Between Crime and War Terrorism, Democracy and the Constitution

Errol P. MENDES*

* Professor, Faculty of Law (Common Law), Ottawa University, and Past Director of the Human Rights Research and Education Centre, Ottawa, Ontario.

I. THE TERRITORY BETWEEN CRIME AND WAR COMES TO NORTH AMERICA

President George W. Bush stated that the September 11, 2001, terrorist horror in the United States was an attack on freedom. He added that it was also an attack through freedom. The individuals who carried out the unprecedented acts of terror were able to do what they did because they attacked from within a free society. They accomplished their crimes against humanity against a society that did not have every inhabitant under constant surveillance and where liberty and privacy are fundamental values.[1]

Some of the terrorists had lived very private lives for years in the United States. They trained at private flying schools, quietly working to qualify themselves for their intended horrible crimes. In the early hours of September 11, 2001, as they made their way to the airports in Portland, Boston and elsewhere, no police officer could have arrested them. They had committed no crime, most were in the United States on valid visas and, if they had the box cutters in their possession, it is unlikely these work tools would have been regarded as offensive weapons, making their owners subject to arrest and interrogation.

Such is the nature of the emerging terrorist threat. The threat to the lives of innocent people may be the quiet neighbour next door. They may have no criminal past. They may be highly qualified individuals such as Mohammed Atta, the postgraduate urban planner, who was the lead terrorist of September 11, 2001. They may be more deadly than most terrorists, because they do not fear their own death in the accomplishment of their

---

[1] For an excellent analysis, written long before September 11, 2001, of the challenges free and democratic societies face when confronted with terrorism, see P. Wilkinson, *Terrorism and the Liberal State*, (London: Macmillan Press, 1977).

crimes. In the case of the fanatical terrorists, they may welcome it. There can be no absolute guarantee of protection against them, as other societies around the world, such as Sri Lanka and Israel, have long experienced. This is the territory between crime and war that has now become a reality for citizens of North America.[2]

Professor Janice Stein describes this new form of "asymmetrical warfare" as the "Network Wars". She describes terrorist networks such as the Al-Qaeda, as highly complex and decentralized with multiple "nodes" spanning across the globe, making it difficult, if not impossible, to eliminate the entire network. However, she acknowledges that even such terrorist networks need one or more host "hubs" which provides temporary organizational focus for financing, recruiting and planning. Ominously for Canada and most liberal democracies, she describes the type of country in which such terrorist networks can thrive in the following manner:

> "Often with life-cycles of decades, networks of terror thrive on the openness, flexibility and diversity of post-industrial society, crossing borders almost as easily as do goods and services, knowledge and cultures. They have global reach, particularly when they can operate within the fabric of the most open and multicultural societies, and through post-industrial organizational forms."[3]

Professor Stein could almost be describing Canada as the ideal place for such terrorist networks.

However, other writers from Canada and the United States have rejected the enormity of the threat posed by these terror networks. They claim that there is plenty of evidence that in the past, democratic states have overstated the threat to their citizens and consequently overreacted. Professor Oren Gross, from the United States, argues that the example of British legislation to counter the threat of terrorist activity from the Irish Republican Army (IRA) is an example. He asserts that "[s]uch

---

[2] For another text of essays written well before September 11, 2001, which documents how terrorism permeates all levels of human society, see Y. Alexander, ed., *International Terrorism: National, Regional and Global Perspectives* (New York: Praeger, 1976).

[3] J. Gross Stein, "Network Wars" in 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) 73 at 75; see also Y. Alexander & M. Swetnam, *Oussama Ben Laden's Al-Qaeda: Profile of a terrorist network* (Ardsley: Transnational Publishers, 2001); J. Stern, *The Ultimate Terrorist* (Cambridge: Harvard University Press, 1999).

'overreaction' may, in turn, result in the 'barbarization' of society, not only in that terrorism from 'below' may be transplanted by institutionalized terror from 'above', but also in that the use of power and force is legitimated as a means of settlement of disputes."[4] There are many in Ireland and Britain, who have suffered from the terrorist bombings of the IRA, who would question whether in fact there was an overreaction by the British authorities when faced with targeting of innocent civilians by the IRA.

II. BALANCING SECURITY AND RIGHTS IN THE TERRITORY BETWEEN CRIME AND WAR; THE OVERARCHING LAW AND JUSTICE OF PROPORTIONALITY

If free and democratic societies have the right to protect themselves against such acts of terror which are both crimes and acts of "asymmetrical warfare" that can destroy thousands of innocent lives, what are the limits of such a right? As has been said elsewhere, agreeing to live in a free and democratic society is not an agreement to enter a suicide pact. But neither can a society remain free and democratic if it undermines the constitutional and human rights values that distinguish it from the values of the terror networks or those who nurture and support them. In a multicultural society such as Canada, the fundamental value of equality and non-discrimination must not be undermined in a way that makes entire sectors of our multicultural community automatic suspects. Professor Sujit Choudry, among others, has asserted that there is little doubt that security and immigration agencies in Canada and in other democratic states will focus their preventative and enforcement actions on persons of Arab origin or appearance. They may do so under the previous police powers or new powers given to them under antiterrorism or immigration laws. In particular he warns of the informal methods of such racial profiling:

> "If immigration and law enforcement agencies begin to engage in the profiling of persons of Arab background or appearance, they will do so through means—ranging from internally distributed departmental memoranda to informal word-of-mouth directives issued by superior officers—which are less visible and hence less susceptible to public

---

[4] O. Gross, "Cutting down Trees: Law-Making under the Shadow of Great Calamities" in Daniels, Macklem & Roach, *supra* note 3, 39 at 43.

> scrutiny and democratic debate than publicly promulgated legal texts such as statutes and regulations."[5]

What hard evidence Choudry has for his assertions of such informal profiling not based on law is uncertain,[6] but, as he has also discussed, such profiling would be contrary to the fundamental principles of the equality guarantee in the *Canadian Charter of Rights and Freedoms*[7] and could not pass the test of Section 1 of the *Charter*.

We should also be careful to heed the warning of experts in administrative justice such as Professor David Dyzenhaus that even democratic states can become addicted to the transfer of emergency powers to ordinary criminal legislation. He also asserts that citizens, and indeed judges, can become accustomed to infringements of fundamental rights and the rule of law through the legal vacuum that enhanced security powers can bring about.[8]

While we should be mindful of the very serious warnings given by such Canadian and American writers on the dangers to democracy in the new territory between crime and war, we must also look to the actual practice of leading democratic states. Some of the leading democracies in the world such as Britain and the United States[9] have passed legislation that seek to protect their societies against the new and deadly forms of terrorism. Britain,

---

5 S. Choudry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter" in Daniels, Macklem & Roach, *supra* note 3, 367 at 368. For a critical analysis of racial profiling in the United States by a leading member of the American Civil Liberties Union, see D. Harris, Pr*ofiles in Injustice: Why Racial Profiling Cannot Work* (New York, The New Press, 2002).

