at war and a possible emergency could be declared. Therefore, an international emergency could be in place year round.

The CCLA recommended that the government balance the means with the desired outcome when dealing with emergency situations. The government should look at the "feasibility of less drastic measures before considering more drastic ones."[12] The CCLA also showed that the government should use legislative powers in place before creating new laws with new powers.[13] In other words, it called into question the very necessity of executive-enabling emergency powers. Why not pass temporary emergency legislation tailored to a particular crisis, legislation that requires full parliamentary input and support?

The CCLA addressed the concerns of judicial review in the event of a war emergency. The CCLA feared that the war emergency provision "could preclude any judicial review beyond what is contemplated by the Charter."[14] The CCLA posed the question of whether there was any limitation on government power beyond the Charter. In their opinion, the war emergency provision could

authorize deportations or exiles and essentially, a repeat of the abuses that Japanese Canadians endured during World War II. "...[I]t is possible to give the government wide powers to deal with a war emergency without letting the government do whatever it believes is necessary."[15] The CCLA believed that "[a]t the very least, the courts should scrutinize the situation in order to prevent arbitrary excess."[16] The courts should be able to scrutinized the orders in council but the issue of the declaration of an emergency remain with Parliament.

The National Association of Japanese Canadians (NAJC) was able to provide a unique perspective on emergencies legislation having been directly affected by the *War Measures Act*. The NAJC encouraged abolition of the *War Measures Act* but were disappointed with the *Emergencies Act*. The NAJC were hopeful that new legislation would "control the exercise of emergency powers by Cabinet and [would] create safeguards that would prevent others [from] being abused as [they] were."[17] The NAJC's position was that the *Emergencies Act* was merely repeating the *War Measures Act* in different words. The NAJC object particularly to the following:

1. "The presumption that the Cabinet should be given broad emergency powers when there is no demonstrated need for such powers;
2. A definition of "national emergency" that offends international law;
3. Broad, and ill-defined definitions of the types of emergencies, definitions which would make it virtually impossible for Parliament to reject a declaration of emergency or a motion to continue emergency powers;
4. Emergency powers so broad they breach international covenants and invite abuse;
5. Illusory and impractical Parliamentary supervision of the exercise of emergency powers;
6. The power to make secret orders and regulations;
7. Limited recourse to the courts;
8. Immunity from liability for abuse or misuse of emergency powers;

9. No independent process for awarding compensation for government errors or abuse of power."[18]

The NAJC thought that the *Emergencies Act* was fundamentally flawed because not only does the *Emergencies Act* fail "to protect civil liberties in time of emergency but also places draconian powers in the hands of an uncontrolled Cabinet."[19] The NAJC maintains that the *Emergencies Act* presumes that

(a) "The federal Cabinet ought to be given broad emergency powers;
(b) Those powers should be minimally fettered;
(c) All orders and regulations made by the Cabinet in time of emergency will be relevant to the emergency and intended to meet the emergency; and,
(d) Any misuse of power will be immediately detected by Parliament which will then quash it."[20]

Japanese-Canadians would see the problems with these presumptions because they faced the injustices that the *War Measures Act* allowed. The Cabinet was given broad emergency powers that were to be minimally fettered and would only pertain to the emergency. The injustices that faced Japanese Canadians were racist, political objectives rather than objectives relating to the war emergency that faced Canada. The actions of Cabinet emasculated Parliament because Parliament had no means of controlling how the power of Cabinet was exercised.[21] There was little confidence that Parliament would to be able to adequately detect injustices and quash any misuse of power. Japanese-Canadians, as former victims of emergency orders, found these presumptions unsound and insufficient. The lessons of the *War Measures Act* had not been learned and therefore, the *Emergencies Act* fell short of protecting the civil rights of citizens.

The courts, under the *Emergencies Act*, are seriously limited in reviewing the question of whether an emergency actually exists. The judiciary can look at the reasonableness of the cabinet's actions after an emergency is passed but the onus is on the victim to prove that an order is unreasonable.[22] The substantial role of the courts is not about preventing emergency orders but about rectifying injustices after the fact. The existence of the Charter could well enhance the court's scrutiny of executive orders and precedents and limit future abuses but this must be balanced by the deference the courts have shown to government security practices historically. The only clear role for the courts is in revision of compensation awards.

History also shows the difficulty of a victim trying to gain access to the courts, let alone proving a case especially during national security crises. "Japanese-Canadians, incarcerated in detention camps, were in no position to obtain the evidence that would prove their incarceration was unreasonable. That evidence could be found only in privileged Cabinet documents, documents that remained classified for 30 years."[23] The experience of Japanese-Canadians during and after World War II shows that placing the onus on the victim to prove the unreasonableness of a government order is unrealistic.[24] Even if, an emergency is clear and unequivocal, the burdens of proving the unreasonableness of measures may well be impractical.

Compensation was a major concern of Japanese Canadians. Japanese Canadians had to fight for 40 years for compensation for their mistreatment during the Second World War and in this respect a process of judicial review is

clearly identified and marks an improvement over the *War Measures Act*. The *Emergencies Act* sets out a process of judicial review for compensation claims. No such process was in place under the *War Measures Act*. Perhaps reflecting a lack of confidence in judicial review through regular litigation. NAJC deemed this unsatisfactory and recommended that an independent tribunal be created to address the issue of compensation and should be headed by a Superior Court judge. There should be no time limit on compensation and the tribunal should have full investigative powers and all awards would be immediately enforceable.[25] The NAJC argued that the *Emergencies Act* had fundamental flaws that needed to be addressed before the legislation was placed permanently into Canadian law.

Interestingly, the *Emergencies Act* has embedded risk calculations as legal process right in the legislation. The government can no longer intern groups of people without considering the cost of compensation claims, as there may be judicial review of compensation claims emanating from internment. The *Emergencies Act* demands that the government conduct a cost-benefit analysis. To what extent this analysis influences the government's decision is difficult to determine but may help explain why the *Emergencies Act* was not employed to deal with terrorism.

There were other submissions but the bill was passed into law without serious consideration of the issues raised by the CCLA or the NAJC. The recommendations provided by these and other groups fell on deaf ears.

One of the more pressing questions currently however, is the relationship between the *Emergencies Act* and the *Anti-Terrorism Act*. There is no mention of the *Emergencies Act* in the debates over Bill C-36 or in the *Anti-Terrorism Act* itself, which we now turn to.

Recent Anti-Terrorism Legislation

Additional security legislation was passed after the events of September 11th, 2001, including the *Public Safety Act* and new measures to enhance police powers at international conferences. The focus here is the sweeping *Anti-Terrorism Act* because of the wide-sweeping, all-encompassing nature of the *Anti-Terrorism Act.*

As previously mentioned, the *Emergencies Act* provides much more effective parliamentary oversight and the possibility of judicial review is somewhat enhanced. Bill C-36, now the *Anti-Terrorism Act*, curiously does not provide a strong role for Parliament. "In this respect, Bill C-36 emulates the *War Measures Act* more than the two regimes, constitutional and statutory, adopted [in the *Emergencies Act*] to prevent repetition of its abuses."[26] Weinrib suggests that the government in fact prefers judicial review rather than parliamentary oversight:[27]

> "As a result, courts may well defer to the government when *Charter* challenges to Bill C-36 arise. One cannot deny that the Bill is both urgent and important or that the courts lack the political accountability, expertise and experience that one might insist upon for stringent review of the state's response to emergency situations.
>
> On the other hand, good reasons militate against judicial deference in this context as well. The Supreme Court has not laid down a clear and consistent directive as to when it will defer, rather than engage in a stringent review of impugned state action that encroaches on guaranteed rights and freedoms."[28]

Quite apart from the questions of judicial competence, historical experience might explain why the government appears to prefer checks by way of judicial review rather than robust parliamentary review. This may explain why the *Emergencies Act* was consciously avoided as the Anti-Terrorism legislation took shape in the wake of September 11th.

There are other reasons too. The *Anti-Terrorism Act* deals with a wide range of national security measures in the *Criminal Code of Canada*, the *National Defence Act*, the *Official Secrets Act* and others that relate to the ongoing management of security issues that would not necessarily entail going so far as an official declaration of emergency. Some longstanding reforms were needed to some of the legislation, such as the *Official Secrets Act*, the *National Defence Act* and the *Criminal Code*, and these were made possible by the urgency of the situation through amendments of the *Anti-Terrorism Act*. However, beyond these practical and administrative conditions the *Anti-Terrorism Act* suggests that the balance between individual rights and the perceived requirements of national security appear to have shifted since September 11th, 2001. The *Emergencies Act* attempted to prevent and correct historically demonstrated executive abuses. The *Anti-Terrorism Act* responds less to historical experience than to perceived new realities.

Bill C-36

There was great debate surrounding Bill C-36, now the *Anti-Terrorism Act*, before it was passed into legislation. Some of the pressure of these debates did result in changes to Bill C-36. The Canadian Civil Liberties Association

(CCLA) and the Canadian Bar Association (CBA) both presented evidence to the Standing Committee on Justice and Human Rights, who worked on the development of Bill C-36, concerning Bill C-36. Furthermore, many academics addressed concerns surrounding Bill C-36, including a book of largely critical analysis, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, which was a result of a conference about this legislation.

There is little doubt that terrorism represents a formidable security threat. Terrorism is global in scope and destabilizing. Although, it is not a new phenomena, technology has extended its reach and consequences. Terrorism is difficult to prevent because of the unknown element – a terrorist can be anywhere and be anyone. Bill C-36 attempts to limit the risk of terrorist activity but in doing so, arguably threatens fundamental democratic principles.[29] David Schneiderman states that

> "(t)o the extent that the Anti-Terrorism Act threatens due process rights, inhibits associational life, and chills democratic expression, our response to the threat of terrorism will have melted away the 'old priorities.' We have entered a danger zone to democratic practice where, in order to reduce the threat of terrorism and associated anxieties and insecurities, we may be institutionalizing a legal regime (with or without a sunset clause) that is repressive of civil liberties."[30]

At the heart of the problem is the need to strike a balance between effective measures to combat a potential, elusive security risk and still respect constitutional principles and fundamental freedoms, which we hope to protect with the measures in Bill C-36. Essentially, based on the perceived threat of terrorism and the desire for effective measure to deal with the terrorist risk,

procedures are created that threaten existing constitutional principles. It is hardly surprising that a wide range of groups expressed concern.

The Canadian Civil Liberties Association (CCLA) believed that the bill was far too broad and specifically that the definition of terrorist activity is problematic. "[The bill] is capable of targeting a variety of behaviour that bears no resemblance to the kind of behaviour most of us would call terrorism. The key is the definition of terrorist activity. Indeed, everything in the bill flows from that definition. The new offences, the new powers, flow from that definition."[31] For example, section 83.01 (1) (b) (ii) (E) of Bill C-36 refers to causing serious disruption to or interference with an essential service.[32] The CCLA states that a strike could be considered a serious disruption to or interference with an essential service but should not be considered terrorist activity.[33] However, the definition of terrorist activity allows for this possible application of Bill C-36. The language of Bill C-36 allowed for ambiguity and therefore, the definition, when subject to interpretation, could have the effect of turning a strike into terrorist activity.

