Commission of Inquiry
into the Actions of Canadian Officials in Relation to Maher Arar
Policy Review

National Security And Rights And Freedoms
A Background Paper
to the Commission's
Consultation Paper

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NATIONAL SECURITY AND RIGHTS AND FREEDOMS

I. INTRODUCTION

National security activities directed to maintaining the safety and security of our country may affect rights and freedoms valued by Canadians and protected by the Constitution. The challenge in liberal democracies such as Canada is to balance the requirements of preserving the rights and freedoms essential to democracy, while also maintaining the security of the country against external and internal threats, including protecting the security of individuals within Canada against threats of terrorist violence.[1] The Supreme Court of Canada has observed:

> On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments…need the legal tools to effectively meet this challenge.
>
> On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values.[2]

In the United States, the 9/11 Commission was prompted by this challenge to recommend the creation of a board to oversee protection of civil liberties in national security activities. In making this recommendation, the Commission commented that:

> The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty.

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[1] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law*, (1981) Second Report, vol. I, at 43 [*McDonald Commission Report*].
[2] *Suresh v. Canada (Minister of Citizenship and Immigration*) [2002], 1 S.C.R. 3, 2002 SCC 1 at para. 3-4, [*Suresh* cited to S.C.R.].

> Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.[3]

This paper will first outline sources of the protection of individual rights and freedoms in Canada. It will then review the potential challenges posed to these rights by national security activities. In particular, this paper will highlight the following issues:

1. extraordinary powers and anti-terrorism offences;
2. the exercise of discretion;
3. international cooperation;
4. racial, religious and ethnic profiling;
5. state inquiry into religious/political beliefs;
6. expression and association; and
7. privacy.

This paper is part of the Commission's Policy Review mandate. The purpose is to highlight issues that may be relevant in considering the design of a review mechanism for the RCMP in its national security activities.

II. Sources of the Protection of Rights and Freedoms in Canada

There are a number of sources for the protection of rights and freedoms. As discussed below, these include the Canadian constitution, and in particular the *Charter of Rights and Freedoms*; human rights codes; international law; and freedom of information and protection of privacy statutes.

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[3] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: W.W. Norton & Company) at 395.

1. The Charter of Rights and Freedoms

Fundamental to the protection of rights and freedoms is the Canadian constitution, including the *Charter of Rights and Freedoms.*[4] National security activities may affect rights and freedoms guaranteed in the *Charter*. These include section 2 (freedom of religion, expression, and association); section 7 (life, liberty and security of the person); section 8 (unreasonable search and seizure); section 9 (arbitrary detention and imprisonment), and section 15 (equality rights). They may also affect rights under international law such as the right not to be tortured. Particular examples are discussed in Part III, below.

It is important to note that the rights and freedoms protected under the *Charter* are not absolute. Infringements or limits on these rights are subject to justification by the government under section 1 of the *Charter*, which provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Courts will engage in a form of proportionality analysis, to determine whether the limits on rights sought to be imposed by government can be demonstrably justified in a "free and democratic society", in order to achieve an objective of sufficient importance to warrant overriding the right. Values and principles essential to a free and democratic society include: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[5] Fundamental freedoms, legal rights and equality rights can also be subject to a renewable five year override under s. 33 of the *Charter*.

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[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
[5] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

2. The *Canadian Human Rights Act*

Another source for the protection of human rights and freedoms is federal, provincial and territorial human rights codes, which protect individuals from discrimination on certain grounds. The RCMP, for example, is subject to the *Canadian Human Rights Act*. Prohibited grounds of discrimination under the *Canadian Human Rights Act* are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.[6] During the debate on Bill C-36, the *Anti-terrorism Act*,[7] Prof. Irwin Cotler, now Minister of Justice, had urged that a non-discrimination principle be expressly set out in the legislation, to specifically prevent the "detention, imprisonment or internment of Canadian citizens or permanent residents" on the basis of race, national or ethic origin, colour, religion, sex, age, or mental or physical disability.[8] This suggestion was not adopted. As discussed below, there is some concern that in the post 9/11 world, national security activities such as investigations may discriminate on the grounds of race, national or ethnic origin and religion. That is, there is some concern that individuals or groups may be treated adversely, or singled out, due to their race, national or ethnic origin, or religion.