6 Choudry cites, *inter alia*, a Globe and Mail report to assert that such informal racial profiling may already be taking place: see E. Oziewicz, "The Brink of War: Border alert targets pilots, Canadian guards told to watch for men with technical training and links to 16 'conflict countries'", *The Globe and Mail* (September 19, 2001) A1.

7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

8 D. Dyzehaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Daniels, Macklem & Roach, *supra* note 3, 21 at 25-27.

9 The American legislation is known by the title *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, pub. L. No 107-56, 115 Stat. 272 [hereinafter *Patriot Act*]. For a severely critical analysis of the Act, see N. Chang, "The USA PATRIOT ACT: What's so Patriotic About Trampling on the Bill of Rights?", online: Center for Constitutional Rights http://www.ccr-ny.org (date accessed: March 7, 2002).

with whom Canada shares a legal, constitutional and socio-political heritage, has found that while it has had to make recourse to its new antiterrorism laws on fewer occasions than expected, it has been most useful to have such laws as both deterrents and as last resort legislative mechanisms to utilize in an emergency.[10] Canada has now followed the lead of its American, European and Australian allies.

Indeed Irwin Cotler has suggested that antiterrorism legislation, such as the omnibus *Anti-terrorism Act*[11] passed by the Canadian Parliament should be regarded as human security legislation that protects both security and civil rights. He argues that such legislation is legally required by United Nations (UN) Conventions on terrorism that Canada has ratified. Cotler asserts that the UN is of the view that "terrorism constitutes a fundamental assault on human rights and, as such, a threat to international peace and security, while counter-terrorism law involves the protection of the most fundamental right to life, liberty, and the security of the person, as well as the collective right to peace."[12] Professor Cotler, however, goes on to give 13 foundational principles that must underpin antiterrorism legislation in democratic societies to ensure that the balance between security and civil liberties is maintained and that there is no "zero sum game" between the two fundamental democratic values.[13]

In a similar vein to the position of Professor Cotler, I suggest that the overarching principles that should guide citizens and courts in our democracy as the provisions of *Bill C-36* get implemented in the daily security operations in this country, is the law and justice of proportionality. I say the law of proportionality, because the provisions of the Bill might eventually pass the proportionality test in Section 1 of the *Canadian Charter of Rights and Freedoms*. This section states that the rights in the *Charter* are:

---

[10] See the *Terrorism Act 2000* (U.K.), 2000, c. 11, and the *Antiterrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24. The website of the British Home Office contains the texts and consultation papers on the major legislation against terrorism, online: British Home Office http://www.homeoffice.gov.uk/atoz/terrorists.htm (date accessed: March 7, 2002. Professor Gross gives a very different picture of how antiterrorism laws have affected civil liberties and democracy in Ireland and the U.K., in Gross, *supra* note 4.

[11] S.C. 2001, c. 41 [hereinafter *Bill-C36*].

[12] I. Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Daniels, Macklem & Roach, *supra* note 3, 111 at 112-113.

[13] *Ibid.*, at 112-121.

> "[…] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

We know that the main parts of the so-called *Oakes* test,[14] (as modified by the *Dagenais* v. *Canadian Broadcasting Corp.*[15]) that interprets Section 1 of the *Charter*, comprises the following elements:

1. Limits to the fundamental rights in the *Charter* must be "prescribed by law" rather than by arbitrary fiat of Government officials or security forces. I have suggested elsewhere that the intent of the "prescribed by law" yardstick is the adherence by the Canadian state to the fundamental tenets of the rule of law.

2. There must be a "pressing and substantial" legislative objective to justify the overriding of the rights in the *Charter*.

3. The limitation must pass the three elements of the proportionality test, laid down in the *Oakes* decision of the Supreme Court, which are as follows:

- the means chosen to limit rights must be rationally connected to the pressing and substantial objective;
- the means chosen must be the least intrusive means of limiting the relevant rights;
- there must be proportionality between the effects and the benefits of the limitation on rights, and between such harmful effects and the important legislative objective.

Jurisprudence of the Supreme Court have watered down some of these Section 1 interpretative tests, but on at least one occasion the Court has stated that in the criminal law context when the State is the "singular adversary" of the accused, it should be applied rigorously. However, even in

---

[14] *R.* v. *Oakes,* [1986] 1 S.C.R. 103 [hereinafter *Oakes*]; for a detailed discussion of the evolution of the test in the *R.* v. *Oakes* decision of the Supreme Court and its subsequent modification by the Court, see E.P. Mendes, "Section 1: The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in G.-A. Beaudoin and E. Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996) 3-1.

[15] [1994] 3 S.C.R. 835.

the criminal law context, the application of the interpretive tests have been varied.[16]

The Government of Canada has wisely chosen not to use the override provision of Section 33 of the *Charter* to guarantee that no challenge to the provisions of *Bill C-36* will succeed in the courts, despite the seriousness of the terrorist situation we face. As one who advocates for the provision of Section 33 to fall into disuse, such boldness on the part of the Canadian Government is much appreciated.[17] Therefore *Bill C-36* will have to face the test of the *Charter* in the inevitable challenges to its provision that will be brought in the courts. I suggest the fundamental framework that both the provisions of *Bill C-36* and the implementation of its provisions must pass through in our constitutional democracy is the law and justice of proportionality. I would suggest that as our world gets more dangerous, the law and justice of proportionality will become one of the most foundational principles that constitutional democracies around the world must strive to adhere to. We must keep this in mind as we examine the most controversial provisions of the Bill.

III. WHERE THE ANTITERRORISM MEASURES IN *BILL C-36* MAY MEET THE CHALLENGES OF THE LAW AND THE JUSTICE OF PROPORTIONALITY

If the specter of the inconspicuous terrorists and their terror networks are what the antiterrorism measures in the western liberal democracies are aimed at, it is clear that timely, accurate and appropriate intelligence, surveillance and interception of terrorist communications together with timely preventative and investigative actions on the part of security forces will be the main mechanisms against such terrorists.[18] It is therefore not surprising that the most controversial parts of *Bill C-36* deal with such mechanisms.

---

[16] See Mendes, *supra* note 14.

[17] For differing views on the override clause, see J. Whyte, "On Not Standing up for Nothwithstanding" (1990) 28 *Alta. L. Rev*. 347, to be contrasted with P. Russell, "Standing up for Notwithstanding" (1991) 29 *Alta. L. Rev*. 293.

