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## **Canadian Counter-Terrorism in and outside the ATA and in Comparative Perspective**

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The 10<sup>th</sup> anniversary of 9/11 and the subsequent enactment of Canada's Anti-Terrorism Act (ATA) provides a good opportunity to reflect on Canadian counter-terrorism in comparative perspective. The dust has settled on the controversies that surrounded the enactment of the ATA. It has become apparent that while influenced by comparative and especially British law, the ATA is more restrained by human rights concerns than British or Australian law. Except for a few minor amendments, the ATA represented the end of criminal law reform to respond to terrorism whereas there have been multiple new acts in both the United Kingdom and Australia. At the same time, the formal law of the ATA has played a more minimal and a less problematic role in Canadian counter-terrorism than many expected compared to other forms of counter-terrorism outside the ATA.

Counterterrorism outside the ATA has included the use of indeterminate administrative detention in the form of immigration law security certificates, judicially sanctioned possibilities of deportation of non-citizens and transfer of Afghan detainees to torture, the listing of terrorists without due process and intelligence sharing that resulted in Canadian complicity in torture in the cases of Maher Arar and other Canadians detained outside of Canada as well as Canadian participation in intelligence gathering at Guantanamo. Worries that the ATA when enacted went too far in emphasizing security over various rights now in hindsight can be seen as a form of innocence that located counter-terrorism in the relatively ordered world of formal domestic law where Canada had considerable control over what happened.<sup>1</sup>

In the first part of this paper, I will outline some of the major features of the ATA in comparative perspective. Even as it was influenced by British anti-terrorism law, the ATA was significantly more restrained than British laws on the definition of terrorism and preventive arrests. Investigative hearings were controversial and allowed to lapse in 2007, but they are more restrained than similar powers in the United States, Australia and the United Kingdom. The ATA featured some restrictions on freedom of expression but they were relatively mild compared to those subsequently enacted in Australian and British law. Similarly, the ATA stressed the state's interests in secrecy, but those provisions like investigative hearings, have been upheld by the Supreme Court from constitutional challenge in large part because of statutory restraints that emphasize human rights.

The second part of this paper will examine Canadian counter-terrorism outside of the ATA and outside of Canada. I will argue that many of these less formal and more transnational practices are more problematic than the ATA in prioritizing security interests over human rights including the most basic human right against torture. These informal and transnational practices are influenced by global

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<sup>1</sup>As the Arar Commission stressed, Canadian counter-terrorism, including information sharing, often has "a 'ripple effect' beyond Canada's borders with consequences that may not be controllable from within Canada." Arar Commission *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, 2006) at 431

pressures and practices including various international mandates to use immigration law as anti-terrorism law, to share intelligence and to compile lists of terrorists on the basis of secret evidence. Canada to its credit conducted two extensive inquiries into Canadian complicity in torture, but has failed to ensure permanent accountability structures for intelligence sharing including with countries with poor human rights records. Canada has provided some domestic remedies for the intelligence gathering activities of its officials at Guantanamo and for domestic damage caused by the UN terrorist listing regime, but these domestic remedies cannot address the problematic nature of the underlying regimes. Counter-terrorism outside the ATA and frequently outside Canada has proven to be much more important, but also much more invasive of human rights than the ATA.

## I. The Formal Counter-Terrorism of the ATA

The enactment of the ATA attracted much critical attention at the time. The speed with which it was enacted reflected not only the dramatic and frightening nature of 9/11, but the UN Security Council's enactment of a quasi-legislative Resolution 1373 that required states to ensure that terrorism and terrorism financing were serious crime and to report back to a Counter-Terrorism Committee (CTC) within 90 days. The Security Council and its CTC did not concern itself with human rights in the first few years after 9/11<sup>2</sup>, so the concerns that human rights would be neglected in the ATA were not frivolous. Nevertheless, the ATA now appears rather benign compared to both comparative law and other forms of counter-terrorism.

### *The Definition of Terrorist Activities*

The Security Council demanded that all nations treat terrorism and terrorism financing as serious crimes, but avoided the thorny issue of the definition of terrorism. The Council urged states to ratify the 1999 Financing Convention, but did not promote its restrained general definition of terrorism. In 2002, however, the Supreme Court of Canada applied this definition, one that focused on violence outside of armed conflict, to an undefined definition of terrorism in Canadian immigration law.<sup>3</sup> By that time, however, Canada like many other countries had enacted much broader definitions of terrorism into its criminal law.

The definition of terrorist activities in the ATA was inspired by the very broad definition of terrorism in the UK's Terrorism Act, 2000. Like other states influenced by the British definition, Canada did not simply copy it. It took a more restrained approach by requiring that actions be taken to compel governments to act and not simply to influence them. It also provided that politically or religiously motivated serious property damage would only be considered terrorism if it was likely to endanger life, health or safety.<sup>4</sup> This helped reduce the risk that protesters who destroyed property would be targeted under the terrorism laws. Canada and subsequently Australia also provided protections for strikes and protests that were absent in both American and British definitions.

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<sup>2</sup> See generally Roach *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) ch. 2 for a critical examination of the counter-terrorism work of the UN Security Council and its Counter-Terrorism Committee.

<sup>3</sup> *Suresh v Canada* [2002] 1 S.C.R. 3

<sup>4</sup> Criminal Code R.S.C. 1985 c.C-34 s.83.01(b) (ii) (D)

At the same time, however, Canada broadened the British reference to disruption of electronic systems to include serious disruption of all public or private essential services. It also included attempts to compel persons including corporations and to intimidate the public with respect to its economic security.<sup>5</sup> These neo-liberal provisions reflected Canada's economic vulnerability to American thickening the border and the fact that a section of the USA Patriot Act was entitled "Protecting the Northern Border" partly in response to erroneous yet plausible claims that some of the 9/11 hijackers had entered the United States from Canada.