3. International Law

International law also protects human rights and freedoms in Canada. Two aspects of international law may be relevant in domestic courts. The first is through treaties, covenants and other international instruments to which Canada is a signatory. The second is by way of application of customary international law. In 1948, the *Universal Declaration of Human Rights* was adopted by the United Nations General Assembly. Since then, Canada has entered into a number of international treaties and covenants by

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[6] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3.
[7] Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001 (assented to 18 December 2001), S.C. 2001, c. 41 [*Anti-terrorism Act*].
[8] Prof. Irwin Cotler, "Terrorism, Security & Rights in the Post-September 11th Universe", (2002) 21 Windsor Y.B. Access Just. 519(QL).

which it agrees to protect human rights. In 1976, Canada acceded to the *International Covenant on Civil and Political Rights* and the Optional Protocol[9]. A number of articles of the *Covenant* are relevant to national security activities: prohibitions against torture or cruel and unusual punishment (Article 7), liberty and security of the person and protection from arbitrary arrest or detention (Article 9), protection from arbitrary or unlawful interference with privacy or attacks on honour or reputation (Article 17(1)), freedom of thought, conscience and religion (Article 18), and freedom from discrimination (Article 26). Canada is also a signatory to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[10] International instruments signed by Canada thus provide a foundation for protection of rights and freedoms.

Unlike the Constitution or domestic legislation, international treaties and covenants are not legally binding on Canadian governments without implementing legislation.[11] However, the presumption is that legislatures intend to comply with Canada's international obligations. This means that, where the law is ambiguous, the interpretation that complies with international instruments signed by Canada will be the correct one.[12] At the same time, the Supreme Court of Canada has not excluded the possibility that domestic constitutional law may not in all cases provide the same protection as international law and has indicated that in exceptional circumstances deportation from Canada to face torture might be constitutional under the *Charter* even though the right against torture is framed in absolute and non-derogable terms in ICCPR and CAT.[13] International instruments are also used to help further understand the scope of Canada's constitutional protections for rights and freedoms.[14]

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[9] U.N.T.S. 1976 No. 14668, vol. 999 at 171.
[10] Can. T.S. 1987 No. 36.
[11] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd edition (Toronto: Butterworths, 1994) 330.
[12] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para. 31; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 173, Laskin C.J.
[13] *Suresh*, *supra* at para. 78.
[14] See for example *Suresh*, *Ibid.*, at para. 60.

Customary international law may also be a source of protection for rights and freedoms. Customary international law is applicable in Canada directly, without the need for implementing legislation, to the extent that it does not conflict with existing Canadian law.[15] Canada may also, as a matter of customary international law, advance a claim in state responsibility against another state with respect to the treatment of Canadian nationals in a foreign state. This is in addition to Canada's rights, as well as individual rights, under Conventions such as the Vienna Convention on Consular Relations and Optional Protocols.[16]

4. Privacy

An important aspect of personal freedom which may be affected by national security activities is privacy. As the McDonald Commission noted in its report:

> In a liberal society, which as a matter of principle wishes to minimize the intrusion of secret state agencies into the lives of its citizens and into the affairs of its political organizations and private institutions, techniques of investigation that penetrate areas of privacy should be used only when justified by the severity and imminence of the threat to national security. This principle is particularly important when groups may be subject to security intelligence investigations although there is no evidence that they are about to commit, or have committed, a criminal offence.[17]

The concept of privacy has many aspects, including territorial or spatial privacy; privacy of the person; decisional privacy; and privacy in relation to information.[18] Section 7 of the *Charter* guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. This broadly-framed section encompasses aspects of decisional, information and personal privacy interests: for example, rights related to physical or psychological integrity, or the

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[15] *Chung Chi Cheung v. The King*, [1939] A.C. 160 (J.C.) at 167-168; *Reference Re Powers of Ottawa (City) and Rockliffe Park (Foreign Legations Reference)*, [1943] S.C.R. 208 at 213-214, per Duff C.J.
[16] Protocols 596 U.N.T.S. 261, *entered into force* March 19, 1967.
[17] McDonald Commission Report, supra at note 1 at 513.
[18] *R. v. Dyment*, [1988] 2 S.C.R. 417 at 428, per LaForest J. (concurring); see also Daniel J. Solove, "Privacy and Power: Computer Databases and Metaphors for Information Privacy" (2000-2001) 53 Stanford L. Rev. 1393 at 1413 and 1436.

right to a sphere of autonomy within which to make basic personal choices. Specific protection for territorial and spatial privacy is found in section 8 of the Charter, which guarantees the right to be free from unreasonable search and seizure, and in section 9, which recognizes the right to be free from arbitrary detention. Finally, international instruments such as the *International Covenant on Civil and Political Rights* explicitly protect the right to be free from arbitrary interference with privacy.