[18] For discussions of what is needed to combat terrorism in a democratic society, in the United States in particular, see United States, *Report of the National Commission on Terrorism: Countering the Changing threat of International Terrorism* (Washington: National Commission on Terrorism, 2000).

I will deal with only a few of the most controversial provisions given the limitations of space and time, but I wish to state at the outset that the provisions of *Bill C-36* represent a fair attempt in a free and democratic society to balance security and human rights. Although it is a fair attempt, as we shall see it is far from perfect. Yet we must bear in mind that perfection is the enemy of the good.

Some of the contents of *Bill C-36* can also be regarded, as Professor Cotler has put it more generally, as involving the fundamental right of Canadians to not have their lives or their security of the person taken away by terrorists. These rights must also be balanced against the rights of accused persons to due process, freedom of expression and non-discrimination. Legislative drafting in *Bill C–36* that is an example of this balancing is the decision not to criminalize membership in a terrorist organization, but to focus instead on the participation in, contributing to or facilitating in the activities of a terrorist group or harbouring and instructing such groups, in sections 83.18 to 83.23 of *Bill C-36*.[19]

The Department of Justice, in defending these provisions, asserted that, as with the federal legislation on criminal gangs, there has been a fair effort to balance the fundamental right to freedom of association with the right of Canadians to be free from terrorist activities on Canadian soil.[20] As we shall discuss below, some of Canada's leading criminal law academics disagree with this position.

However, again it should be noted that while the Canadian legislation follows the US and French legislation in this regard, one of the major birthplaces of constitutional democracy, Great Britain, goes further. The British legislation creates a ten-year maximum penalty for membership in a proscribed organization. In addition, the legislation makes it an offence to wear or display, in a public place, an article that would arouse reasonable

---

[19] The legislation followed the example of the anti-gang legislation which had been enacted earlier by the Canadian Parliament, see *Criminal Code*, R.S.C. 1985, c. C-46, s. 467.11-467.13. However, even this attempt by the federal Government not to criminalize membership in criminal organizations, but to focus on participation, commissioning or instructing the commissioning of offences has attracted the criticisms of the criminal law academics: see D. Stuart, "Panicking over Criminal Organizations: We Don't Need Another Criminal Offence" (2000) 44 *C.L.Q.* 1.

[20] Discussions with Department of Justice, Government of Canada, officials, September, 2001. See also, online: Department of Justice http://canada.justice.ca/en/news/nr/2001/doc_28217.html (date accessed: March 7, 2002.

suspicion that the person is a supporter of a proscribed organization. This offence carries a maximum penalty of six months in prison.[21]

A conclusion as to a fair balancing of national security concerns with human rights and civil liberties is reinforced, if not only national security is regarded as the pressing and substantial objective of *Bill C-36*, but also the right to life and security of the person of Canadians in general. One might add, that if Canada is being used as a staging post for attacks on our American neighbours across the border, the balancing could also include the right to life of innocents in the country next door, which is presently the main target of the networks of terror. The necessity of stopping our territory being used as staging posts for attacks on the United States is also critical to the economic fate of Canada, if the United States hinders transborder commercial activity in response to such staged attacks.[22]

With the above context in mind, I now turn to some of the most controversial of the contents of *Bill C-36*.

IV. THE DEFINITION OF TERRORIST ACTIVITY: *BILL C-36*, S. 4

Under this section, there is little controversy as regards defining terrorist activity as an action that takes place either within or outside Canada that is an offence under one of the 12 UN antiterrorism conventions and protocols.[23]

The following was my submission to the Justice Committee of the House of Commons on perceived problems with the most controversial part of the original definition of terrorist activity in *Bill C-36*:

> There is, however, great controversy as regards the alternative definition of terrorist activity that includes actions causing substantial property damage that is likely to seriously harm people or

---

[21] For details of the legislation in these areas, see the British Home Office Website, *supra* note 10.

[22] Canada is one of the nations most heavily reliant on exports, comprising 30 % of the GDP (Gross Domestic Product) of the country. In 2000, over 87 % of those exports crossed the border to the United States.

[23] The list of the 12 UN Conventions are found within the definition section of *Bill C-36*, Section 83.01 under the definition of "terrorist activity". The full list can also be located at the UN Website, online: United Nations http://untreaty.un.org/English/Terrorism.asp (date accessed: March 7, 2002). Canada has now ratified all 12 of the Conventions.

by interfering with or disrupting an essential service, facility or system. This concern lingers even though the definition expressly excludes actions resulting from lawful advocacy, protest, dissent or stoppage of work that is not intended to result in death or serious bodily harm, endangerment of a person's life or a serious risk to the health and safety of the public or a segment thereof.

[…] It has been argued that this definition could include violent protests by antiglobalization protesters, strikers and others who may engage in civil disobedience, which could interfere or disrupt essential services, facilities or systems. You have heard testimony from other witnesses, including RCMP Chief Commissioner Zaccardelli, that there is no desire to include such actions within the definition of terrorist activity which would trigger the other provisions of the omnibus Bill. Such actions would still be covered by other Criminal Code provisions.

[…] If there could be a clearer way to exclude such civil disobedience actions from *Bill C-36*, I would be in favour of such a clarification. I am in agreement with other witnesses that perhaps the reference to "lawful" could be removed from its qualification of advocacy, protest, dissent or stoppage of work as the application of what is "lawful" to certain acts, especially those outside Canada, would be problematic. What is excluded by customary or conventional international law from the definition of terrorist activity is also open to much debate and potential confusion. Consideration should be given to clarifying this part of the definition.

It must be noted, however, that the present definition would seem to catch only those acts of civil disobedience which are intended to result in death or serious harm, endangerment of life or serious risk to the health and safety of the public or a segment thereof.

Moreover, I also agree with other viewpoints that the need to prove the activity was done out in whole or part for a political, religious or ideological purpose, objective or cause [s. 83.01(1)(b)(i)(A) of the *Criminal Code*, as am. by *Bill C-36*, s. 4] is perhaps unnecessary. What if the terrorist is motivated by hate? Is that political, religious or ideological? Sometimes hate has its basis in unfathomable irrationality. International conventions on terrorism do not have this qualification as a standard definition of terrorist activity.

It should be noted that the definition of terrorist activity in the Canadian legislation is not dissimilar to other major constitutional democracies. The British antiterrorist legislation also requires proof of political, religious or ideological motive.[24] While the limitation is not found in the American or French antiterrorist laws, the French definition is the broadest, extending terrorist activity to acts that seriously disrupt public order through intimidation or terror. It is a specific intent offence.[25]

The amendments to *Bill C-36* addressed one of the major concerns, addressed to the Justice and Human Rights Committee, by the removal of the word "lawful" from the definition. I accept the position put forward by the Minister of Justice that this amendment will ensure that protest activity, whether lawful or not, would not be considered a terrorist act unless it was intended to cause death, serious bodily harm, endangerment of life or serious risk to the health and safety of the public.[26] There remains a clarification to be made, however, in that the serious risk to the health and safety of the public relates to the seriousness of the risk, not the probability of the risk to the health and safety of the public. There are, for example, some protest activities that can pose a substantial probability of some limited risk to the health and safety of the public. Examples could include the obstruction of emergency vehicles by street demonstrators.