Canada borrowed a political or religious motive requirement from British law as a means to distinguish terrorism from other crimes. The motive requirement was, however, more much controversial in Canada than in either the United Kingdom or Australia. Canadian concerns reflected multicultural sensitivities and concerns about targeting Muslims. Interestingly, similar concerns lead Singapore with its even larger 15% Muslim minority to simply delete this requirement even while in all other respects following the broad British definition. Bill C-36 was amended to include a provision providing that the expression of political or religious opinion would not constitute a terrorist activity unless it did so.<sup>6</sup> The amendment may be legally meaningless, but it did signal some concern about criticisms that the ATA might be used to target religious and political minorities in particular Canada's growing Muslim populations.

Even with this amendment, the political or religious motive requirement was struck down as an unnecessary burden that would chill free speech and religion in the first case prosecuted under the ATA. The Ontario Court of Appeal, however, reversed that decision in 2010 concluding that terrorist activities were not protected by freedom of expression and blaming terrorists and "the temper of the times" as opposed to the law for "racial and cultural stereotypes" equating "radical Islamists" with terrorism.<sup>7</sup> Even while it recognized the existence of such stereotypes, the Court of Appeal refused to hold the ATA responsible for them. As such, this case fits a pattern of the more objectionable forms of counter-terrorism being found outside of the ATA. The Supreme Court's recent decision to grant leave in this case suggests that Canadian controversies over the religious and political motive requirement may not be over. Some may be impatient with the definitional debate, but the definition is the lynchpin of the ATA. As international law definitions of terrorism, endorsed by the Supreme Court in *Suresh*, as well as American and other definitions demonstrate, it is not necessary to use religious and political motive to distinguish terrorism from other crimes.

### *Proscription and Related Offences*

The emphasis on terrorism financing in Security Council Resolution 1373 made the proscription of groups and individuals associated with terrorism inevitable. Terrorism financing laws rely on lists that

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<sup>5</sup> *Ibid* s.83.01(b) (l) (B)

<sup>6</sup> *Ibid* s.83.01 (1.1)

<sup>7</sup> *R. v. Khawaja* 2010 ONCA At para 126. The Court of Appeal elaborated that: "In making these observations, we do not intend to condone profiling or stereotyping. We do, however, mean to say that the most obvious cause of any "chilling effect" among those whose beliefs would be associated in the public mind with the beliefs of terrorist groups is the temper of the times, and not a legislative provision that in all probability is unknown to the vast majority of persons who are said to be "chilled" by its existence" *ibid* at para 127

can be distributed to financial institutions and others who enforce the law. Canada, however, did not follow the United Kingdom or Australia in criminalizing membership in a terrorist group. In this respect Canada is closer to the United States where membership in a terrorist group is also not criminalized.

The listing and proscription of some foreign groups as terrorist groups may in some contexts be too simplistic. Canada's first purely terrorism financing prosecution resulted in a 6 month sentence for a Tamil-Canadian who provided \$3000 to the Tamil Tigers during the civil war in Sri Lanka. The sentence was controversial, but was upheld on appeal and it demonstrates some ambivalence about the seriousness of the financing offence given the circumstances in Sri Lanka at the time.<sup>8</sup> Some may criticize this approach as out of step with tougher terrorism sentences, but the Australian courts have ordered non-custodial sentences for those who provided much larger funds to the Tamil Tigers.<sup>9</sup> Listing under the ATA can in theory be subject to judicial review, but this has yet to occur and the ATA does not have the same protections as the Terrorism Act, 2000 to ensure that those who challenge listings are not prosecuted for supporting the listed group.

The most problematic feature of proscription under the ATA is the definition of terrorist group which deems that all groups listed by Cabinet shall be considered to be terrorist groups for the purposes of criminal prosecutions. David Paciocco has made a strong argument that this provision violates the presumption of innocence by substituting a Cabinet decision made on the basis of secret evidence for proof beyond a reasonable doubt in a criminal trial.<sup>10</sup> The problematic provision has, however, not been used in the major Canadian terrorism prosecutions. Consistent with Marc Sageman's theories of the evolution of al Qaeda from a central organizing group into an ideology<sup>11</sup>, these Canadian terrorist groups have been ad hoc homegrown and transnational groups not formally linked with al Qaeda or any other listed group. As such, the Crown has had to prove beyond a reasonable doubt existed that they existed and functioned as a terrorist group. Proscription plays a significant role in many counter-terrorism laws enacted in response to Security Council Resolution 1373, but it may be an example of fighting the last war.

### *Terrorism Offences*

The ATA provides a broad array of terrorist offences, but generally requires relatively high levels of subjective fault. It does not follow the example of British offences that sometimes provide for negligence or even no fault liability or that impose reverse onuses on the accused. It also does not follow Australian offences that provide for lesser forms of liability based on recklessness. The Canadian offences are broad, but do not go quite as far as British offences that apply to the possession of items and training that may only be peripherally linked to terrorism. The Canadian offences anticipated what in Australia became the "the/a" controversy that required rushed 2005 amendments by providing that it is not necessary for the Crown to establish that the accused knew the specific nature of the terrorist

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<sup>8</sup> *R. v. Thambathurai* 2011 BCCA 137

<sup>9</sup> Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) at 320-22.

<sup>10</sup> David Paciocco "Constitutional Casualties of September 11" (2002) 16 S.C.L.R.(2d) 199.