The informational privacy interest receives some legislative protection at both federal and provincial levels, through statutes such as the federal *Privacy Act.*[19] The *Privacy Act* protects individual privacy with respect to information held by government institutions. It also provides individuals with a right of access to personal information about themselves held by government institutions, and a right to request correction of personal information when there is an error or omission in that information.[20] However, there are a number of statutory exemptions that allow government institutions to refuse individuals access to personal information about themselves, including refusal of access to correct erroneous personal information in the hands of government. In the national security context, the most relevant exemptions include personal information obtained in confidence from governments of foreign states or foreign institutions; international affairs or defence; law enforcement or investigation; and security clearances.[21]

There are also a number of "exempt banks", that is, whole categories of information exempt from the *Privacy Act*. Of particular significance to any examination of the impact of national security activities on rights and freedoms is that by executive order, the following personal information banks are designated as exempt: (a) Criminal Operations Intelligence Records under the control of the RCMP;[22] (b) the Canadian Security

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[19] *Privacy Act*, R.S.C. 1985, c. P-21.
[20] *Ibid*., s. 12.
[21] *Ibid*,, ss. 19, 21, 22 and 23.
[22] *Exempt Personal Information Bank Order No. 13 (RCMP)*, SOR/90-149.

Intelligence Service Investigational Records under the control of CSIS[23]; and (c) National Security Investigations Records under the control of the RCMP.[24]

5. Access to Information

The federal *Access to Information Act*[25] and provincial equivalents provide a right of access to information in the control of government institutions, based in part on the principle that government information should be available to the public, subject to limited and specific exceptions. Access to information is an aspect of rights and freedoms in Canada. The Supreme Court of Canada has recognized that the overarching purpose of access to information legislation is to facilitate democracy.[26] Such legislation helps ensure that citizens have the information required to participate meaningfully in the democratic process. Secondly, it helps ensure that politicians and bureaucrats remain accountable to the citizenry, and plays an important role in transparency.

There are exemptions to the right of access to information. In the national security context, the relevant exemptions include information obtained in confidence from a foreign government, foreign institution, or international organization of states; international affairs and defence; law enforcement and investigations, and personal information.[27]

III. Challenges in the Context of National Security

National security activities always have the potential to adversely affect rights and freedoms. This is in part because these activities may involve the most intrusive powers of the state: electronic surveillance; search and seizure of property; information collection and exchange, with domestic and international security and intelligence and law enforcement agencies; and, potentially, the detention and prosecution of individuals.

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[23] *Exempt Personal Information Bank Order No. 14 (CSIS)*, SOR/92-688.
[24] *Exempt Personal Information Bank Order No. 25 (RCMP)*, SOR/93-272.
[25] *Access to Information Act*, R.S.C. 1985, c. A-1.
[26] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.
[27] *Access to Information Act, supra* ss. 13, 15, 16 and 19.

The potential threat to rights and freedoms in the national security context is of particular concern in the post 9/11 context, where both citizens and governments, including security services and law enforcement agencies, are apprehensive of terrorist activities in all western democracies. The impact of terrorism has shaped the approach of security and law enforcement agencies: there is a greater degree of information sharing and cooperation with respect to terrorist threats; many western nations have significantly amended legislation to create extraordinary powers in the terrorism context relating to investigation, detention, and interrogation; and there is a significant shift in resources to the prevention of terrorist activities. Preventive and surveillance activities may not regularly be reviewed by the courts. Targets of a national security investigation may never become aware that they have been the subject of surveillance activities; for a variety of reasons, even if aware, individuals may choose not to make a complaint to the courts or review bodies.

It may be argued that counter-terrorism national security investigations, particularly in the post-9/11 context, pose a greater potential risk to rights and freedoms than traditional criminal investigations.[28] It is argued, for example, that:

1. there is the potential for overbroad use of intrusive powers;

2. there is more information sharing with potentially more significant consequences e.g., sharing with foreign governments;

3. the techniques used to collect information are subject to less external scrutiny (judicial, media, civil society), in part because there are fewer prosecutions and because of the option in some cases of immigration proceedings;

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[28] For an overview of concerns and views on these issues, see for example the essays collected in Ronald J. Daniels, Patrick Macklem, and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); and David Daubney et al., *Terrorism, Law & Democracy*: *How is Canada Changing following September 11?: Papers Presented at a Conference Organized by the Canadian Institute for the Administration of Justice, Held in Montreal, Quebec, Mar. 25-26, 2002* (Montreal: Canadian Institute for the Administration of Justice, 2002), and in the U.S. context, David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: The New Press, 2d ed., 2002).