In testimony to the Justice and Human Rights Committee, I also expressed concern about the possibility of individuals stumbling without "subjective intent" into the facilitation of terrorist activity. Again, this concern has been addressed by the amendments to *Bill C-36* which reorder the provisions on facilitation so that they clearly state that an individual must know or intend that his act would help a terrorist activity to occur, even if the details of such activity are not known.[27]

---

[24] See the Website of the British Home Office for the precise wording of the British definition, *supra* note 10.

[25] The offense of terrorism is defined in the Nouveau Code pénal, art. 421-1, 421-2 and 421-2-1. For details of the French legislation, including the stringent antiterrorism law passed on October 31, 2001, titled "The Law Concerning Daily Security" (*Loi n° 2001-1062 du 15 nov. 2001 relative à la sécurité quotidienne*, J.O. 16 nov. 2001, p. 18215), see the Website of the Interior Ministry of the French Government, online: Ministère de l'Intérieur http://www.interieur.gouv.fr (date accessed: March 7, 2002).

[26] See the explanations for the amendments to *Bill C-36*, online: Department of Justice http://canada.justice.ca/en/news/nr/2001/doc_27902.html (date accessed: March 7, 2002).

[27] *Ibid*.

It is acknowledged that the amendments do not completely address the legitimate concerns of Professor Kent Roach that many of the criminal offenses in the legislation are inchoate offenses, such as financing, facilitating and instructing, which taken in context with the vagueness of the definition of terrorist activity could create constitutional concerns about vagueness and over-breadth.[28] However, as will be discussed below, these concerns are not beyond the ability of the courts to monitor and ensure that the fundamental values of the Canadian constitutional democracy are not threatened.

In this area, a comparison with other leading constitutional democracies are also instructive and reveals evidence of legislative restraint on the part of the Canadian Government in crafting *Bill C-36*. The British antiterrorist legislation goes further than the Canadian legislation and creates additional offences as regards arranging a meeting of three or more persons to support or further the activities of a proscribed group. It also makes it an offence to address a meeting to encourage support for a proscribed group.[29] The French law extends terrorist activity to participation in a organized group, or an agreement entered into, for the purpose of preparing a terrorist activity.[30] The American legislation creates the offence of harbouring terrorists which can be committed even where a person may not know that the person they are protecting is a terrorist, but on an objective examination, would have reasonable grounds to believe otherwise.[31]

The amendments to *Bill C-36* have not removed the reference to the need for prosecutors to prove the terrorist activity was done for a political, religious or ideological cause.[32] Instead the Government has opted for an interpretive clause that the expression of political, religious or ideological beliefs is not terrorist activity unless it constitutes conduct that meets the definition of "terrorist activity". This amendment does not take the clearest path of just removing the reference altogether for the reasons that I stated to

---

[28] K. Roach, "The New Terrorism Offences and the Criminal Law" in Daniels, Macklem & Roach, eds., *supra* note 3, 151 at 154-168.

[29] See the Website of the British Home Office for details of these provisions, *supra* note 10.

[30] A law passed on July 22, 1996 added a new article to the Nouveau Code pénal, art. 421-2-1, under which an act of terrorism would include participation in a group organized or an agreement entered into for the purpose of preparing, based on one or more material facts, any act of terrorism as defined in the Nouveau Code pénal.

[31] See the discussion of the *Patriot Act* by Nancy Chang, *supra* note 9.

[32] See the Website of the Department of Justice, Government of Canada, *supra* note 26.

the Justice Committee. Clarity is preferable to explanations that may not remove the "red flag" nature of the wording. There will undoubtedly be *Charter* litigation alleging that this focus on the prosecutorial search for political, religious or ideological cause will cause a chill on the freedom of expression and religious beliefs of some groups in the Canadian multicultural mosaic.

In conclusion, it can be said, in contrast to other leading liberal democracies such as Britain, the United States and France, that the Canadian Government in defining the borders between crime and war has not ignored the geography of fundamental rights and freedoms, even if the final map is not entirely satisfactory.[33]

V. PROPORTIONALITY AND THE PREVENTATIVE ARRESTS AND INVESTIGATIVE HEARINGS PROVISIONS OF THE ANTITERRORISM LEGISLATION

A. Preventative Arrests

The Canadian Government's justification for provisions in this section focus on the ability of peace officers, in cooperation with the judiciary and the Attorney General, to prevent terrorist activities before they occur.[34] These are extraordinary provisions, which before September 11, 2001, would probably not have withstood a *Charter* challenge. So what has changed since September 11, 2001?

Justice is not static. Neither the constitution nor the judiciary exist in a vacuum. The new pressing and substantial objective of the provisions in section 83.3 of *Bill C-36*, according to the federal Government, is to protect the lives of innocent people from the inconspicuous terrorists who may have no criminal record, and have given no public indication of their intent to commit mass murder. They have plotted in secret and their intentions are only known to security agencies who have put them under various forms of physical and electronic surveillance. This territory between crime and war became a reality for North American society in the early hours of September 11, 2001. Many in the federal Government, and even in the security agencies, have expressed the hope that this power will only be exercised in

---

[33] See *supra* notes 9, 10 and 25.

[34] See the Website of the Department of Justice, Government of Canada, *supra* note 26.

rare circumstances and as a last resort to prevent the endangerment of innocent lives.[35]

The federal Government would argue that the particular means chosen to limit their right to the normal due process of the criminal law is rationally connected to this pressing and substantial objective. The safeguards in section 83.3 are attempts to minimally intrude on the normal due process rights of the suspected terrorist. The consent of the Attorney General is required and the peace officer must convince a provincial court judge that there are reasonable grounds to believe that a terrorist activity will be carried out and that the arrest will prevent the carrying out of the terrorist activity. Where exigent conditions exist and the peace officer carries out the preventative arrest without a warrant, there must be an appearance before a provincial court judge within 24 hours to determine whether supervisory conditions are necessary for the person under preventative arrest. Under these provisions a suspected terrorist can be detained for a further 48 hours, up to 72 hours in total from the time of the arrest. Under the provisions of the section, the provincial court judge then has the power to ensure that persons about to carry out the type of terrorist activity envisaged does not do so. Some have criticized the penal provisions in section 83.3(9) that allows a provincial court judge to hand out a 12-month sentence to those under preventative arrests who fail or refuse to give recognizances as being too severe.