<sup>11</sup> Marc Sageman *Leaderless Jihad* (Philadelphia: University of Pennsylvania Press, 2008).

activity. Such provisions have been upheld by the Ontario Court of Appeal as consistent with the Charter and the Supreme Court of Canada will soon hear an appeal on whether the participation offence in particular is constitutionally overbroad.<sup>12</sup> The Court's performance on other ATA matters suggests that it may likely uphold the offences, but may also highlight or even read in some restrictions on them.

### *Speech Associated with Terrorism*

The ATA did, foreshadow some developments in the *Terrorism Act, 2006*<sup>13</sup> by providing for the ability to remove speech from the internet. One important difference is that the Canadian provision requires a prior judicial warrant.<sup>14</sup> Another important difference is that the ATA provision only applies to hate propaganda long criminalized under the Criminal Code whereas the British provision applies to speech that directly or indirectly advocates terrorisms including through glorifying past or present acts of terrorism in circumstances that can result in emulation.

Canada has not responded to Security Council Resolution 1624 or British responses to the London bombing by enacting new offences against the indirect advocacy or glorification of terrorism. Canada has also not shown the interest that Australia has in modernizing treason and sedition offences to include support for terrorism groups despite the fact that Canadian troops, like Australian troops, were in combat in Afghanistan. On formal matters relating to speech, Canada is closer to the American First Amendment tradition than European concepts of militant democracy.

### *Investigative Hearings*

One of the more controversial features of the ATA were investigative hearings that allow judicially authorized legal compulsion of those who have information relevant to a terrorist investigation. The ATA, however, balanced compelled self-incrimination with broad restrictions on the subsequent use of compelled statements. In 2004, the Supreme Court upheld investigative hearings under the Charter while stressing the importance of this statutory use and derivative use immunity protection and extending it to subsequent extradition and immigration proceedings.<sup>15</sup> The Court also stressed the restraining role that counsel, the presiding judge and the media could play in investigative hearings. The result is that investigative hearings would have more due process and publicity than American grand jury proceedings or the very controversial Australian provisions that allow the Australian Security Intelligence Organization to require people to provide information of relevance to that intelligence agency.<sup>16</sup>

The Canadian investigative hearing provisions are silent on what will happen should a person refuse to co-operate at an investigative hearing, but the response may be less punitive than in the

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<sup>12</sup> *USA v. Nadarajah* 2010 ONCA 859

<sup>13</sup> c.11. ss.3-4

<sup>14</sup> Criminal Code s.320.1

<sup>15</sup> *Re Section 83.28 of the Criminal Code* [2004] 2 S.C.R. 248 ; *Re Vancouver Sun* [2004] 2 S.C.R. 342.

<sup>16</sup> Kent Roach "A Comparison of American Grand Juries and Canadian Investigative Hearings" (2008) 30 *Cardozo L.Rev.* 1089; Kent Roach "A Comparison of Australian and Canadian Anti-Terrorism Legislation" (2007) 30 *University of New South Wales L.J.* 53.

United Kingdom where a number of close relatives of terrorist suspects have been charged with the offence of refusing to provide authorities with information about terrorism. This offence originally was used in Northern Ireland and was abolished in the 2000 legislation, but was revived in the British response to 9/11.<sup>17</sup>

### *Preventive Arrests*

Like investigative hearings, preventive arrests were a controversial of the ATA. Even though never used and were allowed to sunset in 2007, they likely will be re-enacted soon. Canadian preventive arrests were restrained compared to their British and Australian counterparts. Except in exigent circumstances, they required judicial pre-approval on the basis of reasonable grounds that a terrorist activity will be carried out and reasonable suspicion that an arrest or a peace bond is necessary to prevent the act of terrorism. In contrast, s.41 of the Terrorism Act, 2000 allows police officers to arrest those they reasonably suspect is a terrorist and to hold them for 48 hours subject to judicial authorization of longer periods.

The maximum period of detention in Canada was 72 hours whereas in the UK it was 7 days under the 2000 act, a figure that was subsequently extended to 14 then 28 days and now has recently returned to 14 days. The maximum period of detention became a symbolic issue with Prime Ministers Blair and Brown unsuccessfully attempting to increase the maximum period to 90 and 42 days respectively. Australia responded to the London bombings with preventive arrest provisions that allow a maximum of 14 days detention, albeit through combined federal and state legislation. The Canadian provisions are comparatively restrained.<sup>18</sup> If re-enacted, however, Canada should follow Australia and Britain and attempt to regulate the treatment of detainees during the period of preventive arrest.

The Canadian preventive arrests regime has the potential to morph into a defacto control order regime because judges can impose peace bonds for up to one year on those subject to preventive arrest. There may, however, not be much Canadian appetite for such measures given that there has been no reported use of a regular peace bond provision for suspected terrorists that was introduced in 2001 and was not subject to the 2007 sunset.<sup>19</sup> In any event, Canadian peace bonds would be imposed on judges unlike non-derogating British control orders which are imposed by the executive and then reviewed by judges.

Canada has accepted the acquittal of those charged with terrorism including in the Air India trial, whereas control orders have been imposed in the United Kingdom and Australia after accused have been acquitted or had their terrorism convictions overturned. There is a danger in these countries that authorities will use less restrained administrative measures if they are not successful in imposing the criminal sanction. The same impatience with the criminal justice sanction can be seen in the Bush administration's actions in subjecting Jose Padilla to military detention when his material witness

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<sup>17</sup> Clive Walker "Conscripting the Public In Terrorism Policing" [2010] Crim. L.Rev. 441

<sup>18</sup> Craig Forcese "Catch and Release: A Role for Preventive Detention without Charge in Canadian Anti-Terrorism Law" Choices July 2010.