4. the investigative techniques are more surreptitious, approximating intelligence collection;

5. national security investigations may target legitimate forms of dissent, assembly and other non-criminal activity, thereby threatening freedoms of expression and association;

6. national security investigations may effectively target individuals based on race, religion or ethnicity, rather than on the basis of suspected criminal activity;

7. officials may act on information provided by other countries that may have resulted from torture or other prohibited acts, or may provide information to countries that engage in such acts;

8. officials may act on information provided by other countries that may not be reliable or whose reliability will be difficult to determine; and

9. officials may, in order to assist other countries, subject Canadian citizens and residents to surveillance, interrogation or other acts.

All of these issues may affect the exercise of rights and freedoms in multiple ways. By way of example, this paper presents the overlapping problems that may be posed by the creation of new offences and extraordinary powers to deal with terrorist activity; the exercise of discretion; the potential consequences of international cooperation and information sharing; the methods by which individuals and groups may be targeted for investigation, including racial, ethnic and religious profiling; the potential for state inquiry into religious and political beliefs; the chilling effect on freedom of expression and association; and the effect on privacy.

The purpose of the discussion that follows is to identify the kinds of restrictions on individual rights and freedoms that may result from national security activities. It is not the purpose of this paper to identify or comment on activities that have taken place, or

that are taking place. This paper discusses the theoretical possibilities and makes no comment on actual practices.

1. Extraordinary Powers and Anti-Terrorism Offences

Following the events of September 11, 2001, the Canadian government passed the *Anti-terrorism Act* and other statutes that created new anti-terrorism offences and established extraordinary new powers relevant to these offences. These offences and powers are discussed in greater detail in the background paper on the Statutory Framework for the RCMP's National Security Activities. The extraordinary powers include, for example, investigative hearings, preventive detention, and special search and surveillance powers. It should be noted that the preventive detention powers have never been invoked, and the investigative hearing power has only been used once, retrospectively, with respect to the Air India matter.

Section 83.28 of the *Code* permits the holding of judicial investigative hearings where a person with information about a past or future terrorist act may be compelled to answer investigators' questions put to him or her by a Crown attorney. Section 83.3 of the *Code* provides for warrants for preventative arrest where it is necessary to prevent terrorist activity. Extraordinary search and surveillance powers are also available when terrorist activity is targeted. These extraordinary powers are in addition to regular police powers, which may also be oriented towards the investigation and prevention of terrorist activity prior to its occurrence.

Some commentators have raised questions about the impact on rights and freedoms of the creation of extraordinary investigative powers for terrorist activity, and have raised concerns that existing safeguards may be insufficient.[29] During public debate prior to the passage of Bill C-36, the *Anti-terrorism Act*, government representatives argued that their

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[29] See for example Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) McGill L.J. 893; Martin L. Friedland, "Police Powers in Bill C-36" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 269.

legal experts had found the laws to pass *Charter* muster. One commentator notes that "'*Charter*-proofing' is a minimal attainment", stating: "To predict a bill will survive *Charter* scrutiny implies nothing about the way that police officers will use it, nothing about the effectiveness of the bill in relation to its desired ends, and little about its consonance with larger principles of constitutionalism."[30] There is a also a concern that the judiciary may have difficulty avoiding "the temptation of being just a little more deferential towards the government and of leaning towards the state and away from rights in the post-September 11 world."[31]

On the other hand, other commentators have suggested that the new extraordinary powers are sufficiently respectful of rights and freedoms, and that the law reforms in response to terrorism are "both firm and conscientious of Charter rights."[32] One commentator suggests, for example, that the definition of terrorism targets opinions and beliefs "only in so far as they are related to overt criminal actions."[33] The implications of new extraordinary investigative powers for rights and freedoms appear to be a matter of some debate.

Some of the new extraordinary powers have already been the subject of judicial scrutiny. In particular, the Supreme Court of Canada has considered judicial investigative hearings, concluding that the provision permitting them is constitutional.[34] The majority of the Court concluded that the role of the judge presiding over the hearing was not simply to ensure that the witness answered questions, but also to ensure that the proceeding adhered to constitutional protections, including the protection of individual rights and freedoms.[35]

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[30] W. Wesley Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare?" (2003) 41 Osgoode Hall L.J. 267 at 287

[31] Roach, *supra*, note 29 at 926.