The CCLA objected to the clause (section 83.28) allowing for investigative hearings and the disclosure of information. The CCLA explains that an investigative hearing is unnecessarily broad and that the section should be deleted.[34] An investigative hearing "... invit[es] a much greater intrusion into a person's life than our criminal law normally permits."[35] However, the CCLA argues that there should be distinction between gaining information for investigative purposes and for preventative purposes. If there is a risk of imminent peril or danger, then police should be able to compel individuals to provide information. However, this should only be allowed within specific

parameters that the CCLA believes should be determined by an independent tribunal, such as the courts.[36] The CCLA believes that political interests should be limited and therefore, review is necessary in national security matters.[37]

The Canadian Bar Association (CBA) focuses on four aspects of the bill: "the need for a true sunset clause; the definition of terrorist activity; preventive arrest; and investigative hearings."[38] The sunset clause is seen by the CBA as insufficient because clause 145 only allows for the mechanism of simple review. The CBA believes that the government should have to provide evidence if the provisions are deemed to still be necessary after the sunset period.[39] "We recommend that the bill be amended to provide for its expiry three years after it receives royal assent, except for those provisions that relate to protections against religious and racial intolerance."[40]

The CBA also believes that the definition of terrorist activity is too broad. The CBA states that the terrorism is difficult to define but Bill C-36 should defined terrorist activity and terrorist offence to catch terrorist while allowing for lawful forms of protest in a free and democratic society.[41] The CBA believes that section 83.01 (1) (b) (ii) (E), concerning interference with or disruption to essential services, should be eliminated because of the potential for lawful forms of protest being classified as terrorist activity. Also, the CBA believes that the terms political, religious or ideological should be removed from the definition. "The Canadian Bar Association sees this not only as unnecessary but dangerous. It is unnecessary because a terrorist attack done without these motives, but for let us say simple blackmail, would be no less terrorist. It is dangerous, in the view of the CBA, because it opens the door to prejudices and intolerance. Terrorists are

the target of the bill, not particular religious or ideological groups. This requirement should be deleted."[42]

Next, the CBA addresses preventative arrests and investigative hearings. Preventative arrest is a warrantless arrest and detention and investigative hearings are information-gathering hearings. The CBA believes that preventative arrest (section 83.04) should only be used in exceptional cases and only when terrorist activity is imminent.[43] Furthermore, the CBA states that investigative hearings (section 83.28) should go further to "protect communications between clients and their legal counsels."[44] The imperative of risk seems to supersede all others.

As noted earlier, one notable academic response to Bill C-36 was the book, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill.* The book addresses many concerns from a variety of academics across the country. However, contributions by Kent Roach, Lorraine Weinrib and Sujit Choudhry are directly relevant to themes examined here.

Kent Roach argues that "[t]he most charitable reading of Bill C-36 suggests that the new offences add little to the existing law and are more about making a strong symbolic statement against terrorism than providing the police and prosecutors with genuinely new tools to combat terrorism."[45] Essentially, Roach explains that the activities of September 11th, 2001 are already covered under existing sections of the *Criminal Code* but Bill C-36 does take the range of terrorist activities one step further. Roach starts by explaining that the definition of terrorist activity (section 83.01(a)) incorporates existing offences defined in the *Criminal Code of Canada.*[46] The definition (section 83.01(b)) is also expanded to

create other offences. Furthermore, the definition of terrorist activity applies inside and outside Canada and "security is defined broadly in Bill C-36 to include not only traditional concepts of national security but economic security."[47] This just proves to show the state believes terrorism to be a considerable risk so the state must protect Canadians, both inside and outside Canada. Many of Roach's other concerns about the definition of terrorist activity are reflected in the discussion surrounding the CCLA's and CBA's recommendations to the Standing Committee on Justice and Human Rights.

Roach also addresses the new criminal offences created by Bill C-36: participating in terrorist activity, facilitating terrorist activity and harbouring terrorists. "These broad offences, which target activities well in advance of actual terrorism, are in turn expanded by the incorporation of inchoate liability such as conspiracies, attempts, counseling or threats, into the definition of terrorist activities."[48] These new offences are attempting to prevent activities from occurring as well as expanding the reach of the criminal law "... in a manner that is complex, unclear and unrestrained."[49]

Sujit Choudhry focuses on ethnic and racial profiling (hereinafter profiling) that could potentially occur with Bill C-36. Profiling has jumped into the spotlight after the events of September 11, 2001. "The reason is clear – the hijackers identified by American law enforcement officials all appear to have be Arab, and the argument made by proponents of ethnic and racial profiling is that has airport security officials engaged in profiling, the terrorist acts of September 11 could have been prevented."[50] Choudhry ask whether profiling is

constitutional? Choudhry provides an analysis of the constitutionality of racial and ethnic profiling under section 15 of the *Charter* and suggests that some case law shows that profiling has been found to be discriminatory under certain circumstances.[51] However, section 1 of the *Charter* could be employed to circumvent section 15.

Choudhry also argues that to limit inequality, profiling could be applied equally to all people therefore, eliminating inequality. However, this raises serious concerns about liberty and privacy. A blanket policy about searching for specific information about all people in Canada would be costly financial as well as in terms liberty and privacy. Yet, a blanket policy would mean that the costs would be "... borne by everyone, not just those who through no choice of their own share the race and ethnicity of those responsible for September 11."[52] This analysis speaks to questions of risk and racism which will be further examined in the next chapter.

Lorraine Weinrib, as previously stated, argues that the government appears to prefer judicial review rather than direct parliamentary accountability when dealing with the *Anti-Terrorism Act.* Weinrib implies that based on historical experience, the judiciary may be more inclined to uphold the legislation against rights challenges despite the existence of the *Charter of Rights and Freedoms.*[53] "While judicial review is of imperative importance, the *Emergencies Act* demonstrates the advantages of public policy that engages the institutional strengths of legislatures in their many different capacities. Bicameral, multi-party examination of government policy, including systematic review of its application

in individual cases with access to confidential information and a reporting mechanism can prevent and remedy abuses long before they would come to the attention of the judiciary."[54] It appears that the government wishes to avoid similar parliamentary review available in the *Emergencies Act*. This is not necessarily a claim that the courts are more deferential to government wishes (although historical patterns suggest this). It is a claim that parliament is better equipped institutionally to ensure that security measures are accountable. Over-reliance on the judiciary strains judicial independence and may compromise judicial review where the courts are asked to balance rights and public interests.

Furthermore, Weinrib's arguments can be applied, not only to constitutional claims but also to judicial involvement in the administration and enforcement of measures. Judges, when looking at investigative hearings, are expected to participate in the enforcement of provisions in the *Anti-Terrorism Act*; a role not typically meant for judges. Judicial involvement in administration and enforcement of national security measures are another matter altogether and raise similar issues as examined in Chapter 2 when discussing the Taschereau-Kellock Royal Commission. These concerns speak directly to a central theme in this thesis and will be elaborated in the next chapter.

Some changes were made to Bill C-36, as a result of the various debates, before it was passed into law. Some of the changes include: sunset clauses on the preventative arrest and investigative hearing provisions, a provision where an annual report must be tabled about the use of preventative arrests and investigative hearings, removal of the word "lawful" from the definition of

terrorist activity, review of mechanism of Attorney General certificate, a change to the definition of facilitation and other technical changes.

The sunset clauses in relation to preventative arrests and investigative hearings means that these provisions will expire five years after the bill receives Royal Assent. The provisions can be extended for another five years if a resolution is passed by Parliament and the Senate. However, preventative arrests and investigative hearings, in principle, undermine the basic principles guaranteed by the Constitution.

The annual report to Parliament on the use of preventative arrests and investigative hearings is to meant to provide Parliament with statistics about preventative arrests and investigative hearings. The report is also meant to assist with the review of the act that must occur within three years.[55]

The removal of the word "lawful" from the definition of terrorist activity is meant to eliminate the possibility of lawful or unlawful protest being classified as terrorist activity. Furthermore, an interpretative clause was added to clarify the term political, religious or ideological expression. The clause would show that political, religious or ideological expression alone does not constitute terrorist activity but when coupled with causes death or serious bodily harm or intimidating the public or the government, terrorist activity would occur.[56] It could be argued that there is still the potential for abuse for example, in the case of religious freedom where a parent chooses not to give a child a blood transfusion and death results and should be watched. The clause is still an improvement.

Overall, the changes made do not address the key problem, the need for a balance between measures to address an elusive but potent security risk and respect for constitutional principles and fundamental democratic freedoms, which the *Anti-Terrorism Act* was introduced and implemented to protect.

The *Anti-Terrorism Act*

Bill C-36 was hastily introduced to address the events of September 11th, 2001 because the public expected a response by the government to these unprecedented events and because of international pressures. The public expected action to protect them from these terrorists. International relationships had to be protected, particularly with the United States of America. The state perceived national security to be at risk. Therefore, the *Anti-Terrorism Act* was implemented to protect Canadians from the threat of terrorist activity and contribute to international efforts to combat terrorism. Fortunately, some changes were made to the bill but many concerns remain. The *Anti-Terrorism Act* raises serious concerns about our basic fundamental freedoms that Canadians hold in high esteem. The Act fundamentally changes basic principles in the legal system, such as the rule of law and powers of investigation, to the benefit of the government.

The *Anti-Terrorism Act* is omnibus legislation that amends other pieces of legislation such as the *Criminal Code of Canada*, the *Official Secrets Act*, the *Canada Evidence Act*, and the *Proceeds of Crime (Money Laundering) Act*. The purpose of the *Anti-Terrorism Act* is to fight terrorist activity to maintain domestic and international peace and security, to protect political and economic stability, to protect Canadian citizens, to attempt to eradicate terrorism and to support other nations who attempt to eradicate terrorism while respecting Canadian values as promoted and guaranteed by the

Charter of Rights and Freedoms.[57] The problem does not lie in the purpose but in the practicality of the application of such grandiose ideas. If the legislation is implemented in a manner that is consistent with history, the lives of Canadian citizen's could be greatly affected.

The *Anti-Terrorism Act* defines 'terrorist activity' as

(b) "an act or omission, in or outside Canada,
  (i) that is committed
    (A) in whole or in part for 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 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),"[58]

The definition also includes conspiracy, an attempt or a threat to commit one of the acts stated above. The definition encompasses damage to property that could result from legal activities, such as public protests. The definition essentially could comprise of activities that are not necessarily what individuals would determine as terrorist, such as protest or dissent. The definition perhaps rather than shrinking the risk of terrorist

activity actually is expanding the risk. Terrorist activities are unique in nature because the key feature is the unknown quality of terrorism. The definition cannot possibly incorporate this unknown quality of risk that terrorism presents.

> "The target is 'terrorism,' an offence which is undefinable since it presupposes that there is an internal *political* enemy, someone so existentially different that that we cannot name him in advance in order to deal with him either through the ordinary criminal law, or by relaxing the rule of law to some extent for a definable and carefully supervised period."[59]

The terrorist is the personification of fear and state risk. Therefore, the definition of terrorism must allow the state to identify the internal political enemy. The act of protecting Canadians of terrorism is an attempt to predict the unpredictable. The perception of a possible threat to our national security is so high that the government feels the need to protect Canadians from the unpredictable – the unknown. To set aside basic civil liberties for the unknown seems illogical in nature. The legislation assumes that Canadians are prepared to limit risk by sacrificing basic principles in law and our fundamental rights guaranteed by the *Charter of Rights and Freedoms.*

Racism, when considering 'terrorism' can play a role in an arrest made because the 'identified enemies' in society are those people who are different in terms of values, looks, and thought from those in the majority of society. "For this reason, those who think that the statute is likely to end up being used against targets other than the Islamist terrorists are absolutely right. It will be the agents of law-enforcement and security to tell us who the terrorist is, when they have him in their grasp."[60] The disenfranchised of society are likely to be targeted as history shows such as the case of Japanese Canadians discussed in Chapter 2.

The *Anti-Terrorism Act* adds additional sections to the *Criminal Code of Canada*. These sections include financing of terrorism, list of entities, freezing of property, seizure and restraint of property, forfeiture of property, participating, facilitating, instructing and harbouring, proceedings and aggravated punishment, investigative hearing, and recognizance with conditions. The issues of great concern relating to the *Criminal Code of Canada* are increased powers of investigation, vague definitions, suspension of *habeas corpus* and investigative hearings, particularly closed investigative hearings, which contradict the principles of the *Charter of Rights and Freedoms* that the *Anti-Terrorism Act* states must be respected and upheld.