<sup>19</sup> Criminal Code s.810.01

warrant was to expire. The American use of such short-cuts, however, does not have the same legislative legacy as British or Australian control orders.

Like the United States, Canada has no preventive arrest powers at present. The restraint of the formal American approach, however, can be exaggerated because material witness warrants for grand juries were abused in the aftermath of 9/11 as a de facto mechanism for preventive arrests. This follows a pattern of extra-legalism in which the harshest US responses to terrorism were not authorized by legislation, but undertaken by the executive. American extra-legalism is also supplemented by an unwillingness to allow those harmed by such conduct to even bring lawsuits seeking compensation.<sup>20</sup>

Extra-legalism begs the disturbing question of whether restraint in formal laws and powers will be counter-acted by a lack of restraint and regulation in less formal powers. There are some more isolated and milder examples of Canadian versions of extra-legalism such as the summary transfer of refugee applicant Benamar Benatta to American custody the day after 9/11 and CSIS's transfer of Mohammed Jabarah to American custody in 2002.

### *Signals Intelligence*

The antidote to extra-legalism is legality. The ATA like the British legislative response to terrorism was based on a commitment to legality that can be contrasted with American executive based and often extra legal approach. The ATA provided the first statutory recognition of the role of Canada's signals intelligence agency. It provided some legislative authorization for surveillance of foreign communications that might involve Canadian conversations and would be authorized by an elected Minister as opposed to a judge.<sup>21</sup> To its credit, however, the ATA also provided for independent review and audit of signals intelligence, and the commissioner has expressed some concerns about the manner in which the Minister has authorized the use of signals intelligence. In contrast, a similar expansion of signals intelligence powers in the United States was done on the basis of secret executive authority and a legal opinion authored by John Yoo, who is more infamous for his role in the torture memos. Much of the program was subsequently ratified by Congress but only after it was revealed by the New York Times whereas the Canadian program was authorized and regulated by legislation from the start.

### *Secrecy*

An important global trend since 9/11 has been blurring distinctions between secret intelligence and evidence of many new terrorist crimes and overlapping security intelligence and police terrorism investigations. As a result, public interest immunity procedures which allow judges to make non-disclosure orders that secret intelligence not used as evidence do not have to be disclosed have become a central feature of terrorist trials. The ATA recognized this trend by reforming s.38 of the Canada Evidence Act to require participants to notify the Attorney General of Canada about attempts to call classified information and allowing specially designated judges of the Federal Court to balance the

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<sup>20</sup> *Ashcroft v. al Kidd* USSC May 31, 2011

<sup>21</sup> For contrasting views of the constitutionality of this approach see Stanley Cohen *Privacy, Crime and Terror* (Toronto: Butterworths, 2005) at 230 and Steven Penny "National Security Surveillance Powers in an Age of Terror" (2010) 48 Osgoode Hall L.J. 247

competing interests in disclosure and non-disclosure. The new provisions provided safeguards for both the state and the accused in the form of provisions allowing the Attorney General of Canada to issue a certificate countering a judicial order of disclosure and provisions that allowed a trial judge to make any order including a stay of proceedings that may be necessary to protect the accused's right to a fair trial in light of a non-disclosure order by the Federal Court. The ATA did not, as 2004 Australian legislation did<sup>22</sup>, attempt to tilt the balance towards non-disclosure by instructing judges to give greater weight to the state's interests in secrecy over the accused's interest in disclosure.

The Supreme Court in *Ahmad*<sup>23</sup> upheld s.38 from constitutional challenge by stressing that trial judges should not hesitate to use their powers to stay terrorism trials if they are left in doubt about the fairness of the trial. The Court stressed that the efficiency of Canada's unique two court approach to public interest immunity was not before them. The formal law of the ATA places considerable emphasis on rights and due process even at the price of contemplating that major terrorism prosecutions might have to be permanently halted if trial judges have doubts about their fairness.

The restraints in the ATA are praiseworthy in their commitment to legality and human rights and it is not clear that similar restraints will be built into new anti-terrorism legislation.<sup>24</sup> Nevertheless, the possibility that they may lead to less formal and harsher forms of counter-terrorism cannot be discounted. For example, the Americans made a decision to render Maher Arar to Syria after being informed by Canadian officials that he would not be charged criminally if allowed to return to Canada. The publicity and formality of investigative hearings might encourage authorities to use less formal, less judicially supervised and perhaps even more coercive methods to recruit human sources.<sup>25</sup> In addition, Canada's relative inexperience in terrorism prosecutions and the potential of a statutory stay under s.38.14, might encourage alternatives to domestic prosecutions including extradition or the use of immigration law.

## **II. Less Formal and Less Restrained Counter-Terrorism Outside of the ATA**

In the remainder of the paper, I will suggest that counter-terrorism outside of the ATA and outside of Canada has presented greater threats to rights than the ATA. Counter-terrorism outside the ATA is also more reliant on the counter-terrorism activities of other countries than that contemplated within the more orderly confines of the ATA.

### *Indeterminate Immigration Detention and Possible Deportation to Torture*

From 2001 to 2003, Canada issued immigration law security certificates to detain five men suspected of being involved al Qaeda. In 2003, it used immigration law powers of investigative detention to detain non-citizens originally suspected of terrorism in Operation Thread. Canada used

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<sup>22</sup> *National Security Information Act, 2004* s.31(8).

<sup>23</sup> 2011 SCC 6

<sup>24</sup> For example, the expansion of use and derivative use immunity by the Supreme Court is not found in the bills that would re-enact investigative hearings.