[32] David Jenkins, "In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law" (2003), 66 Sask. L. Rev. 419-454 at 454; see also Richard G. Mosley, "Preventing Terrorism Bill C-36: The *Anti-terrorism Act 2001*", in David Daubney et al., *Terrorism, Law & Democracy*: *How is Canada Changing following September 11?: Papers Presented at a Conference Organized by the Canadian Institute for the Administration of Justice, Held in Montreal, Quebec, Mar. 25-26, 2002* (Montreal: Canadian Institute for the Administration of Justice, 2002) at 145.

[33] *Jenkins, Ibid.*, at para. 17.

[34] *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42. [*Application under s. 83.28* cited to SCC].

[35] *Ibid.* at para. 53.

Other extraordinary investigative powers in the national security context have not yet come under judicial scrutiny regarding their effect on rights and freedoms.

2. Exercise of Discretion

Many of the decisions which are made in the context of national security are the result of the exercise of discretion – including "police judgment." These may include the decisions to input information into national security databases, to ask questions of individuals, to select targets for investigation, to recruit and run a human source, and to act upon information supplied by a foreign government. In each of these examples, an official has discretion to make a decision, and in each case, the privacy rights and interests of individuals will be impacted, as may other rights, such as the right to freedom from adverse treatment on discriminatory grounds.[36] Where no charges are laid, it will often be the case that there will be no external scrutiny of these discretionary decisions.

This is in contrast to many of the new extraordinary investigative powers discussed above, which have specific provisions for external scrutiny or supervision. In ruling on the constitutionality of investigative hearings, the Supreme Court emphasized the important role of scrutiny by the presiding judge. In a companion case, the majority of the Court also held that there is a rebuttable presumption that such hearings be held in open court.[37] The Court emphasized that open court proceedings support public confidence in the judicial system, as well as judicial independence and impartiality.[38] A presumption in favour of open scrutiny also supports protection of other rights and freedoms during the hearing. There are also requirements for annual reporting on the use of investigative hearings and the provision has been subject to a renewable sunset.[39]

However, few national security investigations actually receive the degree of scrutiny found within the investigative hearing process. Many aspects of the national security

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[36] For a critical perspective on the exercise of discretion under the *Anti-terrorism Act*, see W. Wesley Pue, *supra* note 30 at 281-285.
[37] *Vancouver Sun v. Attorney General (Canada)*, 2004 SCC 43.
[38] *Ibid.* at para. 25.
[39] *Criminal Code*, R.S.C. 1985, c-46, ss. 83.31-83.32.

activities of the R.C.M.P. are not directly subject to legislation or regulation, consisting instead of discretionary decisions about what activities or persons to investigate and how to do so.[40] Where policies or ministerial directives exist, these sometime contain general language or undefined terms, the application of which necessarily involves the exercise of discretion as well. For example, the goal of intelligence-led policing in the national security context may lead to the collection of a diverse range of information by both domestic and international police and intelligence agencies which is not necessarily directed to prosecuting a crime, but to preventing the commission of a possible crime. Moreover, when a crime is committed, decisions may be made in the national security context not to lay charges to protect Canada's foreign relations, the security of sources, or information sharing protocols with other countries. Where no charges are laid, the choice of investigative targets, and information collection, exchange and investigative methods will generally not be subject to judicial scrutiny, media coverage or public debate.

This poses particular challenges for ensuring the protection of fundamental rights and freedoms. It is clear that discretionary decisions by officials applying a law must be made in compliance with the *Charter*.[41] In the absence of specifically legislated measures to guide or review protection of rights and freedoms during national security investigations, however, it is challenging to ensure compliance with *Charter* values.