The *Anti-Terrorism Act* provides law-enforcement officials with greater investigative powers and greater powers to arrest individuals. "The Bill is designed to remove, in so far as the *Charter* permits this, law-enforcement and intelligence-gathering activities from the discipline of the rule of law. And by rule of law here I mean simply the general principles of the common law of judicial review that require openness and accountability of officials when they make decisions affecting important individual interests."[61] The legislation allows law enforcement and intelligence-gathering officials to influence the outcome of trial but also, to usurp our basic rights. Much of the activity relating to the *Anti-Terrorism Act* are held in secret. The fundamental idea of transparency in the system is challenged and the public could lose confidence in the system as a result.

The *Anti-Terrorism Act* provides new powers to every police force in Canada, including the RCMP.[62] Some of these new powers include: "changes to wiretapping laws; the recognition and enlargement of the surveillance powers of the highly secret

Communications Security Establishment (CSE); the formation of a new power called 'investigative hearings'; and the creation of what has been euphemistically labeled in the Act as 'recognizance with conditions.'"[63]

Section 83.03 added the Criminal Code of Canada, termed 'Recognizance with Conditions,' "is more concerned with arrest and detention, than with recognizances and conditions."[64] Section 83.03 states:

> "Every one who, directly or indirectly collects property, provides or invites a person to provide, or makes available property or financial or other related services
>
> (a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying our such an activity, or
>
> (b) knowing that, in whole or in part, they will be used by or will benefit a terrorist group,
>
> is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years."[65]

The terrorist activity provides a broader definition than other sections in the *Anti-Terrorism Act*, which use the term terrorist offence meaning that the act has been completed or would be completed should the activity continue. However, terrorist activity appears to have a broader compass.[66] "A peace officer must have reasonable grounds to believe that a 'terrorist activity' may be carried out. However, the officer need only 'suspect' on reasonable and probable grounds that the arrest of the individual or the imposition of a recognizance is necessary to prevent 'terrorist activity'."[67]

Before the *Anti-Terrorism Act* was implemented, the *Criminal Code* would allow for warrantless arrest if an officer believes that someone is 'about to commit an indictable offence.' However, section 83.03 allows for warrantless arrest but the terrorist activity does not have to imminent.[68] The section seems to be focused on preventing terrorist

activity by taking possible 'terrorist' out of circulation. The mere risk that an activity could occur at some unknown point in time is enough to detain an individual. However, the detention of people without the laying of charges could lead to many possible abuses.

Furthermore, a 'possible terrorist' can be detained for extended periods of time. A possible offender should be brought before within 24 hours but following an appearance before a judge a possible offender can be held for an additional 48 hours. Therefore, the section "permits a total period of at least 72 hours detention prior to a bail hearing. This applies to a person who has yet to be charged with an offence (although it would appear that the idea of the provision is to provide the police with time to develop a case against an individual to the point where a charge can be laid)."[69] The individual should be detained at a detention center but the legislation is unclear on this point.

This preventative arrest completely eliminates the *actus reus* of an offence – a fundamental element of crime. The individual does not have to commit an action to be arrested. The government is attempting to police our thoughts or the *mens rea* of a crime. Some would argue that if you have done nothing wrong, you have nothing to fear. This argument is shortsighted. How is the public to maintain confidence in a system which can arrest an individual with no evidence?

When looking at Recognizance with Conditions, the individual is taken before a judge. However, the judge is placed in the role of determining whether a person should be held without evidence. The judge is placed in the role of the investigator and the Attorney General rather than the impartial arbitrator.

Another area of concern arising from the *Anti-Terrorism Act* is that of the investigative hearing. "An investigative hearing allows a person to be ordered to appear

before a judge to give evidence – and arrested with a warrant if he or she fails to appear."[70] The judiciary must be convinced that there are reasonable grounds to believe that a terrorist activity will occur and that the person coming before the court has information that will lead to the potential terrorist.[71] The section in the Act covers both a committed crime and an act that may be committed. Investigative hearings can occur before proceedings have begun and apply to crimes that have not been committed.

Martin Friedland argues that in relation to terrorism, CSIS (Canadian Security Intelligence Service) should be controlling the situation with the review that is built into the *CSIS Act.*[72] Furthermore, Friedland argues that Bill C-36 (now the *Anti-Terrorism Act*) focuses on prosecution and punishment too heavily. Whereas, the emphasis should on "discovering and thwarting terrorist activities before they occur."[73] Friedland however, is merely arguing a change in who controls the process whereas the process itself is problematic. Friedland argues that an investigative hearing "is far less coercive than making it an offence to fail to disclose information."[74] However, being called into a hearing before a judge when no charges have been laid goes far beyond the normal procedures in the Canadian legal system.

There are many other changes flowing from the *Anti-Terrorism Act.* For instance, the *Anti-Terrorism Act* amends the *Official Secrets Act*, first by changing the name to the *Security of Information Act.* Two concerns raised by academics are the whistle-blowing or public interest provisions of the Act and also persons permanently bound to secrecy.[75] Wesley K. Wark argues that the whistle-blowing protection is too narrow. Wark explains that a system needs to be built to allow for legitimate whistle-blowing.[76] Individuals

need a means to provide secret information that is in the public interest without fear of terrorism charges.

The provisions surrounding the 'persons permanently bound to secrecy' are clearly meant to protect sensitive intelligence from being disseminated. However, the notion that this information, that needs protecting, can be protected permanently is absurd.[77] "The government has no need, nor right, to permanently protect information. Such a measure serves only to cast a permanent and unhelpful veil of secrecy over security and intelligence institutions that have to function in public, supported by a reasonable degree of public knowledge and sure of some measure of public legitimacy."[78] However, the public needs more confidence in these systems of protection than ever before so the government should provide more information, rather than less information, about the actions of Canadian security and intelligence agencies and institutions.[79] The government must also been seen to be protecting Canadians from terrorist activity and by providing some information, legitimacy can be maintained.

Conclusion

The *Emergencies Act* replaced the *War Measures Act* and was amended to provide much more effective Parliamentary oversight and enhance judicial review. The *Emergencies Act* attempted to correct and prevent historical executive abuses. However, the *Anti-Terrorism Act* does not provide a strong role for Parliament and increases judicial involvement in the administration and enforcement of security measures. The *Anti-Terrorism Act* responds less to historical experience than to perceived new realities.

The federal government was obliged to take action against terrorism to appease international and public concerns, to show solidarity in passing strong measures to deter

terrorist activity. There were also longstanding housekeeping needs in Canada's national security laws. It should be noted that the Anti-Terrorism Act was one of a handful of Acts passed. Bills 35 (enhancing police powers at international conferences) and C55 (public safety legislation concerning access to air passenger information) have give rise to new laws that raise related concerns about civil liberties. However, the *Anti-Terrorism Act* lies at the centre of concern. Although, changes were made to the Act in Bill form as a result of various groups raising concerns, there are still many issue that need to be addressed such as preventative arrests and investigative hearing which will be explored further in Chapter 4.

Judicial review is central to the *Anti-Terrorism Act* because the Act does not place provisions for strict parliamentary review. Judges will be relied upon procedurally and to address constitutional claims that may arise from possible abuses of the *Anti-Terrorism Act*.

The risk that provisions implemented will lead to the potential targeting of certain populations because of race or ethnicity is of great concern particularly in light of the treatment of Japanese-Canadians during World War II. Is history doomed to repeat itself? Although the measures implemented by legislative changes are rationalistic responses to fear, uncertainty and risk, society has to determine what costs it is willing to tolerate to address the fear, uncertainty and risk related to terrorism. The abuses that the *Anti-Terrorism Act* could pose will be discussed further in Chapter 4, specifically relating to the racism, investigative hearings, preventative arrests and the judiciary. These themes are further developed in the context of the security certificate provisions of the *Immigration and Refugee Protection Act* in Chapter 5.

[1] *Emergencies Act* (Revised Statutes of Canada, 1988, c. 22).
[2] *Ibid.* at section 5.
[3] *Ibid.* at section 16.
[4] *Ibid.* at section 27.
[5] *Ibid.* at section 37.
[6] *Ibid.* at section 58(1).
[7] *Ibid.* See sections 7(2), 18(2), 29(2), 39(2).
[8] *Ibid.* See section 62.
[9] *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-77, an Act to provide for emergency preparedness and to make a related amendment to the National Defence Act.* (Ottawa: Supply and Service Canada, 1987-1988) at 3A: 10.
[10] *Ibid.* at 3A: 11-12.
[11] *Ibid.* at 3A: 17.
[12] *Ibid.* at 3A: 20.
[13] *Ibid.* at 3A: 21.
[14] *Ibid.* at 3A: 21.
[15] *Ibid.* at 3A: 22.
[16] *Ibid.* at 3A: 22.
[17] M. Ann Sunahara, *Submission to the Legislative Committee on Bill C-77 by the National Association of Japanese Canadians (Draft).* Unpublished at 1.
[18] *Ibid.* at 2.
[19] *Ibid.* at 3.
[20] *Ibid.* at 3.
[21] *Ibid.* at 5.
[22] *Ibid.* at 6.
[23] *Ibid.* at 6.
[24] *Ibid.* at 7.
[25] *Ibid.* at 51.
[26] Lorraine E. Weinrib, "Terrorism's Challenge to the Constitutional Order" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 104.
[27] *Ibid.* at 104-105.
[28] *Ibid.* at 104.
[29] David Schneiderman, "Terrorism and the Risk Society" ?" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 69.
[30] David Schneiderman, *Ibid.* at 69-70.
[31] *Minutes of the Standing Committee on Justice and Human Rights, Evidence.* (October 24, 2001) Parliament of Canada, online: <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev33-e.htm> (last accessed: August 29, 2004).
[32] *Anti-Terrorism Act*, 2001 (Bill C-36) at section 83.01 (1) (b) (ii) (E).
[33] *Supra.* note 31.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*

[45] Kent Roach, "The New Terrorism Offences and the Criminal Law" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 151.
[46] *Ibid.* at 154-155. Examples include sections 7(2) – 7(3.73)
[47] *Ibid.* at 155.
[48] *Ibid.* at 168.
[49] *Ibid.* at 168.
[50] Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 367.
[51] *Ibid.* at 368.
[52] *Ibid.* at 379.
[53] Weinrib, *supra.* note 26 at 104.
[54] *Ibid.* at 104-105.
[55] Department of Justice, "Amendments to the *Anti-Terrorism Act*", (2001), online: Department of Justice <http://www.justice.gc.ca/en/news/nr/2001/doc_27904.html> (last updated: 24 April 2003).
[56] *Ibid.*
[57] *Supra.* note 32 as found in the preamble of the legislation.
[58] *Ibid.* at section 83.01.
[59] David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 28.
[60] *Ibid.* at 28.
[61] *Ibid.* at 27.
[62] Martin L. Friedland, "Police Powers in Bill C-36" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 270.
[63] *Ibid.* at 270.
[64] Gary T. Trotter, "The Anti-Terrorism Bill and Preventative Restraints on Liberty" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 242.
[65] *Supra.* note 32 at section 83.03.
[66] Trotter, *supra.* note 26 at 242.
[67] *Ibid.* at 242.
[68] *Ibid.* at 242.
[69] *Ibid.* at 243.
[70] Friedland, *supra.* note 62 at 276.
[71] *Ibid.* at 276.
[72] *Ibid.* at 271.
[73] *Ibid.* at 272-273.
[74] *Ibid.* at 277-278.
[75] Wesley K. Wark, "Intelligence Requirements and Anti-Terrorism Legislation" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 291-292.
[76] *Ibid.* at 291.
[77] *Ibid.* at 292.
[78] *Ibid.* at 292.
[79] *Ibid.* at 292.

Chapter 4

As discussed in Chapter 3, the *Anti-Terrorism Act* added many provisions and amended a number of Acts related to national security. The Act includes many provisions to combat terrorism that leaves the opening for abuse. Although some changes were made to Bill C-36 were a step forward, there are still many issues that give rise to concern. Two procedural processes are a particular concern and are the focus for this chapter: preventative arrests and investigative hearings.