<sup>25</sup> See for example the coercive and persistent nature of CSIS's approach to a potential source/suspect in *R. v. Mejid* 2010 ONSC 5532 which resulted in a stay of proceedings.



immigration law as anti-terrorism law in part because it, unlike the ATA, allowed the use of investigative detention, secret evidence, burdens of proof well short of proof beyond a reasonable doubt, detention on the basis of membership in a terrorist group and investigative detention.

Security Council Resolution 1373 encouraged the use of immigration law as anti-terrorism law by calling on all states to ensure that refugee status was not abused by terrorists. The United States detained about 5000 non-citizens after 9/11 and imposed selective registration schemes for men from Muslim countries.<sup>26</sup> The United Kingdom derogated from the European Convention to authorize indeterminate detention of non-citizens suspected of terrorism who could not be deported because of a risk that they would be tortured.

Security certificates had been authorized in Canadian immigration law before 9/11 and their revision shortly after 9/11 received much less critical attention than the enactment of the ATA.<sup>27</sup> In theory, those detained under security certificates are only being detained until they can be deported. The problem is that terrorist suspects could not be deported to Egypt, Syria, Algeria and elsewhere without a substantial risk that they would be tortured. In the *Suresh*<sup>28</sup> case decided in early 2002, the Supreme Court provided two answers to the deportation to torture dilemma. The first was that the court would defer to executive decisions about whether there was actually a substantial risk of torture. This approach has been followed in subsequent British cases that have dangerously contemplated deportation to Algeria and Libya.<sup>29</sup> The second response was that the Charter might in undefined exceptional circumstances allow deportation to torture. In articulating the infamous *Suresh* exception, the Supreme Court contributed to a post 9/11 erosion of the absolute right not to be tortured. Fortunately, however, no Canadian court has yet applied the *Suresh* exception and it has been implicitly rejected by the European Court of Human Rights.

Security certificates have been used as a defacto form of indeterminate administrative detention in a manner not altogether different than administrative detention regimes in Israel and the middle East and in internal security acts in Malaysia and Singapore. Unlike in these countries<sup>30</sup>, administrative detention in Canada has been subject to epic and often successful litigation. The detainees have won two important victories in the Supreme Court which have led to special advocates being able to challenge the secret information<sup>31</sup> and increased retention of raw intelligence that may have evidential value.<sup>32</sup> Even these due process victories have been a double edged sword. They have

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<sup>26</sup> David Cole "English Lessons: A Comparative Analysis of UK and US Responses to Terrorism: (2009) 59 C.L.P. 136.

<sup>27</sup> But for an important exception see Judge Hugessen's 2002 speech in which he expressed concerns about the use of secret evidence not subject to adversarial challenge and stated "I sometime feel a little bit like a fig leaf." James Hugessen "Watching the Watchers: Democratic Oversight" in D. Daubney et al *Terrorism Law and Democracy* (Montreal: Themis, 2002) at 384.

<sup>28</sup> [2002] 1 S.C.R. 3.

<sup>29</sup> *RB (Algeria) v. Secretary of State* [2009] UKHL 10

<sup>30</sup> Administrative detention is constitutionally protected in Malaysia, Singapore and in Egypt from 2007 to 2010. In Israel the administrative regime has been expanded since 9/11 and unsuccessfully challenged in the courts. See Roach *The 9/11 Effect* ch. 2.

<sup>31</sup> *Charkaoui v. Canada* [2007] 1 S.C.R. 350

<sup>32</sup> *Charkaoui v. Canada* [2008] 2 S.C.R. 326

led to continued use of security certificates, now operating as defacto control orders in three remaining cases, as well as disturbing warnings from the head of CSIS that his agency is retaining so much intelligence that he expects that they will be accused of being the Stasi, the East German intelligence agency infamous for its extensive holdings . Director Fadden has also bitterly complained that terrorists receive public and media sympathy<sup>33</sup> without apparently reflecting on whether that sympathy is related to the use of secret intelligence, some derived from torture<sup>34</sup> , as evidence and threats of deportation to torture.

Despite the legal and political controversies over “the secret trials” of security certificates and problems with the reliability of some of the intelligence used as evidence, Canada has persisted in using immigration law as anti-terrorism law long after the United Kingdom abandoned Part IV of its 2001 law in the wake of the House of Lord’s 2004 Belmarsh<sup>35</sup> decision that relying on immigration law was irrational and discriminatory given that the terrorist threat was not limited to citizens. Although reformed security certificates have been upheld under the Charter<sup>36</sup>, it seems only a matter of time before the limits of relying on special advocates in allowing the use of secret evidence will become apparent as has been the case in the United Kingdom.

Security certificates were part of a post- 9/11 global erosion in confidence in the criminal law as a means of responding to terrorism. Guantanamo underlined a lack of confidence in criminal law, one that has increased with Congressional restrictions on the transfer of detainees to the United States for criminal prosecution. The Canadian government, like the American government, has dug in on using controversial alternatives to the criminal law in a limited number of 9/11 cases despite the high success of other post 9/11 terrorism prosecutions. These alternatives to the criminal law respect rights including rights to an impartial jury less than the criminal law. They also may be counter-productive if they are perceived as a form of second class secret trial that is reserved for suspected Islamic terrorists. There seems to be much less public sympathy for those convicted of terrorist plots after a public criminal trial than for security certificate or Guantanamo detainees.

