

Does *Bill C-36* Give Police too Many Powers?

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That we need to do something to respond to the events of September 11 seems to me obvious and beyond dispute. In my view, however, *Bill C-36*¹ and its companion pieces of legislation represent an over response to the problem and are an affront to our civil liberties. I have been practicing law for 35 years and over that period I have had a good deal of first hand experience with issues of national security. My response to this legislation is informed by my experience as a practicing lawyer, but it is also shaped by my appreciation of the fact that the question of how best to empower the police to protect national security is by no means a new one, that it has long a history in Canada, and that we ignore that history at our peril. I begin by highlighting what I take to be a critical omission in public discussions since the events of September 11. Subsequently, I describe the consequences of this omission as they are reflected in the powers the Bill grants to police. Finally, I discuss the dangers introduced with the enactment of the Bill.

It is now a widely accepted fact—and one that I in no way would dispute—that the success of the September 11 attacks was the result of a massive failure of intelligence; and furthermore, that the breakdown was international in scope. The American agencies (FBI, CIA, NSA) are not the only ones who dropped the ball: both British (MI-5, MI-6, GCHQ) and Canadian (CSIS, RCMP, CSE) agencies also fumbled.²

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¹ *Anti-terrorism Act*, S.C. 2001, c. 41 [hereinafter *Bill C- 36*].

² In fact, if we consider the success (alone) of a terrorist attempt as the ultimate indicator of a failure of intelligence, September 11 is only the latest in a series of events that testify to a breakdown: the Embassy bombings in Africa, the attack on the Cole, and the attempt to attack the Eiffel Tower ought also to be registered.

While I think it is very important that we acknowledge the extent of the breakdown, I am nonetheless quite troubled by the fact that the discussion has not yet moved beyond laying blame to the more important *task* of discussing and trying to discover what, exactly, caused the failure and hence, what needs to be corrected or improved upon. Indeed, it is now more than six months after the events of September 11, and the root causes that could account for such a serious failure have still not been made clear at all. Moreover, when clues have surfaced that point to possible answers to these questions, they have been more suggestive than explanative, and have often come from quite unlikely sources. Hence, we learn from the January issue of *Vanity Fair*³ (not the *Washington Post* or the *New York Times*) that well before September 11 the Sudanese government had offered to provide American agencies with information on Al-Qaeda and that these agencies declined the offer.⁴ If, indeed, the explanation for the breakdown is this basic, I don't see how granting police new powers of investigation and arrest would remedy the situation.

Of course, we might want to consult the official record if we wish to be reassured that the new powers are not simply being granted in response to a wish list, but rather that the provisions were genuinely conceived correctives that actually address and will remedy the root causes of the breakdown.⁵ Looking to the public record for proof on this point, however, provides no such solace. Indeed, Bill Blakey did attempt to address this very issue in a question he asked to the RCMP Commissioner when he appeared before the Common's Committee:

"I have a few questions [...] with respect to the sections [...] that provide for preventative detention and preventative arrest. Presumably the government, when it was designing this Bill, was consulting with the RCMP. I wonder if you could tell us if you have a file or some other information with respect to the kinds of things that you might have been able to prevent had you had this provision before rather than only now with this Bill. I mean is

³ D. Rose, "The Secret Ben Laden Files: the Al-Qaeda Intelligence the US Ignored" *Vanity Fair* (January 2002).

⁴ See also W. Wark, *The Globe and Mail* (February 2002).

⁵ The fact that the Bill was 175 pages long by the time it actually reached the House, and the fact that it had a complex (and arguably convoluted) structure, undoubtedly made arriving at a true appreciation of the potential impact and implications of the Bill a daunting task for even the most seasoned Parliamentarians.

there some history for the need for this or are there particular terrorist acts that would have been prevented in the past had this provision been available to the police? Where does it come from”?