Preventative arrests are a procedural expedient that undermine basic constitutional protections related to criminal law. Judicial involvement is central to the procedures around investigative hearings, particularly closed investigative hearings. The judiciary is placed in a role that compromises their independent adjudicative function by involving them in investigative functions. Both procedural provisions reflect the perceived need for special measures to counter terrorist risks. Beyond general constitutional concerns are concrete concerns about denial of rights. In particular, are certain populations being unfairly targeted because they are perceived to be a risk? Does the Anti-Terrorism Act allow and condone racial profiling? These concrete concerns become even more apparent when these anti-terrorist procedural expedients are placed within the network of immigration legislation examined in Chapter 5.

Preventative Arrests and Investigative Hearings

The risk management rationale for these procedures is nicely expressed as follows:

> "Investigative hearings and preventative detention are emergency measures, serious and ugly. But they have a practical role in preventing catastrophes, and focussing the minds of the security and intelligence community. The also send a signal to both the Canadian public and to our

coalition allies in the war on terrorism. The signal is simple: Canada is serious."[1]

However, we do have special measures for declared emergencies as set out in the *Emergencies Act* examine in the previous chapter. The Anti-Terrorism measures are always available whether in a time of war (crisis) or not. Does the risk of terrorism place us in a state of permanent emergency? This rationale in effect makes this alarming claim. The country is in a constant state of unease and is always trying to prevent the risk of terrorism.

Preventative Arrests

Section 83.03 of the *Anti-Terrorism Act* states:

> "Every one who, directly or indirectly collects property, provides or invites a person to provide, or makes available property or financial or other related services
> (a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying our such an activity, or
> (b) knowing that, in whole or in part, they will be used by or will benefit a terrorist group,
> is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years."[2]

Section 83.03 allows for warrantless arrest but the terrorist activity does not need to be imminent whereas previously the *Criminal Code of Canada* would only allow for warrantless arrest when an officer believes that someone is 'about to commit an indictable offence.' The section focuses on the potential risk of an act occurring without being in imminent peril. The concept means that possible 'terrorist' would be taken out of circulation although, the 'terrorist' may never commit the act. The principles of risk are actually embodied in this section of the Act. The 'terrorist' or risky person is removed before the risky behaviour can occur.

Independent checks on police investigative powers is a huge area of public policy concern, and this concern is intensified when police are given special powers for reasons of national security. The use of powers of the state to investigate offences has for hundreds of years been regulated by the issuing of writs and warrants. Traditionally, this was done by the justice of the peace who would independently consider the evidence presented by investigators seeking to obtain more evidence. In more recent years, the function has been extended to provincial and federal court judges. Exceptional writs, such as the writ of assistance available to the RCMP and "telewarrants" have been controversial because they compromise independent checks on police powers in obtaining evidence.

Interestingly, other related provisions of the *Anti-Terrorism Act* have come into recent controversy involving police investigations. For example, the raid on Juliet O'Neill who wrote about Maher Arar conducted by the RCMP under a search warrant where the information was protected because of national security. The RCMP search was supported by the "security of information" provisions of the *Anti-Terrorism Act* (which amended the *Official Secrets Act*). Judge Ratushny of the Ontario Superior Court has recently challenged the secrecy of the warrant and reiterated powers of the Justice of the Peace.[3] The information must be kept secret because the risk to national security is too high to release the information into the public domain. The state is using the rhetoric of risk to promote its own agenda.

Section 83.03 also directly raises concerns about *habeas corpus*, a fundamental principle of our system since the 1676 Act and reiterated in the *Charter of Rights and Freedoms*. This of course relates to the prohibition on indefinite detention, the right to be

promptly informed of charges and to be tried within a reasonable period of time. The state uses this section as a tool of risk management.

Section 83.03 also disturbs fundamental principles of criminal law liability. The section appears to be attempting to predict the mental element of an act, the *mens rea* and this is impossible. The mere risk that an activity could occur at some unknown point in time is enough to detain an individual. Preventative arrest completely eliminates the *actus reus* of an offence – a fundamental of element of a crime. Although, it is not completely unprecedented that a person can be considered culpable without committing the offence, in these cases, the individual has taken steps to commit the crime and the act is imminent. As previously stated, the government is attempting to police our thoughts or the *mens rea* of a crime.

The public will lose confidence in a system that previously arrests individuals who may be proved to have committed no crime where the thresholds of evidence are as weak as permitted by this legislation. The potential risk of serious harm is perceived to be so great that fundamental principles of criminal law are compromised and constitutional protections around arrest and detention are conveniently set aside. The right of *habeas corpus* is threatened by related procedures around security certificates examined in the next chapter.

Investigative Hearings

The investigative hearings section raises a different set of concerns, which echo those raised in previous chapters – involvement of the judiciary in investigative and prosecutorial functions and how this compromises judicial independence.

Section 83.28 of the *Anti-Terrorism Act* states that:

"(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply ex parte to a judge for an order for the gathering of information. ....
(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that
    (i) a terrorism offence has been committed, and
    (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or
(b) that
    (i) there are reasonable grounds to believe that a terrorism offence will be committed,
    (ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and
    (iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph."[4]

Investigative hearings allow a person to be compelled to provide information to assist in police investigations. "A person subjected to such an order must 'remain in attendance until excused by the presiding judge' and 'shall answer questions put to the person by or on behalf of the police officer who applied for the order' unless the answer would disclose information that is protected by any law relating to non-disclosure of information or privilege."[5] The wording of this section seems to imply that any person can be called before a judge to assist with an investigation whether they have direct ties to the terrorist activity or not. The person may unwittingly have information to provide and would be compelled to come before a judge. "At present, there is no requirement

under Canadian law that ordinary citizens assist police officers in their investigations, and certainly no power that would permit a person to effectively be detained, compelled to attend a hearing, and to answer questions for this purpose."[6] This provision is an end to the risk because the risky persons have been identified.

Furthermore, a terrorist activity does not have to have occurred. This section allows for a person to be compelled to assist in an investigation if there is a suspicion of possible terrorist attacks. The individual is attempting to provide information about an event that has not occurred. The information is therefore, all hearsay. Although, terrorist activity is horrible and should be curtailed whenever possible, are we willing to circumvent established practices?

It is important to note that all the new provisions in the *Anti-Terrorism Act* hold their own penalties and many of them steep penalties from 10 years in prison to life imprisonment. Also, except for life imprisonment, the penalties are to be serves consecutively. These are harsh consequences for an activity that you may not have been fully aware of and have minimal participation in. Cases have been presented and are coming to the Supreme Court of Canada concerning the use of secret evidence and closed hearings.[7] The concern of secrecy in cases, particularly surrounding the *Anti-Terrorism Act* is very real and will be discussed further in the analysis.[8]

Analysis

Both preventative arrests and investigative hearings are meant to expand the capacity of the government through the police and other investigative agencies

to prevent events similar to September 11th, 2001 from occurring. Martha Shaffer explains that although the legislation aims to prevent terrorist activity through the many provisions enclosed within it. However, Shaffer argues that the terrorist activities were criminal long before the September 11th and that we should be looking at better enforcement practices rather than expanding existing legislation to the detriment of our procedural protections and fundamental freedoms.[9]

If the *Anti-Terrorism Act*'s focus is on prevention of terrorist activity then it should in turn be focused on the results that the legislation creates? The common paradigm of risk comes into play. In psychology, when determining whether an offender should be released on parole, for example, the risk is examined and a determination is made based on risk factors. Studies have shown that psychologist will err on the side of keeping offenders in prison who could possibly re-offend.[10] The same principles of risk can be applied in the case of preventative arrests and investigative hearings. The police, judges or other investigative agents must gather together the risk factors and determine whether the 'suspected terrorist' should be detained and could indeed err on the side of detainment rather than risk the possibility of a terrorist attack.

The other related concern is that the 'suspected terrorist' might not be suspected because of a terrorist act but because of other factors, such as ethnic status that may affect the determination. For example, a Canadian Muslim may in fact have family who live in Arab countries that have terrorist ties. This Canadian Muslim may send money to this family as a means of support. Should this person be called in for an investigative hearing or arrested? While there may be highly

legitimate reasons in this scenario that are risk factors in the eyes of the police, judge or other investigative agent, there is also a very real concern that status rather than actions will determine the exercise of these powers, a concern elaborated in the next chapter.

Racism may play a central role in who is brought before a judge in an investigative or who is arrested. Racial profiling is an investigative tool that is used by the police on a regular basis. Racial profiling seems to have two definitions, a broad and narrow definition. "The broad definition holds that profiling consists of a decision to detain or arrest an individual, or to subject an individual to further investigation, '*solely* on the basis of his or her' race and ethnicity. The narrow definition is that profiling consists the use of race or ethnicity *along with other factors*, such as suspicious behaviour."[11] Regardless of the definition problems arise because race and ethnicity plays a 'decisive' role in the decision-making of law enforcement officials. "... decisions to target law enforcement will still be made on the basis of race or ethnicity, even if that factor is one among many."[12] However, it should be noted that profiling is meant to target investigations and not meant to be a reason for final decisions. The courts still ultimately make the decisions about guilt and innocence. However, the expanded investigatory powers may indeed raised further problems around racial profiling.

"Racial profiling is already a problem within the criminal law, but these expanded investigatory provisions have the potential to greatly exacerbate it. Use of investigatory hearings on members of unpopular political groups may have

chilling effect on political dissent."[13] Investigative hearings are targeted towards those suspected of terrorist activities but the question of who should be profiled or targeted by investigative hearings is always raised. "Advocates of profiling have not made clear who it is who would be profiled – Arabs, persons of Middle Eastern appearance, or Muslims, three groups whose membership overlaps, but is not at all identical."[14] Anecdotal stories can be told of Arabs, Muslims or those of Middle Eastern appearance being unfairly targeted when traveling can be told.

Sujit Choudhry discusses the constitutionality of racial and ethnic profiling under s.15 of the *Charter*.[15] "The test for determining whether there has been a s. 15 violation was recently rearticulated by the Supreme Court in *Law v. Canada*, and has three parts: (a) that a distinction be drawn, (b) that it be drawn on the basis of a prohibited ground, and (c) that it be a discriminatory distinction."[16] The courts seem to suggest that profiling is discriminatory under s. 15 of *Charter*, however, the practice still occurs. There is a stigma and indignity associated with be targeted by law enforcement officials. "Those travellers would essentially be asked to establish their legitimacy; they would be placed in the position of have to state and justify their reasons for travelling, an entirely legal activity, while other travellers would face not such burden."[17] Choudhry suggests that the solution should be that everyone regardless of race and ethnicity should be targeted by law enforcement[18] and yet, this is not occurring.

One of the main justifications for police powers and punishment is the deterrence or prevention of criminal activity. Can such provisions of the *Anti-Terrorism Act* demonstrably deter individuals from performing terrorist acts?

Martha Shaffer argues no. "In terms of deterrence, it is certainly far from clear that [the Anti-Terrorism Act] offers any improvement over the deterrence potential of the existing criminal law."[19]

The *Anti-Terrorism Act* also aims to protect Canadians from terrorist activities and to effectively prosecute these 'terrorists'. Investigative hearings and preventative arrests may indeed incapacitate terrorists temporarily. Surely a 'suspected terrorist' should not be detained indefinitely. Although, as we will see in the next chapter, this is possible under the *Immigration and Refugee Protection Act* security certificate procedure. Therefore, a person once released from custody, if so compelled, will still complete their objective. The only benefit may be that "[b]y compelling persons to assist police investigations, investigatory hearings might also assist the goal of successfully prosecuting those who managed to carry out terrorism offences."[20]

There is a cost to these provisions and these concern our civil liberties and an independent judiciary upholding them. Investigative hearings "... completely derogate from the longstanding principle that citizens are under no legal obligation to assist the state in criminal investigations."[21] Furthermore, the targeting of certain political or ethnic groups may have a chilling effect on political dissent and may also exacerbate the problem of racial profiling.