#### *Intelligence Sharing and Accountability Gaps*

In the immediate aftermath of 9/11, Canadian officials co-operated with American officials in secret and problematic ways. Inadequately trained RCMP officers shared complete investigative files with American officials without vetting them for reliability or attaching restrictions on their further use. This information played a role in Maher Arar’s detention in the United States and rendition to Syria and in the detention of three other Canadians detained and tortured in Syria as did the sending of questions to be asked of these men to both Syrian and Egyptian officials. As the Arar Commission stressed, Canada has much less control and basic human rights such as the absolute right against torture are at risk when

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<sup>33</sup> Richard Fadden “Remarks” October 29, 2009 available at <http://www.csis-scrs.gc.ca/nwsrm/spchs/spch29102009-eng.asp>

<sup>34</sup> *Re Mahjoub* 2010 FC 787; *Re Mahjoub* 2010 FC 937 . . .

<sup>35</sup> *Secretary of State v. A* [2004] UKHL 56.

<sup>36</sup> *Harkat v. Canada* [2010] FC 1242

Canada shares information in transnational counter-terrorism. Increased sharing of intelligence was encouraged by Resolution 1373, but not enough attention was paid to the reliability of the intelligence.

One of the challenges of less formal transnational counter-terrorism is to ensure accountability for secret activities that have a potential to violate human rights. The need to prevent another 9/11 placed much pressure on governments to break down barriers to information sharing, but in many cases accountability structures remain tied to individual agencies. The Arar and Iacobucci inquiries could examine the activities of all Canadian officials, but foreign agencies declined to participate. The Arar Commission recommended enhanced review structures that would dramatically expand SIRC's jurisdiction and allow review agencies to work together.<sup>37</sup> The government ignored this recommendation until 2010 when it introduced amendments only to the RCMP complaints agency that did not even ensure that agency would have access to secret information, something the Arar Commission had stressed was a prerequisite for effective review. Much national security activity in Canada is subject to no review given the absence of a federal Ombudsperson and the inability of Parliamentary committees to access secret information. Canada lags behind Australia which has expanded the jurisdiction of its Inspector General and strengthened review by Parliamentary committees. The Arar and other cases suggest that the greatest threat to human rights lies not within the tidy legal confines of the ATA, but in the less formal worlds of intelligence sharing and transnational terrorism investigations. The threat is aggravated by secrecy and the absence of effective accountability mechanisms short of the extraordinary appointment of public inquiries.

The need for effective review is also underlined by recent reports that Canada continues to share information (including the name of Mubin Shaikh, an informant in the Toronto terrorism prosecution) with the United States on the basis of associations with suspected terrorists. It appears that this information then is used to place people on US and other foreign terrorist watch lists<sup>38</sup>, raising again the issue of whether Canada is placing proper restrictions on the use of the information it shares with the United States. Such sharing of information will likely increase under the proposed new security perimeter arrangements. The point is not that Canada should not share information, but that independent review must be expanded to ensure appropriate screening of such information. In Canada and elsewhere, there is no effective audit of how police, intelligence agencies, customs, financial intelligence and foreign affairs departments share information about suspected terrorists. Even if there was effective review, information sharing remains a risky business because there is no guarantee that other countries will respect Canadian restrictions or caveats on the use of shared intelligence.

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<sup>37</sup> Commission of Inquiry *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Supply and Services, 2006)

<sup>38</sup> Wesley Wark "No one wants another Arar case" Ottawa Citizen May 20, 2011 available at <http://www.ottawacitizen.com/news/wants+another+Arar+case/4819009/story.html#ixzz1NBnii6iv> Colin Freeze "Easy for terror suspects to get onto no-fly lists, much harder to be taken off" Globe and Mail June 1, 2011 available at <http://www.theglobeandmail.com/news/national/easy-for-terror-suspects-to-get-onto-no-fly-watch-lists-much-harder-to-be-taken-off/article2043591/page2/> The wiki leak document suggests that the US used the information to include names on various watch lists but it does not contain the originating information from Canada and whether any caveats were attached to the information shared. Wiki leak document available at <http://www.cbc.ca/news/pdf/wikileaks-usembassyottawaseglins.pdf>

Expanded terrorism offences and increased emphasis on prevention of terrorism has changed the relation between intelligence and evidence in many countries. Even after 9/11, the United States has refused to create a domestic security intelligence agency even while military and foreign intelligence has greatly expanded. In the United Kingdom, domestic intelligence has made some adjustments to the increased evidential significance of evidence but has successfully resisted the use of most forms of electronic surveillance as evidence because of concerns about the effects of such use on retention and collection practices. In Canada, CSIS's intelligence has been subject to adversarial challenge in the security certificates cases with the Court overturning its traditional policy of destroying raw intelligence in part in recognition of the possible evidential value of such intelligence collected in targeted investigations.<sup>39</sup> Although the Air India commission warned about continuing problems in the relation between intelligence and evidence including CSIS's discretion not to disclose relevant information, the Toronto terrorism prosecution demonstrated much better CSIS-police co-operation than seen in the pre and post bombings Air India investigations. There is, however, room for improvement with CSIS indicating some concerns about the judicialization of intelligence<sup>40</sup> and various positions emerging about how it is dealing with increased retention responsibilities.<sup>41</sup>

The Air India commission stressed the need for more effective review of national security activities from within the executive including from the Prime Minister's national security activities in order to ensure the effectiveness of those activities. The Arar commission stressed the need for more effective review of national security activities to ensure their propriety. Perhaps reflecting the unpopularity of those inquiries among the security establishment, however, both review recommendations have been rejected by the government. The lack of effective review could threaten both human rights and security and is another example of a critically important dimension of counter-terrorism found outside the ATA.