Another brief comparison with other constitutional democracies is appropriate here. The British legislation also allows for detention without charge. In order to obtain evidence, detention can take place for up to 48 hours without review. Beyond that period, an application can be made for continued detention for up to 7 days from the time of the arrest where a judge is satisfied that there are grounds for such continued detention. The British Government proposed strengthening these provisions even further to allow for indefinite detention of some terrorist suspects.[36] The American *Patriot Act* provides for mandatory detention of suspected alien terrorists after certification by the US Attorney General that there are reasonable grounds to believe that the alien is a threat to national security. The detention can continue for up to seven days, after which the alien must be released

---

[35] Discussions with various Government officials, October 2001—January 2002.

[36] See the Website of the British Home Office for details of the provisions in this area, *supra* note 10.

unless he/she is charged with an offence or deportation proceedings are commenced. If this happens, detention can continue indefinitely but is subject to *habeas corpus* judicial review.[37]

The French antiterrorism measures allows detention of suspected terrorists for up to four days and these suspects have the right to counsel only after the first 72 hours of detention has expired.[38]

This comparative study shows that the Canadian provisions on preventative arrest are among some of the most restrained among the leading Western constitutional democracies.

B. Investigative Hearings

The validity of the investigative hearings provisions of section 83.23 the *Criminal Code* (as amended by *Bill C-36*) dealing with investigative hearings would also have been doubtful under the *Charter* if the horror of September 11, 2001 had not happened. Under the provisions of the section, individuals with information relevant to an ongoing investigation of a terrorist crime are required to appear before a judge and are compelled to testify, provided the consent of the Attorney General is obtained. However, any evidence obtained can not be used in criminal proceedings against the person compelled to testify.

Again, we can see how the Canadian Government could argue that such a provision has a pressing and substantial objective to ensure that material witnesses provide information to secure the arrest of those who have either committed a terrorist activity or may be about to do so. The fact that the consent of the Attorney General is required for this process is indicative of the possible "last resort" nature of the process. The reviewing judge must also be satisfied that there are reasonable grounds for believing the person could be a material witness.

---

[37] For a civil liberties critique of these provisions, see Nancy Chang, *supra* note 9.

[38] Articles 63, 77, 154 and 706-723 of the French Code de procédure pénale.

The federal Government would argue that it is clear that there is a rational connection to the objective of the limitation on due process rights. The Government is also confident that, given the need for consent of the Attorney General and the oversight of the courts, it could constitute a minimal intrusion on the rights of any material witness.

In contrast to the federal Government's defense based on the proportionality of the antiterrorism measures, critics of such antiterrorism measures, like Professors Kent Roach, Martha Shaffer and Don Stuart, attack the rationality of the measures given the objective is to prevent terrorism. Kent Roach first notes that all the acts of terrorism on September 11, 2001, would have made the terrorists subject to prosecution under existing criminal laws had they lived. With great respect, the learned professor misses the point that they may have deliberately chosen not to live, mandating that in any legislative response, the emphasis should be on prevention rather than punishment. Professor Roach also argues that passing tougher criminal laws which are primarily symbolic in nature, will not by themselves prevent future terrorist acts.[39] Likewise, Martha Shaffer and Don Stuart dismiss the preventative value of the measures, arguing that if the terrorists are prepared to die for their cause, it is highly improbable that they would be deterred by higher penalties.[40] Professor Shaffer admits that the preventative arrest and investigative hearing powers may yield more information and a heightened ability to incapacitate terrorists before they carry out their plans. However, she argues that they will primarily be targeted at persons who are associates of terrorists or peripherally involved in terrorist activity. This may have important consequences in terms of civil liberties and possible racial profiling.[41]

In contrast to these serious concerns about the proportionality of the preventative arrests and investigative hearing provisions, an expert in security and intelligence matters offers a defense to these provisions that reinforce their proportionality foundations. Wesley Wark argues that these provisions might have the effect of focusing urgent investigations on genuine

---

[39] K. Roach , "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Daniels, Macklem & Roach, eds., *supra* note 3, 131 at 136.

[40] M. Schaffer, "Effectiveness of Antiterrorism Legislation: Does Bill C-36 give us what we need in Daniels, Macklem & Roach, eds., *supra* note 3, 195; D. Stuart, "The Dangers of Quick Fix Legislation in Criminal Law: The Antiterrorism Bill should be withdrawn" in Daniels, Macklem & Roach, eds., *supra* note 3, 205.

[41] M. Shaffer, *ibid.,* at 199-201.

threats and reducing security paranoia. He argues that some of the powers in *Bill C-36* might have curbed the excesses of the period of 1946 "when the Canadian Government floundered its way through a Royal Commission on Espionage." Wesley Wark argues that preventative arrests and investigative hearings have a practical role in preventing catastrophes and focusing the mind of the security and intelligence community, while sending out a signal that Canada is serious about the war on terrorism.[42]

The difference between the analysis of criminal lawyers and security and intelligence experts may well indicate the parameters of the new uncharted territory between crime and war. It will be in this territory that the courts will have to adjudicate between the legitimate interests of a free and democratic society in security for its citizens and the fundamental rights of individuals and certain groups who may be the target of security agencies.

Professor Kent Roach almost gives up the constitutional battle before it has even begun. He has conceded that the courts may well uphold the constitutionality and the proportionality of these provisions of *Bill C-36*, given the track record of courts in Canada to be deferential to Governments in times of national security crises. However, he argues that this "charter-proofing" alone should not stop the debate on the threat that such legislation can pose to a constitutional democracy like Canada. Referring to the investigate hearing provision, for example, he states:

> "The bells and whistles of Charter-proofing—judicial authorization, derivative and use immunity and the right to counsel—may ensure that the provision for investigative hearings is not struck down under the Charter, but it does not remove the danger of abrogating the right of silence that potential suspects have long enjoyed in our adversarial system of criminal justice."[43]

---

[42] W. Wark, " Intelligence Requirements and Antiterrorism Legislation" in Daniels, Macklem & Roach, eds., *supra* note 3, 287 at 290-291.

[43] K. Roach, *supra* note 39 at 136.

Roach argues that provisions such as those relating to investigative hearings could infect other parts of the criminal process and that "the maximum standards of conduct in the *Charter* are quickly becoming the maximum standards of restraint that we can expect from our Government."[44]

The equivalent of the investigative hearing provisions in the United States is the Grand Jury system. The Grand Jury system applies to the criminal process in general, and its main purpose is to ascertain whether there are sufficient grounds to lay criminal charges. It can also be applied to suspected terrorists and their accomplices. Under British antiterrorism laws, suspected terrorists can be detained for questioning and the gathering of evidence.[45] After September 11, 2001, the British Government proposed to strengthen these provisions by imposing a duty on all persons to disclose information of material assistance in the prevention or prosecution of terrorism, making it a criminal offense not to do so. In the French penal process, as in all major civil law systems, investigative hearings are part of the ordinary criminal process and not restricted only to terrorist activities. However, under antiterrorism measures, there is relaxation of investigatory rules concerning terrorist activities, including search and seizure rules of private residences and the stopping and searching of vehicles.[46] Again, the comparative study demonstrates that Canada is not out of step with any of the other leading constitutional democracies as regards investigative hearings.