It is perhaps inevitable that the judiciary also must play some role in the investigative hearings to serve as a check on what in effect is a proto-trial to assist the Crown's investigation. While judges are in a position to prevent abuses, their involvement can easily cross the line into unfortunate precedents such as the

Kellock-Taschereau. Closed hearings make it easier for them to cross this line. The problem lies in the use of closed investigative hearings as well as investigative hearings. In closed investigative hearings, the public scrutiny is eliminated because the information poses possible dangers for national security. A judge's role is compromised. The judge is required to ask questions to investigate into possible crimes that may or may not occur in the future (or could have occurred) which is normally outside the scope of the judge. The judge is meant to be the impartial arbiter a case. The judge could potentially investigate a terrorist and then participate in the case against the terrorist – the judge is already invested where he/she should be hearing the facts and then making a determination. The judge's role is forever changed. Furthermore, history shows that judges have a difficult time remaining unbiased in investigations.

In Chapter 2, the Royal Commission were explored and showed the dangers of having judges participating in investigations. The problem is further exacerbated in investigative hearings because these hearings could become mainstreamed by being applied in other cases of criminal liability – although it is stated that these are strictly to be used in relation to terrorism.[22]

As previously explained in Chapter 2, a judge must perform his/her duties as impartial arbiter but must also be seen to be doing what is just, be seen to be independent and be seen to be impartial. Closed investigative hearings mean that the judge's appearance of independence and impartiality is not open to public scrutiny: "The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve

impartiality in their judging."[23] The appearance of impartiality is just as significant as the fact that a judge is actually impartial. The public expects, in fact, demands that judges be held to higher standard than the rest of the legal community because of the significance and effect that their decisions can have on our own individual rights or society at large.

Judicial Review of the *Anti-Terrorism Act*

In the spring of 2004, the investigative hearing provision was referred to the Supreme Court of Canada in relation to the Air India Flight 301 case. A judicial investigative hearing was conducted *in camera* while the Air India trial was occurring and notice was not provided to the accused in the Air India Trial, to the press or to the public.[24]

The Supreme Court of Canada addressed concerns about the constitutional validity of s.83.28 of the *Criminal Code of Canada* and specifically, does s.83.28 of the *Criminal Code* infringe on s.7 of the *Canadian Charter of Rights and Freedoms* and does s.83.28 infringe the principles of s. 11(d) of the *Charter*. Some additional issues were whether the *Anti-Terrorism Act* could be applied retroactively, the terrorist offences occurred in 1985 and can s.83.28 be used for the purpose of pre-trial discover of evidence of the named person.[25]

The Supreme Court held that section 83.28 of the *Criminal Code of Canada* is constitutional. The court determined that there was able to balance between the battle against terrorism and the fundamental democratic values of the *Charter* and more specifically the importance of life, liberty and the rule of law.[26]

The court also determined that the rules of evidence apply because these investigative hearings can be seen as criminal proceedings. The court explained that "[t]his[27] broad power enables the judge to respond flexibly to the specific circumstances of each application and ensure that constitutional and common law rights and values are respected."[28] The court explained that the judge is there to ensure that procedures are carried out according to constitutional principles.

The court decided that "[s]ection 83.28 is presumed to have immediate effect and to apply retrospectively because it effects only procedural change and does not create or impinge upon substantive rights."[29] Essentially, the court determined that the section can be applied to terrorist activities that have occurred in the past. Typically, after a law is passed only offences that occur after the date of implementation can be prosecuted under the new law.

Justices McLachlin, Iacobucci and Arbour state that "the purpose of the hearing in this case was to investigate a terrorism offence and not to obtain pre-trial discovery."[30] However, they do capitulate that the Crown may have a pre-trial advantage but that the ruling in the *Vancouver Sun* appeal would balance and overcome these concerns.

Ultimately, the Supreme Court of Canada concluded that "[a]nti-terrorism provisions that compel unco-operative witnesses to answer questions in special investigative hearings are constitutional – but cloaking them in immense secrecy is not ...."[31] Justices McLachlin, Iacobucci and Arbour state that:

> "Judges acting under s. 83.28 do not lack institutional independence or impartiality, nor are they co-opted into performing an executive function. Section 83.28 requires the judge to act judicially, in accordance with constitutional norms and the historic role of the judiciary in criminal

> proceedings. A broad and purposive interpretation of s. 83.28 is consistent with the judiciary's role, which in this context is to protect the integrity of the investigation and the interests of the named person. Judges bring the full weight of their authority to the hearing to provide all the constitutional guarantees of the *Charter*, and a failure to do so will constitute on the part of a hearing judge a reviewable error. A reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent. The conclusion in the *Vancouver Sun* appeal that hearings are presumptively to be in open court also supports a conclusion that the judiciary is independent and impartial."[32]

The Supreme Court is saying that the judiciary can maintain its independence and impartiality and indeed, are there to ensure that civil rights are respected in the context of such special procedures. However, they also signal that this must be seen to be done in open courts. They therefore indicate a preference for open investigative hearings over closed investigative hearings. However, they do not rule out the need for closed hearings and therefore some cases will be closed for various pressing reasons of national security. The opportunity for a robust defence of basic civil liberties and rights appear to have been missed. The decision might even be interpreted as confirming the historical pattern of judicial deference to government in national security cases. In these cases, the judiciary can too easily cross lines, as shown the Taschereau-Kellock Royal Commission. In these cases, judicial independence and impartiality could be compromised with no public scrutiny.

Furthermore, Justices LeBel and Fish recognize the concern of judicial independence and the perception of an independent judiciary. Justices Fish and LeBel dissenting opinion in the Air India case explains that:

> "Judicial independence has two dimensions, namely individual independence, which attaches to the individual judge and institutional independence, which attaches to courts as institutions and ensure the separation of powers. Although a judge may be independent in fact an act

> with the utmost impartiality, judicial independence will not exist if the court of which he or she is a member is not independent of the other branches of government on an institutional level. In this case, s. 83.28 requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch, this cannot but leave a reasonable, well-informed person with the impression that judges have become allies of the executive branch."

Again, judicial independence involves autonomy from the executive and its investigative and prosecutorial functions. Only when judges can remain separate from the executive powers of the state can judicial independence be maintained. Judicial independence is crucial to maintaining a balance between effective measures and human rights or civil liberties.[33] As seen in the historical examples surveyed in Chapter 2 and 3 of this thesis, serious questions are raised about judicial independence in security cases despite the formal protections that seek to minimize a blurring of the lines. The role of judicial review in the area of national security poses the challenge of balancing public interests and rights. The judiciary's independent role becomes challenged and the very notion of judicial independence is called into question in national security cases because the lines are blurred. Judicial independence cannot be maintained in a situation where they are called to be a role other than impartial arbiter. In turn, the public loses confidence in the system because the judiciary is seen be an extension of the state. Furthermore, if in times of crisis these principles can be compromised, then how real can the principles of independence and impartiality be in the first place. When the state is threatened or in a heightened risk environment, then constitutional or Charter rights are thrown out the window as illustrated in the legislative changes discussed and will be further illustrated in Chapters 4 and 5.

We have also introduced concerns about risk and racism which we will return to in the next chapter. Although, the events of the internment of Japanese-Canadians may not occur again, are not Arab, persons of Middle Eastern appearance and Muslims, being unfairly targeted by law enforcement practices? These populations are targeted and are not being protected whether they are Canadian citizens or not, such as of Maher Arar and other cases examined in the next chapter.

Conclusion

Preventative arrests and investigative hearings are new additions to law through the *Anti-Terrorism Act* and pose serious problems for individual rights and also, the judiciary. Preventative arrests essentially go against every principle in the rule of law. Preventative arrests mean that innocent people could be held for indefinite periods of time, particularly if judges decide to support the government.

Investigative hearings and in particular, closed investigative hearings raise serious concerns about the rule of law, the judiciary and racism. Investigative hearings allow for law enforcement officials and the judiciary to compel individuals to provide information whether the individual is directly involved in the offence or not.

Furthermore, investigative practices include racial profiling and this practice can unfairly target Arabs, persons of Middle Eastern appearance and Muslims who are seen as the terrorist of September 11th, 2001 because these are the people who were on the planes. However, other terrorists are present who

look just like us, even though we don't care to admit it. Racial profiling poses problems because certain populations are unfairly targeted. The rhetoric of risk is political and ideological. By creating a suitable outside enemy, such as an Arab, Muslims or persons of Middle Eastern appearance, to target, society feels safer. The risk is mitigated.

The judiciary is placed in the position, with preventative arrests and investigative hearings, of judge and investigator. We expect that the judiciary will not be an investigator but rather the impartial arbiter in a case. The judiciary is meant to make difficult decisions about the legitimacy of legal problems and by blurring the role the judiciary plays in the legal system; the system itself breaks down and loses its legitimacy.

The question is whether the judiciary will be influenced by the executive and as history shows the judiciary tends to ally itself with the executive. The judiciary errs on the side of caution, particularly if there is no clear evidence that the government acted maliciously. The harm to the image of the judiciary is real. The same considerations can be applied to the investigative hearings and in particular, closed investigative hearings. "Repeatedly upholding the government's position, which is not at all unlikely, will make the judiciary seem to be an arm of the government. This is particularly so when the hearing in many cases will be conducted in whole or in part in closed or, as it will be labeled, "secret" sessions."[34]

The judiciary is meant to be independent rather than be an arm of the government. There are definite benefits to uses the judiciary in national security

cases because they are already an established institution and therefore, no other structure needs to be established. "The judiciary is trusted by the public and will no doubt act in such a way as to continue to justify that trust."[35] However, the judiciary will lose this trust if they are seen to be an arm of the government. The judiciary must be allowed to maintain its independence from the government.

The judiciary cannot be turned into an arm of the government because the judiciary is meant to provide the checks and balance. The judiciary must be and be seen to be truly independent from the government. Investigative hearings and preventative arrests mean that the judiciary are placed in a position that means that the judiciary are helping in the process of arrest and investigative, therefore, determining who will be prosecuted. The courts are actively employed in the assessment of security risk on a case by case basis in processes which are considered exceptional or exempt from regular due process.