In addition, the extraordinary powers introduced by Canada's anti-terrorism legislation authorized new ministerial powers for executive officials. For example, the Attorney General of Canada holds broad discretion to protect the disclosure of "potentially injurious" and "sensitive" information under s. 38 of the *Canada Evidence Act*.[42] Persons who anticipate the disclosure of such information during the course of court proceedings must notify the Attorney General, who may apply to Federal Court for an order respecting the information. If a disclosure order is made, whether by the Federal Court

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[40] Such discretion is arguably protected from political interference, at least in its specific application, by the principle of "police independence": See on this point the Background Paper on Police Independence.
[41] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2002] 2 S.C.R. 1120, 2000 SCC 69.
[42] *Canada Evidence Act*, R.S.C. 1985, c. C-5; 2001, c. 41.

or, upon appeal, by the Federal Court of Appeal or Supreme Court of Canada, the Attorney General has the discretion to personally issue a certificate prohibiting disclosure in order to protect information received from or in relation to a foreign entity.[43] The Attorney General's certificate is binding, even during criminal proceedings.[44] There are provisions for judicial review of the certificate[45], but the grounds upon which the Attorney General exercises his or her discretion are difficult to review for compliance with constitutional values. This example may be illustrative of the difficulties of assessing whether the exercise of ministerial discretion in the national security context respects fundamental rights and freedoms.[46]

Another element of discretion in the national security context is that in cases involving those who are not citizens of Canada, the state has a discretion to choose whether to lay charges under the criminal law, or to proceed by means of immigration proceedings. Immigration law, including the security certificate process, provides for broader grounds of culpability than under the criminal law. It also allows for the possibility that some proceedings may be conducted in private and without the person being subject to the proceedings attending the proceedings.[47] The Supreme Court of Canada has recognized that non-citizens are vulnerable to discrimination[48] and the category of non-citizen can overlap with those groups who may be vulnerable to racial, ethnic and religious profiling, a topic to be discussed below. In addition, the immigration context, or the provision of information to foreign governments, raises the issue of the effects of a security investigation by Canadian officials on how the target of the investigation will be treated by other countries.

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[43] *Ibid.*, s. 38.13.
[44] *Ibid.*, s. 38.14.
[45] *Ibid.*, s. 38.131.
[46] Lorne Sossin, "The Intersection of Administrative Law with the Anti-Terrorism Bill" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 419-434.
[47] Audrey Macklin, "Borderline Security" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).
[48] *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

The high degree of discretion exercised by investigators on an operational level and by ministers and their delegated decision-makers may result in the vast majority of national security activities occurring many steps removed from external scrutiny. This may render their impact on rights and freedoms difficult to assess or to challenge.

3. International Cooperation

International cooperation during national security investigations may have the potential to impact rights and freedoms significantly. As countries coordinate their law enforcement and security intelligence activities, the effects of practices such as information sharing may increase exponentially, in both positive and potentially negative ways. The sharing of information internationally that was gathered during investigations in Canada may have a "ripple effect" beyond Canada's borders with consequences that cannot be controlled from within Canada. The legal power of Canadian courts and governments to require respect for constitutional rights and freedoms is exercised within Canada's territorial borders. Once persons or information exit Canada, it becomes much more difficult legally to ensure treatment of persons or information in accordance with Canadian constitutional rights and values.

The Supreme Court of Canada has recognized this problem in the context of extradition and deportation proceedings within Canada, particularly where the affected person could face torture or the death penalty in the destination country. The Supreme Court ruled that extradition to face the death penalty will violate section 7 of the *Charter*[49], and that deportation to face torture is impermissible.[50] In both instances the Court noted that there may be extraordinary exceptions. However, the Court stated that Canadian decision-makers must consider the potential consequences of their actions on rights and freedoms beyond Canadian borders. Where there is a sufficient connection between Canadian government actions and a subsequent deprivation of liberty outside Canada in violation of the principles of fundamental justice, section 7 of the *Charter* may be

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[49] *United States v. Burns*, [2001] 1 S.CR. 283, 2001 SCC 7.
[50] *Suresh*, *supra* at note 2.

unjustifiably infringed. The Canadian government thus may bear responsibility within Canada for deprivations of liberty outside Canada as a result of its actions.

Beyond the direct risk of torture or death, the Supreme Court has recently recognized the possibility that compelled testimony from investigative hearings may be used against the witness in extradition or deportation proceedings, and subsequently passed on to other governments for prosecution purposes. The Court has indicated that such a situation would violate the right against self-incrimination, and that judges presiding over investigative hearings will set conditions to prevent such use of the testimony.[51] This touches on the impact of information collection and exchange prior to any ultimate decision to extradite or deport. However, it is clear that setting parameters for investigative hearings may only touch the tip of the iceberg of the potential consequences of international cooperation in national security activities for individual rights.