C. In Defense of the Courts and their Ability to Monitor the Territory between Crime and War

I suggest that critics like Professor Roach have too easily given up on the ability of our courts, in particular the Supreme Court of Canada, to safeguard the foundations of our constitutional democracy in this new territory between crime and war. Recent decisions have amply demonstrated the ability of our top court to do so.

---

[44] *Ibid.,* at 137.

[45] See the Website of the British Home Office for details on these provisions, *supra* note 10.

[46] See the details of these provisions on the Website of the French Interior Ministry, *supra* note 25.

On November 15, 2001, the Supreme Court released two decisions which reinforce this conclusion. In two cases dealing with publication bans to protect the identity of undercover police officers and the nature of the undercover investigative techniques employed, *R.* v. *Mentuck* and *R.* v. *O.N.E.,*[47] the Court focused on the proportionality tests for section 1 of the *Charter*. It ruled that publication bans on undercover police work, which has similarities to antiterrorism operations, should be carefully tailored and restricted to prevent the infringement of other fundamental rights. Mr. Justice Iacobucci, speaking for the Court, stressed that the proportionality test required the Court to balance the interests of the public in ensuring effective policing with society's fundamental interest in monitoring the police, as well as the right of the accused to a fair and public hearing.

The Court ruled that the publication bans on the identity of the undercover officers was proportionate as long as it was restricted to a period of one year. It added that as the circumstances of the case may change, the order could be made subject to further modifications by the issuing court. However, as regards the ban on operational methods, the court found that there was no serious risk to the police operations being compromised. The court went further to emphasize that even if there had been a serious risk to the operations of the police, other parts of the final test of proportionality would have to be met. This is very significant for the constitutional monitoring by the courts of the antiterrorism provisions in *Bill C-36* or indeed in any other legislative provisions such as those in *Bill C-42*.[48] The Court seems to be signaling that it would not be enough for the security agencies to say: "Trust me, we know what are proportionate measures to ensure the security of our citizens." In demanding that the publication bans satisfy the rest of the last part of the proportionality test, the Court seems to be demanding that the same security agencies satisfy a "show me" threshold.

---

[47] The decisions were released together on November 15, 2001: *R.* v. *Mentuck*, 2001 SCC 76 [hereinafter *Mentuck*]; *R.* v. *O.N.E.,* 2001 SCC 77.

[48] Bill C-42, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, 1st Sess., 37th Parl., 2001 (1st reading November 22, 2001) [hereinafter *Bill C-42*].

The Court ruled that even if a serious risk to police operations had been demonstrated, the deleterious effects of the ban on the freedom of the press and the right of the accused to a fair trial, including the right to have the media access the courtroom and report on the proceedings, would substantially outweigh the benefits of the unpublicized undercover operations. The Court also ruled that any such benefits were speculative and marginal to the efficacy of undercover operations. In a strong statement that the courts and the public have a right to a "show me" standard even in matters of security, the court stated : "A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state."[49]

Likewise in the high profile decisions *Suresh* v. *Canada (Minister of Citizenship and Immigration)*[50] and *Ahani* v. *Canada (Minister of Citizenship and Immigration)*[51], the Court again took a firm line on a proportionate balance between security and fundamental rights. In *Suresh*, while the Court upheld the constitutionality of the relevant provisions of the immigration and refugee legislation that gave the minister the power to deport Suresh and Ahani on the grounds of being a danger to the security of Canada, it also insisted that fundamental rights, under both domestic and international law, could not be ignored. Suresh and intervenors in the case had argued that Canada's legal obligations under *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[52] imposed an absolute obligation not to deport back to a country where there was a substantial risk of torture.

In *Suresh*, the Court held that deportation to a country where there is a substantial risk of torture would constitute a violation of the right to life, liberty and security of the person under section 7 of the *Charter*. They left open the possibility of doing so in exceptional cases. The Court indicated that deference should be paid to the Government's assessment of whether an individual is such a danger to the security of Canada that he or she falls within the exceptional case category. However, if that individual makes a *prima facie* case that he might be tortured on return, he must be provided

---

[49] *Mentuck*, *supra* note 47 at para. 50.

[50] 2002 SCC 1 [hereinafter *Suresh*].

[51] 2002 SCC 2 [hereinafter *Ahani*].

[52] December 10, 1984, Can. T.S. 1987 No 36.

with the procedural safeguards necessary to protect his section 7 rights not to be expelled to torture. In the case of Suresh, the Court found he had not been provided with the required procedural safeguards, while in the case of Ahani, he had been provided with such minimal procedural safeguards.

While some have criticized the Court for imposing only a due process obstacle to the Government's assessment of when an individual is considered such a danger to the security of Canada that his section 7 rights can be violated,[53] others, including Amnesty International Canada, have noted that the *Suresh* and *Ahani* decisions have also introduced the relevance of international human rights law into the balancing of security and human rights, describing the *Suresh* decision as "A Blow Against Torture But Not a Complete Victory for Justice."[54] These decisions will guide the courts in their interpretation of the provisions and implementation of *Bill C-36*. They act as precedents for the principle that in a liberal democracy, security must be bounded by the imperatives of fundamental due process.

One can extrapolate from these recent decisions of the Supreme Court that in the new territory between crime and war, the courts will also insist that the law and justice of proportionality must prevail in our constitutional democracy. In particular, I suggest that the courts are more than ready to meet the challenges of the discretionary powers exercised by our security forces under the legislation, if they result in unconstitutional behaviour such as racial profiling or if the extraordinary powers under the legislation are used for ordinary criminal processes outside the territory between crime and war. If the powers under *Bill C-36* were used in this fashion, it is unlikely that they would pass any part of the proportionality test and perhaps not even be regarded as limits on rights that are "prescribed by law."

---

[53] See my own first reactions to the rulings and those of other civil liberties lawyers in K. Makin, "Court allows deportation of refugees facing death, ruling could give boost to terror bill", *The Globe and Mail* (January 12, 2002).

[54] This is how Amnesty International Canada described the ruling in *Suresh*, see, online: Amnesty International Canada http://www.amnesty.ca/library/news/amr20C012.htm (date accessed: March 8, 2002).