[1] Wesley K. Wark, "Intelligence Requirements and Anti-Terrorism Legislation" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 291.
[2] *Anti-Terrorism Act*, 2001 (Bill C-36) at section 83.03.
[3] Jeff Sallot, "Reveal evidence, RCMP told" *The Globe and Mail* (13 November 2004) A7.
[4] *Supra.* note 2 at section 83.28.
[5] Martha Shaffer, "Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 197.
[6] *Ibid.* at 197.
[7] Please see: Application under s. 83.28 of the *Criminal Code (Re)* 2004 SCC 42
[8] Raga Khouri, "9/11: Do you know where you civil rights are?" *The Globe and Mail* (11 September 2003) A17.; William Kaplan, "When secrecy has been necessary" *The Globe and Mail* (7 November 2003) A7.; Jim Bronskill, "Civil liberties at risk, former CSIS chief says" *The Globe and Mail* (27 November 2003) A5.; Kirk Makin, "Anti-terrorism act assailed in Supreme Court test" *The Globe and Mail* (11 December 2003) A11.; Kirk Makin, "Top court judges question rigidity of anti-terror act" *The Globe and Mail* (12 December 2003.; Kirk Makin, "Top court rejects secrecy in anti-terrorism hearings" *The Globe and Mail* (24 June 2004) A1 and A7.
[9] Shaffer, *supra.* note 5 at 195-196.
[10] Lauren B. Alloy, Neil S. Jacobson and Joan Acocella, *Abnormal Psychology: Current Perspectives, 8th Edition* (Boston: McGraw-Hill College, 1999) at 45.
[11] Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 369.
[12] *Ibid.* at 369.
[13] Shaffer, *supra.* note 5 at 200.
[14] Sujit Choudhry, *supra.* note 11 at 367-368.
[15] *Ibid.* at 371.
[16] *Ibid.* at 371.
[17] *Ibid.* at 373.
[18] *Ibid.* at 378.
[19] Shaffer, *supra.* note 5 at 200.
[20] *Ibid.* at 200.
[21] *Ibid.* at 200.
[22] *Ibid.* at 200.
[23] R. v. S. (R.D.) in Logan Atkinson, et. al. (eds.), *Introduction to Legal Studies, 3rd Edition* (North York: Captus Press, 2001) at 370.
[24] Application under s. 83.28 of the *Criminal Code (Re)* [2004] 2 SCR 248.
[25] *Ibid.*
[26] *Ibid.*
[27] Referring the powers provided under ss. 83.28(5)e and 83.28(7).
[28] *Supra.* note 24.
[29] *Ibid.*
[30] *Ibid.*
[31] Kirk Makin, "Top court rejects secrecy in anti-terrorism hearings" *The Globe and Mail* (24 June 2004) A1 and A7.
[32] *Supra.* note 24.
[33] Charles M. Cameron, "Judicial Independence: How can you tell it when you see it? And, Who Cares?" in *Judicial Independence at the Crossroads: An Interdisciplinary Approach.* (Thousand Oaks, California: Sage Publications, Inc., 2002) at 144 and 145.
[34] M. L. Friedland, *National Security: The Legal Dimensions.* (Toronto: Minister of Supply and Services Canada, 1980) at 118.
[35] *Ibid.* at 118.

Chapter 5

The *Anti-Terrorism Act* is a part of a network of legislation that is meant to protect Canadians from national security threats. The *Anti-Terrorism Act* provisions have caused concerns as discussed in previous chapters but other legislation, and in particular the *Immigration and Refugee Protection Act*, raise related concerns that will be examined in detail in this chapter. The *Immigration and Refugee Protection Act* is a massive piece of legislation. Of particular concern here are those provisions concerning security certificates, secret evidence, indefinite detention and summary deportations as well as similar processes arising out of intelligence sharing. These issues will be the focus of this chapter.

These sections of the *Immigration and Refugee Protection Act* raise many questions. Are the sections constitutional? Do the provisions create inequalities amongst persons residing in Canada or seeking to enter? Although permanent residents and foreign nationals do not share all the same protections as citizens of Canada, permanent residents and foreign nationals have been said by the courts to share basic fundamental rights. Are these rights being protected and how far does the Charter apply in practice?

Furthermore, are certain ethnic groups being unfairly targeted by the legislation? Racial profiling exists and in the cases to be discussed in this chapter, the appellants are all of Middle Eastern descent. Is there a correlation between ethnicity and those held under provisions of the *Immigration and Refugee Protection Act*?

Immigration and Refugee Protection Act

Indefinite detention and summary deportations are the primary national security related powers authorized under the *Immigration and Refugee Protection Act* (*IRPA*).

These powers have been widely used in Canadian history, originally exercised as an executive power under royal prerogative (for example, the Acadian expulsion). These powers took legislation form during World War One in the form of the *War Measures Act* and section 41 and 42 of the *Immigration Act*, the later widely used in the 1920's and 30's to summarily deport thousands. In chapter two we examined the overtly racist use of these powers of indefinite detention and summary deportation in the context of the treatments of persons of Japanese ancestry during World War Two. The *IRPA* received Royal Assent November 1, 2001[1] to replace the *Immigration Act*. The Immigration Act was amended on several occasion, in particular significant amendments were made in 1992 and 1995.[2] The *IRPA* implemented further revisions in the wake of September 11th, 2001.

The *Immigration and Refugee Protection Act* (*IRPA*) provides provisions concerning immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger. The sections of the *IRPA* which are of particular interest for this analysis for this chapter are the section pertaining to security certificates, secret evidence, indefinite detention and summary deportation which are further provisions are implemented to address issues of fear, uncertainty and risk associated with terrorism. Section 77 refers to a security certificate and section 78 discusses a judge's roles including evidence and secret evidence.

> "77.(1) The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80.
> (2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application

under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes a determination.

78. The following provisions govern the determination:

(a) the judge shall hear the matter;

(b) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(c) the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(d) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination;

(e) on each request the Minister or the Solicitor General of Canada made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person;

(f) the information or evidence described in paragraph (e) shall be returned to the Minister or Solicitor General of Canada and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary;

(g) the information or evidence described in paragraph (e) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but its disclosure would be injurious to national security or to the safety of the person;

(h) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed;

(i) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and

(j) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence."[3]

These provisions are meant to provide a judge with guidelines and establish some basic procedures. The judge, under these sections, is asked to keep information secret

and ensure confidentiality of security information. However, these provisions do not follow the usual rules of a court. The process is set up to favour the executive and again challenges judicial independence by involving judges in law enforcement in proceedings closed to the public.

Rules of evidence are also different. If the judge feels the information is appropriate, it can be submitted even if it would not be admissible in a court of law. How does this provision safeguard fundamental rights to a fair and just trial? If information is not admissible in a court of law, then evidence should not be admissible in cases surrounding national security. By maintaining the air of secrecy around information in case, the rhetoric of risk is maintained. The fear of the public is increased or the public feels that these provisions are acceptable and are willing to adhere to the law to prevent the risk. By insisting on maintaining secret information, the public is more aware of risk. These issues will be discussed further in relation to specific cases that have gone before the Federal Courts.

Section 81 deals with the summary deportation of a permanent resident or foreign national if a security certificate is deemed reasonable.

> "81. If a certificate is determined to be reasonable under subsection 80(1),
> (a) it is conclusive proof that the permanent resident or foreign national named in it is inadmissible;
> (b) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing; and
> (c) the person named in it may not apply for protection under subsection 112(1)."

The section allows for no appeal. Further, the section creates a process in which the individual may never be aware of the reasons for their deportation or inadmissibility. Essentially, a permanent resident or foreign national could be removed from the country

with no appeal without knowledge of the reasons for the deportation, without an opportunity to present any evidence. Such expedients are contrary to basic due process rights. Not allowing appeals means that miscarriages of justice can occur. Information can be incorrect and people could be deported without being convicted of a crime

Sections 82 to 87 refer to the determination and procedures arrest and detention of permanent resident or a foreign national. The role of judge is described in these sections.

> "82.(1) The Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77(1) if they 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.
> (2) A foreign national who is named in a certificate described in subsection 77(1) shall be detained without the issue of a warrant."[4]

These sections allow for the arrest and detention of individuals but do not explain the criteria by which an individual would be arrested and detained. The threat of a possible event sometime in the future is enough to cause allow for the arrest and detention. Furthermore, an individual can be arrested and detained without the issuing of a warrant, a standard procedure in law discussed in the previous chapter.

What factors play role in the arrest and detention of these individuals? Race and ethnicity appears to play a role as we will see in the cases explore later in the chapter. Targeting individuals because of family ties to a nation where terrorist cells exist appears to be enough to arrest and detain an individual. Detention is indefinite and may be based on mere suspicion, but the public remains unaware because the information must remain a secret. The indefinite detention provisions increase our awareness of the risk of these individuals by making them the enemy.

An exploration of a variety of cases, such as Mohamed Harkat, Adil Charkaoui, Hassan Almrei, and Maher Arar, will explore the variety of concerns that are raised by these sections. Sections 77 through 82 are those that have been presented to the courts at this time. Furthermore, all these individuals are all Middle Eastern and faced, in some cases, lengthy periods of detention or torture because of the provisions of the *IRPA*.

Analysis

The exploration of the above-mentioned cases, allow for a discussion of a wide array of issue. Furthermore, the cases show the problems with judicial involvement and the blurring of roles.

The Harkat Case

Mr. Harkat discussed the appointment of an *amicus curiae* or "Friend of the Court" during the portions of the hearing when he could not be present at the hearing concerning the reasonableness of a security certificate. Mr. Harkat argued that the *IRPA* is in breach of section 7 of the *Charter* if an *amicus curaie* is not allowed in the hearing of reasonableness of a security certificate.[5]

The court decided that the appointment of an *amicus curaie* is not necessary for jurisdiction and that section 7 of the Charter is not breached without an *amicus curaie* because it is assumed that judge can achieve the balance required and ensure justice.[6]

> "In my opinion, designated judges are the cornerstone of the review procedure because they have a twofold obligation: to protect criminal or national security intelligence; and to provide the person concerned with a summary of the evidence that reasonably discloses the circumstances giving rise to the certificate and the warrant that resulted in his detention. This constitutes the balance between the opposing interests."[7]

The problem is that the judge is also involved in the enforcement of the procedure and there is no public scrutiny. Certainly bias in favour of the government appears to be reflected when the judge states:

> "In my view, the following factors also weigh against the exercise of discretion to appoint an *amicus* in this case at this time:
> i) It would not be in accordance with the intent of Parliament, as expressed in the legislation.
> ii) The request is made late in the proceedings and would result in further delay.
> iii) The procedure set out in section 78 of the Act provides the designated judge with the necessary power and flexibility to inquire into the reasonableness of a security certificate while balancing and protecting the rights of the person named in the security certificate."[8]

However, the concern, not only surrounds the judge, but around the intelligence gathering and who is targeted. Race and ethnicity appear to play a role.

> "Long criticized by academics and public interest organizations examining the workings of criminal justice and immigration systems, profiling has now, as a result of September 11, attained renewed prominence. The reason is clear – the hijackers identified by American law enforcement officials all appear to have been Arab, and the argument made by proponents of ethnic and racial profiling is that had airport security officials engaged in profiling, terrorist acts of September 11 could have been prevented."[9]

Profiling appears to have become an accepted practice by those who are not directed affected by the consequences. Upper or middle class white men are not taken into custody of the police without knowing what crime they have committed; Arabs, persons of Middle Eastern appearance and Muslims are the ones effected by profiling, thus creating an outside enemy.

The Charkaoui Case

Mr. Adil Charkaoui was a permanent resident of Canada and awaiting his Canadian citizenship. "On May 21, 2003, he was arrested and placed under detention.

The arrest warrant was issues under section 82 of the IRPA, pursuant to a security certificate referred to the Federal Court that day in accordance with section 77 of the Act."[10] Mr. Charkaoui remained detained from the date of arrest to the time of the trial without knowledge of the reasons for the detainment. He was aware that he was arrested under a security certificate. "... [O]n July 17, 2003, [the judge] allowed some information that until then had been protected to be given to the appellant."[11] Further information was provided to the appellant on August 14, 2003.[12]

The security certificate was signed by the Minister of Citizenship and Immigration and by the Solicitor General of Canada. Mr. Charkaoui argued that s. 33, 77 and 85 should be declared unconstitutional. A wide range of concerns about the *IRPA* were raised in particular:

- the jurisdiction of judges;
- procedures for detention;
- the constitutionality of ss. 77 and 78 with respect to a fair trial before an independent and impartial tribunal;
- if s. 76 derogates an appellant's status as a permanent resident;
- the equal treatment of permanent residents who are declared inadmissible on security grounds;
- if detention provision during judicial examination are consistent with the *Charter* and the *Bill of Rights*;
- if the expressions "reasonable grounds to believe" and "danger to the security of Canada" used in s. 33 and 34(1) are vague, overly broad or discriminatory;
- whether the absence of the right to appeal is contrary to s. 96 of the *Constitution Act, 1867*; and
- judicial examination procedure under s. 76 to 85 of the *IRPA* comply with Canada's international obligations.[13]

The court determined that the designated judge does have jurisdiction to decide constitutional questions in relation to the *IRPA*. "... we find that Parliament's intention was not to make the "designated judge" a second-rank judge invested with fewer power than a non-designated judge, but to ensure the presence of judges who are sufficiently

informed to hear matters pertaining to national security."[14] The court decided that designated judges retain their status as a Federal Court judge and the powers associated with it and also have the powers of being a designated judge.[15]

The court concluded that "... the designated judge had jurisdiction to determine the constitutional questions that were put before him and that he did not commit any reviewable error, in the circumstances, by doing so in the context of the motion."[16] The court essentially determined that the designated judge has the ability to consider and decide constitutional questions arising from the procedure of review of a security certificate.