One American commentator has noted, for example, that "the most serious questions of human rights will arise not here, but abroad", if countries try to "reap the benefits" of activities forbidden by international human rights conventions, by attempting to obtain information about the plans of terrorists in countries which do not have similar standards on issues such as interrogations, detention, or surveillance.[52]

The opposite end of information exchange may also have implications for rights and freedoms. Canadian investigators may receive and act upon information from other countries. Receipt of this information may lead to significant personal consequences for individuals in Canada, such as surveillance, further collection of personal information, or interrogation, whether of themselves or of acquaintances. However, information obtained from other countries may not have been acquired in ways consistent with rights and freedoms protected here. It may, for example, have been obtained through torture or other unacceptable investigation techniques, or in the absence of checks and balances to ensure reliability. Without such assurances as to reliability and respect for rights and

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[51] *Application under s. 83.28, supra* at note 37.
[52] Philip B. Heymann, "Civil Liberties and Human Rights in the Aftermath of September 11" (2001-2002) 25 Harv. J.L. & Pub. Pol'y 441 at 453-454.

freedoms, the entrance of such information into Canadian information banks could have unfortunate, cascading consequences.

This concern with potential lack of reliability of information is exacerbated because the subject of information will, until that information is divulged to him or her, have no way to identify whether or not the information in the hands of investigators is correct. Investigators, acting on incorrect information, may invoke a substantial array of intrusive techniques ranging from interviews of friends, employers and family through to applications for electronic surveillance or potentially investigative detention, all based on unreliable and incorrect information. We have already referred to personal information contained in data banks held by the RCMP and CSIS which are exempt from the *Privacy Act*, and exemptions in the *Privacy Act* which allow governments to refuse access to personal information or the right to correct such information on the grounds, for example, of law enforcement.

4. Racial, Ethnic and Religious Profiling

A number of the intervenors in this Inquiry have raised concerns about the targeting of Arab and Muslim communities through racial, ethnic, and religious profiling in the wake of September 11th.[53] Profiling can be defined broadly as the use of race, religion, or ethnicity as the sole reason or as a factor in a decision to detain or arrest an individual, or to subject him or her to further investigation.[54] It may stigmatize and place some groups in Canadian society at risk. Intervenors and academic commentators have expressed the concern that such profiling undermines the liberty, privacy and equality of innocent Canadians. In doing so, profiling may be vulnerable to a finding that it is discriminatory under s. 15 of the *Charter*. It also may implicate the individual's right not to be deprived

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[53] *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, see for example: Application for Standing of the Council of Canadians and the Polaris Institute, p. 6. Application for Standing of Canadian Labour Congress, pp. 3-4; Application for Standing of the Muslim Community of Ottawa-Gatineau, p. 9; Application for Standing of the Canadian Council on American-Islamic Relations, p. 7; Application for Standing of the Canadian Arab Foundation, p. 3; Application for Standing of the Muslim Canadian Congress, p. 4.

[54] Sujit Choudhry & Kent Roach, "Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1-36 at para. 2 (QL).

of life, liberty or security of the person except in accordance with the principles of fundamental justice under s. 7 of the *Charter*.

A further concern flows from the fact that no statute specifically mandates a choice by the police to engage in racial, ethnic, and religious profiling. This may mean that, if such profiling does occur, it takes place in the realm of discretionary operational decisions, removed from public debate or legislative scrutiny.[55] That is, racial, ethnic and religious profiling practices emerge not from a legislative direction, but from administrative discretion and investigative practice. The concern is that such discretion may be exercised without a thorough understanding of the cultural and religious mileu in which the investigation is conducted.

Further, as discussed below, the anti-terrorism offences require the police to inquire into the religious, political and ideological motivations of suspects. Another complicating factor is that today, many of the most active terrorist organizations and networks themselves identify with a particular religious creed. This raises the question of how to conduct an investigation into a requisite element of the offence (a political, religious or ideological purpose) without engaging in discriminatory profiling. This ties into issues regarding training, language ability, and many other issues.

At least in the present context, there is an additional concern that members of the Arab and Muslim communities, including recent immigrants and non-citizens, may feel reluctant to complain about the conduct of police authorities, or may feel compelled to answer questions. However, the same points may be made with respect to racial profiling in any other criminal context. For example, the Ontario Court of Appeal has recognized the existence of racial profiling by the police in relation to black Canadians.[56] Questions which arise include whether the national security activities of the RCMP have a different effect on rights and freedoms than the RCMP's more traditional policing activities, and

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[55] *Ibid.*, at para. 58; Lesley A. Jacobs, "Securer Freedom for Whom: Risk Profiling and the New Anti-terrorism Act", Book Review (2003) 36 U.B.C.L. Rev. at 375-384.