I would argue strongly against the position of Professor Lorraine Weinrib that the courts are not up to this crucial task in our constitutional democracy, based in part on their past demonstrated deference to Governments in times of emergency.[55]

In particular, comfort should be drawn from the *Mentuck* decision, in which the Supreme Court has quite rightly stated that Canada is not a police state. The courts have been given clear directions by the legislation that discretionary powers given to our security agencies would be exercised unconstitutionally if they were used to investigate or prosecute lawful or even unlawful dissent, protests or civil disobedience. They must only be used to prevent the carnage of terrorist activities and enhance the human security of all our citizens in this new territory between crime and war.

My support of the ability of our courts to monitor the territory between crime and war is not without qualification. I am in agreement with Professors David Duff and Lorne Sossin that in many areas of *Bill C-36* and indeed in other antiterrorist legislative measures such as those in *Bill C-42*, there will be little or no scope for the fundamental notions of natural justice in relation to ministerial discretion concerning national security. Professors Duff and Sossin, in reinforcing their positions, point legitimately to the extensive powers given to Solicitor General and the Minister of National Revenue to deny charitable status or de-register organizations under the provisions of *Bill C-36*.[56]

VI. EFFECTIVE OVERSIGHT AS A CONSTITUTIONAL DUTY IS THE TERRITORY BETWEEN CRIME AND WAR

The strongest criticism of the most controversial parts of the antiterrorist measures, described above, should have been on the inability of either the public, the Government or indeed the courts to determine effectively whether or not the implementation of these provisions would run counter to the last aspect of the proportionality test. This concerns the ability to judge whether the negative effects of the measures are proportionate to the

---

[55] L. Weinbrib, "Terrorism's Challenge to the Constitutional Order" in Daniels, Macklem & Roach, eds., *supra* note 3, 93 at 102-104.

[56] D. Duff, "Charitable Status and Terrorist Financing: Rethinking the Proposed *Charities Registration (Security Information) Act*" in Daniels, Macklem & Roach, eds., *supra* note 3, 321 at 327-333; L. Sossin, "The Intersection of Administrative Law with the *Anti-terrorism Bill*" in Daniels, Macklem & Roach, eds., *supra* note 3, 419.

objectives of national security and the beneficial effects of such measures. I suggest that this final part of the justice of proportionality is a profoundly urgent call to constitutional duty on the part of relevant Governments that they ensure there are effective oversight mechanisms to monitor and report on this last aspect of the duty of proportionality.

The position that I put most strongly before the Justice and Human Rights Committee and the Senate Committee reviewing *Bill C-36* was that it is imperative that annual reviews by Parliament be conducted to ensure that the new security agencies' powers do not impact so much on the fundamental values and freedoms of Canadians that it violates the law and justice of proportionality. There will need to be careful reviews of the use of *Bill C-36* powers to ensure that particular segments of Canadian society are not being singled out and that the safeguards against self-incrimination and other possible abuses are effective. After two years of effective reviews and a third year of enhanced review, I suggested the application of a sunset clause, at a later stage, may be appropriate with this provision.

I suggested that the annual reviews should include rigorous examination by the relevant committees of the Parliament of Canada of all the relevant oversight agencies, apart from the judiciary. I also suggested that the same oversight agencies should have the power to examine whether the extraordinary powers under *Bill C-36* are not being abused or violating the fundamental rights of Canadians. Parliamentary Committees should also hear from representatives of individuals and groups affected by the extraordinary powers.

The amendments to *Bill C-36* have only partially addressed the request to have effective annual reviews. Under the amendments, the Attorney General and Solicitor General of Canada and their provincial counterparts would be required to give essentially quantitative reports annually to Parliament on the use of the preventative arrests and investigative hearings only.[57] This is not adequate oversight to allow the public and the courts to determine whether there is proportionality of the antiterrorism measures in our constitutional democracy. There must be more thought and action given to the need for greater oversight mechanisms.[58] If

---

[57] See the Website of the Department of Justice, Government of Canada, *supra* note 20.

[58] See the argument of Professor Martin L. Friedland, "Police Powers in Bill C-36" in Daniels, Macklem & Roach, eds., *supra* note 3, 269 at 274-276, where he also suggests that the oversight functions for the new security and surveillance powers given to our

the final part of the proportionality test requires a balancing between the beneficial and deleterious effects of the antiterrorist measures, there must be effective oversight mechanisms to determine, in an objective manner, what precisely those beneficial and deleterious effects are. If this can not be done by existing oversight mechanisms, then I suggest that there is a fundamental constitutional duty on the part of the appropriate Governments to reinforce them or create new ones. Otherwise, there will be an undermining, whether intended or not, of the law and justice of proportionality as it applies to antiterrorist measures enacted in Canada.

I suggest that it would be in keeping with the spirit of the Government's amendments to the original *Bill C-36* that the annual reviews by Parliamentary Committees of *Bill C-36* be both qualitative and quantitative. These reviews should also be extended to require that relevant oversight agencies, such as the oversight agencies of CSIS (the Security Intelligence Review Committee), the RCMP (The Commission for Public Complaints Against the RCMP) and the CSE (the Commissioner of the CSE) also report on the use of these *and other* provisions of the Bill. Likewise, the Committees of the House of Commons and the Senate could also call on the Privacy and Access to Information and the Chief Commissioner of the Canadian Human Rights Commission to prepare as part of their annual report to Parliament how they see the use of antiterrorism legislation affecting the fundamental human rights and civil liberties of Canadians. Indeed, the Canadian Human Rights Commission could be tasked with the role of being the key ombudsman for the citizen as regards the appropriate balance between security and the rights of citizens at the federal level. Provincial human rights commissions could perform a similar function at the provincial level. If such additional roles were to be assigned to these critical oversight bodies, they should receive additional human and financial resources to effectively perform these oversight functions. However some critics, including Professor Martin Friedland, have questioned whether most of these oversight agencies have the mandate, ability or resources to carry

---

security agencies are weak, especially those given to the Canadian Security Establishment. He seems to suggest either extending the powers of SIRC, the review agency of CSIS to the CSE or follow the example of the U.K. where a senior group of Parliamentarians from the House of Commons and the Lords oversee the functioning of the most important security agencies in that country.

out an effective oversight function for the additional powers under *Bill C-36* given to the agencies that they oversee.[59]

For the reasons that I mentioned to the Justice Committee, I was more concerned about the establishment of effective annual reviews than sunset clauses. As mentioned, with majority Governments being the rule in Canada, I fail to see how sunset clauses are effective checks against overreaching legislation. That being said, I welcomed the additional scrutiny that will come in five years for the two most controversial provisions of *Bill C-36*.