The plethora of questions raised by Mr. Charkaoui relate to constitutionality but also to the fact that the security certificate, arrest and detention result from an action by the executive and not a judge, indicating the warrantless element. The executive has its own interests to consider and the very protection of the rights of the individual are not their main focus. However, a judge is meant to protect the individual and society by achieving an acceptable balance. The court held that the section is constitutional and does not violate rights. The court fails to recognize the significance of the appearance of justice as well as actually doing justice. The judge, because of a blurring of the lines between the executive and the judge, is put in an awkward position.[17] For example, the executive initially determines what information should be withheld and then the judge determines which information should remain secret. The fine line between the roles causes confusion particularly about judicial independence and impartiality.

"The Federal Court of Appeal has upheld the constitutionality of security certificates used to detain suspected terrorists such as Adil Charkaoui."[18] The Federal

Court of Appeal is a three judge panel stated that the provision questioned by the Charkaoui case were indeed constitutional. All the judges are presented the same opinion on the legislation. The *IRPA* provisions are constitutional and that "permanent residents such as Mr. Charkaoui do not have an absolute right to remain in Canada if letting him do so would compromise national security."[19]

Again, race and ethnicity appear to play a role in this case. The risk that Arab Muslim poses appears to be great. "Mr. Charkaoui is among five men who have been held under security certificates since 2000."[20] All the men are Arab Muslims. Does this population represent greater risk? The government perceives them to be a greater risk than the rest of country.

The Almrei Case

Mr. Hassan Almrei was being detained by a security certificate and was making an application pursuant to section 84(2) of the *IRPA*. Mr. Almrei held that section 84(2) of the *IRPA* did not incorporate section 78 of the *IRPA* and so, secret evidence could not be presented to the Court in the absence of Mr. Almrei himself.[21] The court held that "section 78 of the IRPA applies to detention review hearings pursuant to section 84(2) of the *Immigration and Refugee Protection Act.*"[22] This effectively prevented Mr. Almrei from defending himself from allegations against him. Again, the court held the hearing *in camera* and information could not be released to Mr. Almrei.

Mr. Almrei argued that he was being tortured by the cold and secret trials.[23] "On that second point, Canada's immigration law allows for Draconian measures to be taken against non-citizens deemed a national security threat."[24] The case once decided by the courts cannot be appealed. The fact that the case not only is held in secret but also cannot

be appealed causes concerns about the risk of a miscarriage of just. The question is whether Canadians care if there is risk of a miscarriage of justice or whether Canadians are prepared to give up rights.

The Arar Case

Canada's precise role in the Arar case remains unclear. Arar was targeted by law enforcement officials and although he was deported to Syria and torture from the United States, Canadian agencies may have played a role in his deportation. An inquiry has been called in the attempt to reveal what was done by the Canadian government and the RCMP and CSIS.[25]

The inquiry will ultimately have to determine the legitimacy of the Maher Arar's claim of Canadian agencies' involvement and this case goes to the important but secretive process of intelligence sharing. Mr. Arar states that before his deportation from the United States to Syria for his torture, the Mounties contacted Mr. Arar and wanted to meet with him and would explain things then. Mr. Arar explains that he said he would attend if he could have a lawyer present, at which time, the RCMP lost interest.[26] "Canadian officials say the Americans consulted with the RCMP before they deported Mr. Arar. But the Mounties said they were not told that the Americans' plans involved sending Mr. Arar to Syria."[27]

The secrecy of intelligence sharing is in clear tension with the accountability of security agencies.[28] The procedures and their consequences can have profound impact on our rights. The cases seem to show that people who are Arab, persons of Middle Eastern appearance and Muslims are the target because they are seen to be a greater risk than other populations in Canada.

The Zundel Case

Ernst Zundel is a Holocaust denier who was deported March 2, 2005 to Germany.[29] "Mr. Zundel came to Canada in 1958, but never obtained citizenship. He moved to the United States in 2000 to live with Ms Rimland, an American, in Tennessee. Because of a confusion over his visa's processing, Mr. Zundel was deported back to Canada on Feb. 18, 2003. He was detained at the border and has been in jail every since."[30]

Mr. Zundel had been confined for "two years under a security certificate, which allows indefinite detention on secret evidence without charge or trial."[31] "Last week, Federal Court Justice Pierre Blais ruled Mr. Zundel's association with neo-Nazi and white supremacist groups that espouse violence threatened national security and "the international community of nations.""[32]

Mr. Zundel was deported to Germany because he was a distasteful person. The Zundel case is an excellent example of how provisions of the *IRPA* can be abused and in this case, can deport an individual who society deems a loathsome individual and have little sympathy for. The case seems to demonstrate how malleable and far reaching the measures can be.

The courts have limited information on the Zundel case. The courts for some reason do not have detailed information or decisions for the Zundel case. Access to all information relating to the all cases is difficult to obtain because documents are secret and cannot be provided to the public. The risk of providing access to the information in the documents however, the cost is a lack of transparency in the system. As previously

stated, public scrutiny is a key element of the legal process. Justice must be seen to be done as well as actually being done.

All the cases, except the Zundel case, discussed are people who are Arab, persons of Middle Eastern appearance and Muslims. To ignore the targeting of certain ethnic groups is to ignore the core problem of the legislative framework. The risk lies in judges erring on the side of the executive and holding permanent residents or foreign nationals for information that may not be available or of which they have no knowledge. Of course, the public cannot ensure fair and decent treatment because cases are held *in camera* and evidence remains secret.

Justice must be seen to be done as well as actually being done. The lack of transparency in the process means that the judicial institution is called into question because it is seen to be influenced by the executive, even if the individual judge has remained independent and impartial. The process itself makes the institution questionable.

One Federal Court judge, Mr. Justice James Hugessen, has expressed public doubts about the process of security certificates.[33] The courts appear to have doubts about national security processes and are concerned about impartiality and independence. Independence and impartiality of the judiciary are central and essential to the legal system. Without these guarantees, faith in the systems is lost.

Conclusion

The *Immigration and Refugee Protection Act* (*IRPA*) creates executive powers with enormous potential for abuse and the reach of the security certificate procedure has been amply demonstrated since September 11th, 2001. When considered with the other

legislation, such as the *Anti-Terrorism Act*, these measures raise the question: Granted we need effective measure to combat terrorism but at what cost? How much are our rights and freedoms being compromised? How much are the guardians of our rights, judges, being compromised in their independence? And does not democracy depend on an informed public and open and accountable legal proceedings?

Arabs, persons of Middle Eastern appearance and Muslims appear to be targeted by investigations by the police and other intelligence officials. Judges appear to see no problems with evidence in these cases but are also limited in their ability to question who is investigated.

Judges have decided in many cases, some of which were discussed in this chapter, that the legislation is constitutional. Further, the courts have decided that judges can balance the need to protect national security information and advocate for the accused. However, traditionally this is not the role of a judge. Judges are meant to decide cases after hearing evidence and in these cases, the rules of evidence are not as strict. Judges give the appearance because of a lack of transparency, that there are supported the executive's position rather than doing justice.

In creating an outside enemy, namely Muslims, Arabs or persons of Middle Eastern appearance, a heightened sense of risk is maintained. Judges end of contributing to the rhetoric of risk initially established by the state by participating in the process as both judge and investigator.

Canadian society is in a risk society of sorts that is qualitatively different from what has preceded it but the concerns and problems we encounter are nonetheless quite similar resulting in political and ideological solutions that are masked in a rhetoric of risk

and the construction of suitable outside enemies. Risk is as powerful today as a state rhetorical device as it has always been during a time of crisis. Legislative language has changed over time to reflect a more nuanced view and expectation of rationalistic calculation in targeting who is risky.

[1] Library of Parliament: Parliamentary Information and Research Division, *Canada's Immigration Program* by Benjamin Dolin and Margaret Young (Ottawa: Library of Parliament: Parliamentary Information and Research Division, Law and Government Division, 2004), online: Library of Parliament <http://www.parl.gc.ca/information/library/PRBpubs/bp190-e.htm#atheroadtxt> (date accessed: 12 April 2005).

[2] *Ibid.*; "Each bill occasioned significant controversy on the part of interested parties: immigration and refugee lawyers; refugee advocates, many of whom work in settlement agencies; human rights groups; ethnic organizations; knowledgeable individuals, and others.

Beginning in the mid-1990s, there was a thorough and virtually continuous review of immigration and refugee law and policies. In early January 1998, a three-member advisory group to the Minister of Citizenship and Immigration released its report, *Not Just Numbers: A Canadian Framework for Future Immigration.* A year in the making, the work was based on wide consultation and presented a comprehensive review of all aspects of Canadian immigration law and policy.

In the summer of 1999, when four boats carrying Chinese migrants arrived off the shores of British Columbia, the debate over immigration and refugee law and policies became more widespread and intense. Much of the Canadian public did not like what it saw. Some 600 Chinese migrants, including a number of teenagers, arrived in leaky boats amid execrable conditions. None had documents, and most made refugee claims.

The Canadian public was taken aback. Much of the debate was similar to that in the mid-1980s when two boats of migrants had arrived off the East Coast. This time, however, sympathy was even scarcer because more was known about the criminal organization and recruitment of the migrants and the fact that for many the intended destination was not Canada, but New York City.

Although many Canadians called for the migrants to be returned to China immediately, the Minister of Citizenship and Immigration and those knowledgeable about the refugee system explained Canada's international and domestic commitments. They pointed out that the arrivals represented a tiny percentage of the number of individuals who arrive each year, mostly by air or across the U.S. border, to claim refugee status. Nevertheless, mass arrivals do frequently generate a backlash, especially when there are strong suspicions that those arriving are not true refugees.

The long-awaited legislation, Bill C-31, the Immigration and Refugee Protection Act, was tabled in the House of Commons in April 2000. Study of the bill by the Standing Committee on Citizenship and Immigration had just begun when an election was called and the 36th Parliament ended; thus, Bill C-31 died on the *Order Paper*. Its replacement, Bill C-11, was introduced in Parliament in February 2001, received Royal Assent on 1 November 2001, and came largely into force, along with an entirely new set of regulations, on 28 June 2002." *Ibid.*

[3] *Immigration and Refugee Protection Act*, 2001, c.27 at s. 77.

[4] *Ibid.* at s. 82.

[5] *Harkat, Re* 2004 FC 1717.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*" in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 367.

[10] *Charkaoui v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 421.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] Canadian Press, "Security certificates unfair, protesters say" *The Globe and Mail* (9 November 2004).

[18] Ross Marowits, "Appeal court back security certificate" *The Globe and Mail* (11 December 2004) A11.

[19] *Ibid.* at A11.

[20] *Ibid.* at A11.

[21] *Almeri v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1523. (Please note: This is the correct citation – Mr. Almrei's name is spelt incorrectly in the citation at the federal court level.)
[22] *Ibid.*
[23] "A prisoner's protest" *The Globe and Mail* (16 October 2003).
[24] *Ibid.*
[25] Jeff Sallot, "Arar recounts tale of torture" *The Globe and Mail* (5 November 2003) A1 and A4.
[26] Jeff Sallot, "Arar to break silence over U.S. arrest" *The Globe and Mail* (4 November 2003).
[27] *Ibid.*
[28] Drew Fagan, "Intelligence-sharing rules lacking" *The Globe and Mail* (27 November 2003) A4.
[29] Adrian Humphreys, "Zundel handed over to German authorities" *The Ottawa Citizen* (2 March 2005) A1.
[30] *Ibid.* at A3.
[31] *Ibid.* at A1.
[32] *Ibid.* at A4.
[33] *Supra.* note 23.