What was Commissioner Zaccardelli’s reply? “I am not going to speculate Mr. Chair about the past and so on. But our position, our support for this Bill obviously is based on what happened on September 11, the world changed on September 11, we have to take that into consideration. I believe we have as a Canadian society and a government taken that into consideration.” The Commissioner went on to give what, in my view, is a total non-answer. After all, who could disagree with the commissioner of the RCMP that we need to take measures to try to be sure that there are no terrorist acts? It is also noteworthy, in this context, that nobody asked Ward Elcock what the Canadian Security Intelligence Service (CSIS) had been doing prior to September 11.⁶ I would have thought somebody would have wanted to ask Mr. Elcock what percentage of the agencies time was spent on counter-terrorism, what kinds of provisions the agency would need to be mount a more effective offensive, and whether the powers entailed in the new legislation would contribute to this fight. Nobody asked those questions and what we got was a wish list of additional powers for the police.

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I am not going to talk about the processes behind the drafting the legislation, except to note the dangers of passing the legislation almost immediately after the calamities have taken place.⁷ I am curious, however, about the necessity and conceivable efficacy of the new powers the Bill grants to the police. To be clear, *Bill C-36* grants to the police in Canada a wider range of powers that has ever been the case before in Canada: it loosens the restrictions on wire-tapping; it allows the police powers of preventative arrest; and, it allows them to convene investigative hearings

⁶ I asked the Commissioner yesterday about the CSIS’s dealings with transnational crime. In 1999, the Security Intelligence Review Committee said “CSIS is dealing with transnational crime, it is outside their mandate, they don’t know what they are doing and they are down to street level drug dealing.”

⁷ I would, however, recommend R.J. Daniels, P. Macklem & K. Roach, eds., “*The Security of Freedom: Essays on Canada’s Anti-terrorism Bill*” (Toronto: University of Toronto Press, 2001). The chapter by Oren Gross called “Cutting Down Trees: Lawmaking Under the Shadow of Great Calamities,” is especially good.

in which the right to remain silent is essentially forfeit. The value of these new powers in fighting terrorists with the kind of motives and zeal demonstrated by the Al-Qaeda network, however, seem to be quite dubious. Let me illustrate this claim with three examples. First, the preventative arrest provision allows that a suspected terrorist arrested can be held for up to 72 hours before he/she is released. This much makes sense. But then a subsidiary clause provides that the accused must enter into a peace bond upon release (similar to the *Criminal Code*⁸ provision for convicted pedophiles). Now, if someone really intends to sacrifice his own life by flying a plane into a building, isn't it a bit of stretch to expect a peace bond to stop them? A similar argument applies in my second example: the investigative hearings provision. Imagine a real member of Al-Qaeda being brought before a judge and being asked questions about the other members of the cell. What kind of answers do you think he/she might give? He/she might decline to answer the questions, might swear, or lie, but is it very unlikely that the information gained is going to be of any value.

The wire-tapping powers are a little different. The new legislation loosens the restrictions for wire-tapping; I am not convinced that there was a bottleneck here in the first place. Indeed, I would suggest that when we consider the effect of a similar provision in the anti-gang legislation we will see that this is the case. As many of you are aware, a struggle for territory and control between two rival bike gangs has been going on in Montreal and throughout Quebec more generally, and there have been a number of deaths. About one hundred people have been killed. Now, the old rules governing wire tap authorization, which stem from passage of the protection of the *Privacy Act*⁹ in the mid-70s, stipulate that you had to have tried other investigative techniques and they had to have failed. I cannot imagine, however, after a hundred people have been killed, that the police didn't have authorization to wire tap every biker in the Province. Indeed, it seems to me that if they didn't have, they ought to have resigned for incompetence. Nonetheless, the new legislation was passed and now you can wire tap without having to establish prior investigative techniques that have been tried and failed. We now have the same provision in regard to this legislation and in my view, it is a danger to our society. More to the point, I don't know generally why we needed

⁸ R.S.C. 1985, c. C-46.

⁹ R.S.C. 1985, c. P-21.

to give those to the police. The CSIS has a responsibility for dealing with counter-terrorism. They have very broad wire tap powers. They have to go to a Federal Court judge and lay out a little bit (but a whole lot less than the police) do to get wiretaps. It seems to me it was appropriate to leave that power with the CSIS and not pass it on to every police department in the country.