### *International Processes of Terrorist Listing*

Canada participates in various terrorist listing regimes mandated by the UN under its Chapter VII powers. Two Canadians have been caught in the 1267 listing regime which is based on the sharing of secret intelligence and intergovernmental decision-making. Liban Hussein's name was added to the 1267 and US and Canadian lists shortly after 9/11, but was subsequently removed from those lists.<sup>42</sup> Although Hussein's lawyers were prepared to challenge his extradition and listing in Canada, they would

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<sup>39</sup> *Charkaoui v. Canada* [2008] 2 S.C.R. 326

<sup>40</sup> For reports that CSIS intelligence was not used for fear of disclosure in the processing of Nexus and FAST cards to facilitate crossings into the United States See "Border agency ignores CSIS data" Toronto Star Feb. 15. 2010

<sup>41</sup> Director Fadden has ominously predicted that CSIS will be accused of being the Stasi because of increased retention. Richard Fadden "Remarks" October 29, 2009 available at <http://www.csis-scrc.gc.ca/nwsrm/spchs/spch29102009-eng.asp>. The Inspector General has, however, reported a "high level of non compliance" with new retention directives including cases where reference to operational notes that were referenced in reports could not be found and were apparently not made. See "Certificate of the Inspector-General CSIS- 2010" made public May 2011 and available at <http://www.publicsafety.gc.ca/abt/www/igcsis/cert2010-eng.aspx>

<sup>42</sup> E. Alexandra Dosman "For the Record" (2004) 62 U.T.Fac.L.Rev. 1

have been powerless to obtain a remedy from the 1267 committee had the US not agreed that it had listed him in error. It is not clear that even under recent reforms in Resolution 1989 (2011) that the US as the listing country could not still block a delisting, though it might have to find some allies either within the 1267 committee or on appeal to the Security Council. The Council has attempted to provide some appearances of a judicial remedy in response to increasing domestic challenges, but the listing process still remains secret and intergovernmental.

Abousfian Abdelrazik continues to be on the 1267 list despite receiving a strong domestic remedy that held he should be allowed to return to Canada and strongly criticized the 1267 listing process.<sup>43</sup> The Abdelrazik case has international counterparts, notably the *Kadi* decision of the European Court of Justice. It has contributed to reforms of the 1267 listing process in the form of an Ombudsperson and subsequently the Security Council Resolution 1989 reforms which attempt to give more weight to delisting recommendations by the Ombudsperson.<sup>44</sup> These reforms, however, do not require the disclosure or adversarial testing of intelligence or provide a judicial remedy from the confidential and intergovernmental nature of the listing process.<sup>45</sup> The reliability of the intelligence used to list Abdelrazik- including allegations that he was “closely associated” with abu Zabadayah- who was repeatedly waterboarded by the CIA- is unknown because the 1267 committee’s narrative summary does not reveal the sources and methods used to obtain the information. As will be seen, the Abdelrazik case is not the only case in which Canadian courts have been unable to provide fully effective remedies for transnational counterterrorism.

#### *Counter-terrorism Beyond Borders and Outside of Canada*

The Omar Khadr case also illustrates the limits of domestic remedies. Khadr’s Canadian lawyers won a number of cases and restrained Canadian officials from continuing to interrogate him at Guantanamo. They also won two Supreme Court victories that concluded that Canadian officials violated both international law and the Charter when they interrogated Khadr at Guantanamo in 2003 and 2004, the later after sleep deprivation. Khadr’s victories were, however, hollow. The disclosure remedy first ordered by the Court was limited by national security confidentiality claims including arguments rejected by the court that disclosure would adversely affect Canada’s relations with the United States.<sup>46</sup> In the second case, the Supreme Court overturned the trial judge’s remedy that Canada be required to request Khadr’s repatriation on the basis that it interfered too much with Canada’s

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<sup>43</sup> *Abdelrazik v. Canada* [2009] FC 580

<sup>44</sup> Paragraph 23 of Resolution 1989 provides that a delisting recommendation from the Ombudsperson shall take effect unless the 1267 decides by consensus to reject the recommendation. Each member state would appear not to have a veto, but they do have the power to refer a delisting recommendation to the entire Security Council. Similarly provisions apply when a designating state requests delisting. Although this resolution improves matters by giving the Ombudsperson’s delisting recommendation considerably more weight, the ultimate decision-making remains intergovernmental and there remains no assurance that the Ombudsperson will have access to all the secret intelligence that may form the basis for the listing.

<sup>45</sup> Craig Forcese and Kent Roach “Limping into the Future: The 1267 Listing Regime at the Crossroads” (2011) 42 *George Washington International Law Review* (forthcoming)

<sup>46</sup> *Khadr v. Canada* 2008 FC 807 at para 89. Note, however, that the precise parameters of the disclosure are not revealed in the public reasons.

diplomatic affairs with the United States.<sup>47</sup> Even though this decision left Khadr without an effective remedy, it is in line with British and South African decisions that stopped short of ordering governments to make diplomatic representations on behalf of terrorist suspects.<sup>48</sup> Even if courts did make such orders, they would not provide an effective remedy if the United States refused to release someone held at Guantanamo. The same is true with 1267 listings. No effective remedy is possible if the US says no.

Canadian courts are, however, not always powerless to provide effective remedies for abuses in transnational terrorism investigations. Khadr's brother, Abdullah, was captured, beaten and detained in Pakistan before eventually being released and allowed to return to Canada. The US then sought to extradite him to face material support of terrorism charges. The Canadian courts, however, stayed extradition proceedings in response to various abuses committed against him including denial of consular access and judicial review and 6 months of investigative detention. The Ontario Court of Appeal upheld the stay and stressed that Canada could prosecute Abdullah Khadr in Canada.<sup>49</sup> This decision underlines how a purely domestic Canadian approach may be the most rights protective especially given American doctrines which suggests that courts will not review improprieties such as foreign abductions when they assert jurisdiction. At the same time, the case also likely placed pressures on Canadian/American relations no less severe than in the Omar Khadr case. The remedy obtained by Abdullah Khadr largely depended on the fact that he, unlike his younger brother, was fortunate enough to be present in Canada.