Chapter 6

The events of September 11th, 2001 and the risk of future terrorist attacks left many Canadians in fear. This perception, along with international pressure, resulted in the government writing new legislation to deal with terrorist threats. The government claimed that it was attempting to balance national security with political, legal and due process rights. As in the past the judiciary has been called upon to assess this balance. As in the past, the judiciary has also been called to participate as investigator. Judicial involvement in these new processes of risk assessment calls into question formal claims of independence.

It has been shown that the courts' role in protecting rights is complicated because important decisions are being made around the balance between broad public interests and individual and political rights. Furthermore, the relationship between national security measures and public interests are unclear or contentious. The principles of judicial independence and impartiality are not sufficient guarantees of a non-partisan resolution of all these issues.

Historically, Japanese Canadians were deemed a security risk because of their ethnic status. Japanese-Canadians were deemed the outside enemy by the state. Under the *War Measures Act*, Japanese Canadians were an easy target of a racist administration. Futhermore, judicial review was limited in matters such as, detention without trial, compensation for property confiscated, deportation and political rights. In the case of the Bird Royal Commission, Justice Bird showed his bias and in the end provided compensation that was unsatisfactory. In terms of risk, the actions taken by the state make sense as a means of limiting the perceived risk that Japanese-Canadians posed to

the community. However, the detainment of individuals is unacceptable in practice and ultimately, compensation was paid.

The Gouzenko Affair and the Taschereau-Kellock Royal Commission is an example of the dangers of judges playing a role in the investigative process. As explained in Chapter 2, the two Supreme Court Justices were required to determine who, if anyone, should be indicted. The hearings were held *in camera* and any persons brought before the commission had no right to bail or to counsel.[1] This is a similar situation as found under the *Immigration and Refugee Protection Act*, when looking at security certificates.

The Supreme Court justices were placed in a role, which compromised their independence as members of the judiciary because they were required to perform a role that is normally left to the police and crown prosecutors. In so doing, Taschereau and Kellock were seen to do the work of the executive, a common theme throughout the discussions of the application of national security legislation. The judiciary was and is called to participate in the process to determine who the risky people are. The perception of the judiciary being an extension of the executive is exacerbated by these processes. Society must see justice as being done as well as justice actually being done; there must be transparency in the system. However, recognizing that the state may have legitimate reasons for maintaining secrecy of certain evidence.

The *Anti-Terrorism Act* changes basic principles in law, such as the rule of law and powers of investigation, to the benefit of the government. As such, serious concerns are raised about basic fundamental freedoms that Canadians hold in high regard. Under the *Anti-Terrorism Act*, judges are relied on to address constitutional claims that may

arise from possible abuse. Furthermore, the judiciary is required procedurally to participate in closed investigative hearings and preventative arrests. Although, these measures in terms of risk management techniques are legitimate, our notions of basic rights are also necessary. The numerous cases in Chapter 5 show the discomfort with the measures in place to address the risk of terrorism.

The judiciary is directly affected by the provisions of the *Anti-Terrorism Act* because they are required to participate in the process in a manner that is inconsistent with their positions. However, as we have seen by the wide array of cases discussed, courts have proved more deferential to government security concerns than individual rights.

The Justice Department has produced a 90-page secret report on racial profiling, issued in December 2004, which police and border-security officials think should be rewritten or withdrawn altogether.[2] "The draft report, authored by the Justice Department's public law policy section, warns that Canada has fallen behind the United States and Britain in taking steps to combat the problem, and offers numerous option for politicians to consider, from launching an education campaign to introducing anti-racial profiling legislation."[3]

The cases discussed in Chapter 5 show that race is indeed a determinant of risk for terrorist activity. The police can state that racial profiling is not an issue but when cases are primarily focused on persons of a specific race or ethnicity, these claims no longer seem feasible. The secret report highlights that even if racial profiling is not a problem, "[p]eople who fear they may be subjected to racially biased treatment, ..., will feel shame and resentment, and modify their behaviour, regardless of the actual degree of

risk."[4] The provisions of the *Anti-Terrorism Act* allow the state to target individual without the public knowing the reasons for targeting a particular individual. This creates further resentment and fear that the individual is being targeted on the basis of race.

The *Anti-Terrorism Act* is currently under review, as was originally intended by the legislation.

> "The Anti-Terrorism Act, passed in December 2001 in response to the terrorist bombing in the United States, requires a review after three years, but Mr. Cotler said he hopes the inquiry extends to several other laws that were affected by the legislation as well. They include such things as tougher immigration laws and allowing airline authorities to give information to law enforcement agencies for purposes unrelated to terrorism."[5]

The government is obviously concerned about certain provisions of terrorism legislation. In particular, the Justice Minister is concerned about decisions made by the British Lords to strike down provisions in anti-terrorism legislation. The British Lords decided that the provisions allowing for the arrest and detention of foreign nationals suspected of terrorist activities without trial is invalid because it violates international laws.[6] "Justice Minister Irwin Cotler said he is going to look at the British ruling because of similar provisions in Canadian law allowing federal cabinet minister to issue arrest warrants, known as security certificates, to detain terrorist suspects who are not Canadian citizens."[7]

The review is considering the adoption of British amendments to British legislation to prevent terrorism such as house arrest and electronic ankle bracelets. "The new measures, inspired by Britain's recent move to tone down its anti-terrorism laws, would expand the range of options authorities have to deal with non-citizen immigrant

who are arrested as security threats to include measures such as electronic ankle bracelets and house arrest."[8] To allow for these measures means that suspects could really be held indefinitely but because people are in their own homes rather than jail, the perception is different. The people that these measures will effect have not been convicted of any crime. "The idea smacks of a dictatorship. It would put civil liberties at grave risk for Canadian citizens."[9] In terms of the security certificate, a person could remain in the country, rather than receiving a deportation order, on the condition of house arrest or an electronic ankle bracelet. The evidence and/or information surrounding the "possible" terrorist's case would still remain secret. The same problems occur but the person could truly be indefinitely kept under surveillance because they are too risky to be allowed to wander free even though, they are not convicted of an offence.

The judiciary also has concerns about the anti-terrorism measures. The judiciary hopes that the review of the legislation will allow for some change and consult all relevant groups.

> "The chief justice of the Federal Court, which deals with cases involving anti-terrorism laws, went much further last week when he said that the security obligations imposed by the act created "absurd" situations in the court by forcing it to keep too much information secret."[10]

The review of legislation should be extended to include more legislation than just the *Anti-Terrorism Act.*

> "The investigatory hearing provision, where someone can be forced to testify, has been used only once and that was in the Air-India case. The pre-emptive arrest provision has never been used. But at the same time, the use of safety certificates provided for in the Immigration Act (enacted before 9/11) have skyrocketed. These involve trials so secret that even the targets of the certificate are not told of the evidence against them. One of the first fights, according to NDP justice critic Joe Comartin, will be to broaden the review to include them."[11]

As explained in Chapter 5, the *Anti-Terrorism Act* is only one part of a web of legislation that is meant to protect Canadians from national security threats. The *Immigration and Refugee Protection Act* includes provisions for indefinite detention, summary deportation, security certificates and secret evidence as well as similar processes that arise out of intelligence sharing. All legislation that concerns terrorism should be considered as many of the same concerns arise.

Two committees are currently reviewing post-September 11, 2001 anti-terrorism legislation. One provision under consideration is the security certificate. Justice Minister Cotler has stated that the compromises proposed by Britain could be useful here.[12] "Britain's so-called control measures include house arrest and a variety of conditions that include curfews, restrictions on using telephones and other communication devices, and the use of electronic-tagging devices, such as ankle bracelets."[13]

Adil Charkaoui was released by order of a Federal Court judge after 21 months in jail. Mr. Charkaoui is out on bail and is waiting the installation of an electronic ankle bracelet.[14] Essentially, when terrorist suspects cannot be deported, the security certificate provisions allow for the indefinite detention of suspects with no charges. "Critics [of security certificates] argue any misuse of certificates could suggest the abuse of provisions against terrorism in the future."[15] These measures still maintain surveillance of the 'possible' terrorist to limit risk.

The use of these types of measures, such as an electronic ankle bracelet, expands the web of surveillance through technology. Canada already uses these types of measures but for convicted criminals for a set period of time. To extend these measures to persons merely suspected of crimes is an expansion of state powers that is unacceptable. Does

this mean that the state will monitor citizens using similar technologies because of a suspicion, whether founded or not? Zundel, as discussed in Chapter 5, was deported because his statements were distasteful which is an expansion of the legislation. Does this expansion of state powers mean that citizens could be further targeted by surveillance technologies?

Anti-terrorism measures are going to be a part of our legislative infrastructure from now on. However, changes could be made to the provisions within the network of legislation that could curtail the possible abuses. The British Lords have already struck down one piece of legislation in Britain that allows for the indefinite detention of foreign nationals held on what is similar to the Canadian security certificate. These provisions are currently under review in Canada as per the legislation. Hopefully, the committees reviewing the legislation will make significant changes to anti-terrorism laws to provide better protections for people living in Canada.

In creating outside enemies, a heightened sense of risk is maintained. The risk today may be similar to the historical time of Japanese-Canadian internment. However, the cost of internment are too great to follow this road so, the state must target their focus in a more strategic manner.

We are in a qualitatively different risk society than what came before but we encounter similar troubles resulting in political and ideological solutions that are disguised in the rhetoric of risk and the construction of suitable outside enemy. Risk is a powerful rhetorical device, as it has always been during a time of crisis or fear. However, legislative language has changed over time to reflect a more nuanced view and expectation of rationalistic calculation in targeting who is risky.

The *Anti-Terrorism Act* and the *Immigration and Refugee Protection Act* provisions, examined in Chapters 4 and 5, suggest that although security risks are handled in a more refined and subtle fashion, themes of the past continue. Security crises seem to justify a compromise of established rights and due process. Suspects are targeted by these processes and are identified on the basis of race or ethnic background. The courts are still complicit in the administration of security measures in a manner that belies formal claims of judicial independence. Similar patterns are therefore demonstrated with a different spin.

While many would consider it naïve to think that there is absolutely no risk of terrorist activities in Canada, the difficult questions remain: what provisions are we willing to have put into place to mitigate the risk of terrorists attacks? Are Canadians willing to limit our rights and compromise due process to protect national security? Our historical experiences suggest that we should be concerned when making these compromises.

[1] Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada.* (Toronto/Vancouver: Clarke, Irwin & Company Ltd., 1983) at 146.
[2] John Ibbitson, "Police said to be cool to racial-profiling report" *The Globe and Mail* (17 March 2005) A4.
[3] *Ibid.*
[4] *Ibid.*
[5] Janice Tibbetts, "Cotler seeks wider review of anti-terror legislation" *The Ottawa Citizen* (17 August 2004) A1.
[6] Jeff Sallot, "British ruling prompts anti-terror law review" *The Globe and Mail* (17 December 2004) A15.
[7] *Ibid.*
[8] Campbell Clark, "Cotler seeks expanded anti-terror arsenal" *The Globe and Mail* (24 March 2005) A1.
[9] Editorial, "Cotler is musing about unreasonable powers" *The Globe and Mail* (26 March 2005) A16.
[10] Tibbetts, *supra.* note 5 at A2.
[11] Hugh Winsor, "Is it time to scale back anti-terrorism laws?" *The Globe and Mail* (6 December 2004)
[12] Campbell Clark, "Cotler eyes security certificates: Minister considers legislation to reduce indefinite jailings in terrorism cases" *The Globe and Mail* (22 February 2005) A8.
[13] *Ibid.* at A8.
[14] *Ibid.* at A8.
[15] *Ibid.* at A8.

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