Professor Brodeur is going to talk about signals intelligence and the role played by the Communication Security Establishment in listening. Few of us appreciate the extent of surveillance that is done by the National Security Agency in the United States, Government Communication Headquarters in Britain, and the CSE; I never remember the names of the Australian or the New Zealand organizations. They monitor every form of electronic communication in the world and while they are generally not allowed to monitor their own citizens. My general impression is that they monitor each other's citizens and the information is flowing back in a circle. One of the things you have to make sure of is that the information flows to all of the agencies that need the information and it may well be in the past that CSIS has not been very good in providing information to the RCMP. There has been a jurisdictional or turf war going on between those organizations for a very long time.

Other than the financing of terrorist activities, I don't think that the legislation was necessary. Everything that is illegal under this legislation was illegal before. It was illegal to plan mass murder, it was illegal to carry out mass murder so all that we have done is provided some legislation that, in my view, will be a significant problem in the future.

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Having established that the efficacy of many of the new powers granted by *Bill C-36* is questionable, I think it is important to emphasize the dangers of the Bill. First, the right to remain silent has long been an important feature of Canadian law and its loss in any legal context constitutes a grave danger. We cannot even find solace in the fact that the power to convene investigative hearings is subject to a sunset clause. After all, the English too, intended to suspend the right to remain silent only as a temporary measure, in order that they might be more effective in their fight against IRA terrorists—but now that right is gone completely. The fact that provision has been granted for a parliamentary review of the legislation is no more reassuring; this is partly because there is no reassurance to be found in the conduct of the parliamentarians when the

legislation was enacted, and partly because Parliament has seldom shown itself very responsive to review processes in the past.¹⁰ Second, other than a brief reporting to parliament, there is no built-in oversight mechanisms in the new legislation to supervise the exercise of these new police powers. The CSIS is subject to some very significant oversight powers, while the CSE has virtually no oversight. It has no legislation that creates it, at least up until this point (God knows what they are doing) and the CSE has been given additional powers: they can now monitor Canadians inside Canada who are talking to people outside Canada. Again, is that necessary? I don't know. I would prefer that we do not go down that road until we have examined the intelligence failures that have led to the events of September 11. Finally, it is important to say that while granting the police more extensive powers gives us no reason to believe they will be more effective, it does give us cause to worry about the mindset these powers promote. It behooves us to recall, in this context, the string of illegalities committed by agencies like the FBI in the name of fighting "communist subversion", or of discrediting Martin Luther King, or of destroying the Black Panther Party. Anyone who imagines this could not or would not happen in Canada need only consult the Keable Inquiry and the McDonald Commission reports for a graphic description of the dirty tricks perpetrated by the Security Service of the RCMP against Quebec Nationalists.¹¹ The CSIS, it should be remembered, was created in order to take away the responsibility for national security from a very badly run Security Service of the RCMP and to try and provide some modicum of accountability and control over the activities of the security agencies in this country.

I want to close by reiterating what I think was a particularly poignant comment by Ron Atkey. Mr. Atkey was the Immigration Minister in the Joe Clark Government. He was the first head of the Security Intelligence Review Committee when it was formed in 1984. He has a significant knowledge of national security issues from the inside. He was also, in my view, the best parliamentarian in the debates in the mid-70s in the creation of the wire tap powers under the misnamed *Protection*

¹⁰ For example, five years after the creation of CSIS, a team, headed by Stewart Farson, conducted a review which produced 117 recommendations. Three were adopted.

¹¹ The McDonald Commission didn't get to look at many of the Security Service's dirty tricks under operations named "Tent peg", "Oddball" and "Checkmate" because the RCMP were careful enough to destroy those files before the McDonald Commission was created.

of Privacy Act. Mr. Atkey was interviewed on the CBC National News about *Bill C-36* before it was passed. He concluded his comments by saying, “10 years from now your grandchildren will ask you what did you do to stop this Bill when it was introduced?”