VII. PROPORTIONALITY, PRIVACY AND THE RIGHT TO ACCESS INFORMATION IN A CONSTITUTIONAL DEMOCRACY

My submission to the House of Commons Justice and Human Rights Committee on the original provisions in *Bill C-36* were as follows:

> "The extent to which privacy is protected under the *Charter* is still a question of much debate. In various contexts, the Supreme Court has indicated privacy is an important part of certain *Charter* rights, such as the right against unreasonable search and seizure under section 8 of the *Charter* and the right to life, liberty and security of the person under section 7 of the *Charter*. Likewise, there is no clear indication that the Supreme Court is willing to entrench the right to access to information as part of any *Charter* right, such as the right to freedom of expression.
>
> However, I suggest that while the law of proportionality laid down by the Supreme Court in its interpretation of Section 1 of the *Charter* may not be strictly applicable to analyzing the appropriateness of the above sections of *Bill C-36*, the principles of Justice inherent in the proportionality approach to balancing security with human rights is absolutely critical for reasons that I will state in the conclusion to this presentation. Applying those principles to the amendments to the *Privacy Act* and the *Access to Information Act* in *Bill C-36*, it would be easy to fit the testimony before this Committee of the Privacy Commissioner, George Radwanski, and the Access to Information Commissioner, John Reid, into the proportionality analysis. They seemed to both indicate that, while there are pressing and substantial

---

[59] *Ibid*.

objectives to the amendments and the means chosen may be somewhat rationally connected to those objectives, the least intrusive means was not chosen. It is significant that both Commissioners were in agreement that, if they were allowed to review the information covered by the certificate of the Attorney General prohibiting disclosure for the purpose of protecting international relations or national defence or security, the objectives of amendments would still be protected. This is because under the present provisions of both Acts and a review of past practice they revealed that no information can or has been disclosed which would be a threat to international relations, national defence or the security of Canada. However, the oversight does allow these independent Officers of Parliament to confront those who would abuse the existing powers of secrecy. The Access to Information Commissioner also made a strong case for their position when they revealed that the United States had not amended its Access to Information legislation in its response to the terrorist horror in the United States. It is therefore unlikely that it would pressure its northern neighbour to do something it has not done before being willing to share critical security information.

Finally the two commissioners also brought the attention of this Committee to the possible over intrusive use of the ministerial certificate to cover whole departments. Even if there is little likelihood of such overuse of the power in the amendments, the mere possibility of such a use could again reinforce the violation of the fundamental justice of proportionality as regards these amendments.

Therefore, it may not be wise to wait for legislative reviews as regards the effects of the use of such ministerial powers under the amendments. The lack of proportionality between legitimate objectives and the means chosen would seem to necessitate a rewrite of these sections to simply reinforce the existing provisions of both Acts that prohibit non-disclosure of information covered by the Attorney General's certificate while keeping the oversight functions of both Commissioners.

> There should be no substantive policy reason why the Government of Canada should not adopt the recommendations of the two Commissioners."

One of the most critical amendments made to *Bill C-36* by the Government of Canada was done to meet the above and similar critiques from many organizations, such as the Canadian Bar Association. The concessions made have been significant. The Minister can not issue the certificates at any time, but only after an order or decision for disclosure has been made in a proceeding, which brings back the crucial oversight played by the two Commissioners. In addition, the ability to have judicial review of the Minister's certificate by a judge of the Federal Court of Appeal provides another layer of critical accountability and oversight.[60] Likewise, the preservation of the other provisions of the federal privacy legislation is also making the appropriate balance between security and rights. The outstanding intervention by the two Commissioners is indeed a demonstration of the need for effective oversight and monitoring of the fundamental values of constitutional democracy in the territory between crime and war.

I had suggested to both the House of Commons and Senate Committees reviewing *Bill C-36*, that to give a greater comfort level to the public and both Commissioners, again it would be in the spirit of the amendments to have an express provision that stipulates that nothing in *Bill C-36* detracts from the existing powers of the two Commissioners to fulfill their mandates under their respective enabling legislation up to the time the Minister issues the certificate to prevent disclosure to the public of the sensitive information and it is upheld by the Federal Court of Canada. This advice was not heeded.

CONCLUSION

Western countries like Britain, France, Spain and other European Countries have had to face the task of balancing national security with human rights and civil liberties in a western liberal democracy long before September 11, 2001. After that date, the United States and Canada had to do the same and in some respects play catch-up with the reality that many in Europe have had to deal with. This task is both intellectually challenging and psychologically traumatic. Perhaps it is most so for those with whom I have

---

[60] See the Website of the Department of Justice, Government of Canada, *supra* note 26.

spent most of my professional life, namely lawyers and others who have devoted their professional and personal lives to defending the fundamental values of our constitutional order and our free and democratic society. Since 1982, this professional and personal vocation took an immensely high profile in the public's eye with the enactment of the *Canadian Charter of Rights and Freedoms*. Not many constitutional and human rights lawyers that I know have had an easy time since September 11, 2001. Many have rightly pointed out that there are grave dangers in overreacting to the terrorist horrors we have witnessed. They have asked us to look back at history to see the overreaction that caused so much needless misery to the Japanese Canadians during the Second World War. They ask us to remember what some see as the excesses of the October Crisis in the province of Quebec. They ask us to remember the persecutions of the McCarthy era in the United States. They are right to remind us of how such overreactions undermine the very basis of our free and democratic societies, in particular to the fundamental values of equality, freedom of expression and due process. They are right to warn us to keep the lessons of history in mind as we examine *Bill C-36*, to avoid repeating them. If we overreact we are indeed giving solace to those who we are fighting against, as we undermine the fundamental values and freedoms of our societies.

At the risk of torturing a revered Buddhist saying, we should also remember that neither a country nor the world can enter into the same history twice. The most powerful weapon of mass destruction is the human mind and perhaps the most powerful and ruthless manifestation of this fact may not be the weapons of mass destruction, but thousands of fanatical minds focused on the destruction of as many innocent lives as possible. This is the extremely dangerous territory between crime and war. This could well be a form of asymmetrical war without a foreseeable end, in which case we are entering a new paradigm where the old balancing between security and human rights may have to give way to a new rebalancing.

In this context, I have argued that the proportionality principles in Section 1 or the *Charter* may provide for a new contextual reasoning. However, I do not agree with some of the commentaries and witnesses who may argue that the new rebalancing should tilt the scales of justice towards security.

The most important point of my presentation is that it does not have to be a "retilting". I suggest that the power and justice of proportionality does not make "security" overwhelm "human rights" in the aftermath of September 11, 2001. Rather it mandates that law and justice adapt to the evolution of our society and the larger world. Ultimately, what is demanded of our Governments, our legislators, our judiciary and our fellow citizens is not only the knowledge of how to deal with the new threats that face us, but also the wisdom that forestalls them from overwhelming us and our most fundamental values.