### *The Afghan Detainees*

A final example of how counter-terrorism outside of Canada has threatened rights more than counter-terrorism in Canada under the ATA is the decision that Canadian courts could not restrain the transfer of Canada's detainees in Afghanistan even if the transfer resulted in their torture at the hands of Afghan intelligence.<sup>50</sup> Such litigation by public interest groups would not have been allowed in the United States where it would have been prevented through narrow standing requirements and broad political questions and state secrets doctrines.<sup>51</sup> After allowing the litigation to proceed on the assumption that the detainees faced a substantial risk of torture if transferred, the Canadian courts ruled that there was no Charter violation in large part because the affected persons were not Canadian citizens even though s.7 rights textually and traditionally have been extended to non-citizens. This

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<sup>47</sup> Khadr persisted and won a trial judgment that held the government had breached a common law duty by not consulting him before issuing a diplomatic note that the US not use the Canadian interrogation in his Guantanamo proceedings. The decision also noted that the United States did not comply with Canada's request and concluded that if necessary to provide an effective remedy the courts could require Canada to request Khadr's repatriation. *Khadr v. Canada* 2010 FC 715. This judgment, however, was stayed pending appeal and the appeal declared moot given Khadr's guilty plea before a military commission. *Khadr v. Canada* 2010 FCA 199; 2011 FCA 92.

<sup>48</sup> *Kaunda and others v. President of South Africa* [2004] ZACC 5; *Abassi v. Secretary of State* (2002) EWCA (Civ) 1598. .

<sup>49</sup> *United States of America v. Khadr* 2011 ONCA 358 at para 76

<sup>50</sup> *Amnesty International v. Canada* 2008 FC 336 affd 2008 FCA 401 leave denied SCC.

<sup>51</sup> *Munaf v. Geren* 128 S.Ct. 2207 (2008). .

decision combined with the Suresh exception for torture underlines that Canadian courts have regrettably not been resolute since 9/11 in defending the absolute right against torture.

The Federal Court's performance in the Afghan detainee case protects basic human rights much less than the European Court of Human Rights when it recently affirmed that the European Convention applies not only to Iraqi detainees but also to those killed by British patrols exercising public powers in that country.<sup>52</sup> This again suggests that rights protection is stronger within Canada and in the ATA than outside Canada and the ATA. However praiseworthy Canada's performance on human rights has been within the ATA, it has shown much less respect for human rights outside the ATA and outside Canada than its European counterparts.

Finally, the Afghan detainee affair underlines the large accountability gaps as Parliamentary committees experienced difficulties and delays in accessing relevant but secret information, the military police complaints commission has limited jurisdiction and the government has refused to appoint a public inquiry.

## **Conclusion**

Don DeLillo has a striking passage in his 9/11 novel, *Falling Man*.<sup>53</sup> He remarks that we were all less innocent by the time the second aircraft hit the World Trade Centre. Canada's robust debate about the ATA can in hindsight be seen as a similar form of innocence. We are all now less innocent given what we have learned in the last decade about harsh counter-terrorism outside of the ATA and outside of Canada. The ATA struck a balance between rights and security that in comparison to the balance struck in other democracies, most notably the United Kingdom and Australia, respected human rights while also enacting new offences and providing the state with new powers to investigate terrorism.

The ATA debate assumed that Canada was in control of its own counter-terrorism and that it could strike its own balance between respect for human rights and security. Some did not agree with where the ATA struck the balance, but the ATA proceeded on assumptions that Canadian norms, especially those of the Charter, would prevail. In the years following 9/11, Canadians began to appreciate that Canada does not call all or perhaps most of the shots in its counter-terrorism. Canadian courts, as in the Abdullah Khadr cases, have sometimes been able to provide effective remedies for counter-terrorism abuses. In the Omar Khadr case, however, they were unable to provide such remedies and in the Afghan detainee case, they were unwilling to do so.

The worst post 9/11 abuses of human rights are not found in the carefully crafted legal text of the ATA but in the informal and often secret world of Canada's participation in transnational counter-terrorism. Canada has carefully dissected these activities in two inquiries that found indirect Canadian complicity in torture abroad. Public inquiries are, however, extraordinary and not likely to be called on

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<sup>52</sup> *Al-Skeini v. The United Kingdom* Application no. 55721/07 July 7, 2011 (Grand Chamber). In a companion case, the Grand Chamber also rejected the "UN made us do it defence" to internment without trial and articulated a presumption that Security Council resolutions should be interpreted in a manner that respects "fundamental principles of human rights." *Al Jedda v. The United Kingdom* Application no. 27021/08 at para 102

<sup>53</sup> (New York: Scribner, 2007)

national security matters any time in the foreseeable future. As the Afghan detainee affair and recent reports of information sharing with the US suggest, fundamental accountability gaps exist with respect to much of Canada's transnational; counter-terrorism activities including pervasive intelligence sharing.

For three years after 9/11 Canada relied on security certificates to detain terrorist suspects rather than criminal prosecutions under even the enhanced ATA. Security certificates have been problematic in part because Canada cannot control the risk of torture if it deports terrorist suspects to countries such as Syria. Canada also found out that intelligence it shared might contribute to renditions and torture. Counter-terrorism outside of the ATA and outside of Canada has been less respectful of rights and more resistant to effective remedies than counter-terrorism inside the ATA and Canada's record on respect for basic respect for human rights outside its own border and for maintenance of the absolute prohibition on torture unfortunately lags behind that of the European democracies.