[56] *R. v. Brown* (2003) 173 C.C.C. (3d) 23, 64 O.R. (3d) 161 (C.A.) at para. 9, 42-46; see also *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: M. Gittens & D. Cole) at 358.

what sorts of responses are appropriate in cases where there has been discriminatory profiling.

5. State Inquiry into Religious/Political Beliefs

Another possible threat to rights and freedoms posed by national security activities is the degree to which they may lead to state inquiry into religious and political beliefs. A distinctive characteristic of the terrorism-related offences in the *Criminal Code* is that they are based on motivation, requiring that the prohibited activity take place "in whole or in part for a political, religious or ideological purpose, objective or cause."[57] This appears to mark a shift from the traditional proposition in criminal law that motive is not a necessary element of a crime, but rather may be a factor at sentencing. One commentator suggests that "the implications of prohibiting certain political or religious motives in our criminal law could be far-reaching."[58] While violence is excluded from *Charter* protection, the shift towards motive as an essential element in a crime may provide increased reason for national security investigations to involve inquiry into a subject's personal religious or political beliefs, or for investigation to stem from suspicions arising from a subject's personal beliefs.

One American commentator states that in the post-9/11 context: [59]

> [T]he FBI is now authorized to go into mosques and churches without identifying themselves, and collect information on Americans worshipping there. On the slightest hint of a connection to a foreign church or government, the FBI is required to share that information with the CIA, which is free to include it in any secret databases.

Similar concerns may arise in Canada. Essentially, investigators may be guided by the definition of terrorist activity in the *Criminal Code* towards increased inquiry and investigation based on religious or personal belief. In addition to privacy and freedom of

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[57] *Criminal Code*, supra at note 42 s. 83.01(1)(a).
[58] Kent Roach, "The New Terrorism Offences and the Criminal Law" in Ronald J. Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 151 at 156.
[59] Kate Martin, "Domestic Intelligence and Civil Liberties" (2004) 24 SAIS Review 7 at 15.

religion and expression concerns, this issue relates to profiling. It is possible, in the course of an investigation, that an officer may consider questioning every member of a particular mosque, for example, or seeking intrusive surveillance of the activities of a religious leader.

6. Expression and Association

Freedom of thought, belief, opinion, expression and association are essential to democracy, and are protected under section 2 of the *Charter*. It has long been recognized, however, that one of the greatest concerns with respect to investigations relating to national security is the potentially chilling effect on legitimate dissent: indeed, one of the major concerns of the McDonald Commission was the improper targeting of legitimate dissent.[60] Those who exercise these freedoms to challenge our social, economic and political structures should not "have their activities noted in secret security dossiers to be used against them by the state…"[61] The present "zero tolerance" climate is a factor which may adversely affect rights and freedoms.

The breadth of the new anti-terrorism offences –financing and facilitating, for example – also increases the potential for state scrutiny of a wide range of associational and expressive activities, as well as privacy invasions.[62]

While the advocacy of violent overthrow of the state is not protected speech, the decision as to whether an organization is a terrorist organization may not be clear, and has significant consequences for rights and freedoms. In the United Kingdom, for example, both the Kurdistan Workers Party and the People's Mojahedin Organisation of Iran were proscribed by the government as "terrorist organizations", which meant that it was an offence punishable by imprisonment to belong to or arrange meetings of the organizations, to further their activities, or to financially contribute to such

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[60] McDonald Commission Report, supra at note 1 vol. 2 pp. at 445-511.
[61] *Supra* at 46-47, 409.
[62] See, for example, David Schneiderman and Brenda Cossman, "Political Association and the Anti-Terrorism Bill" in Ronald J. Daniels, Patrick Macklem, and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 173-194.

organizations.[63] Each organization challenged the government's determination that they were terrorist organizations, arguing that these organizations were respectively engaged in lawful armed conflict in the exercise of the internationally recognised right to self-determination of peoples, and a resistance movement committed to the establishment of a democratic government in a repressive state.[64] The potential for political abuse of the ability to proscribe "terrorist organizations" is obvious.

Some American commentators refer to the criminalization of financing and association with terrorist organizations as creating "guilt by association" that had defined the McCarthy era.[65] In Canada, under the new "Financing of Terrorism" provisions in the *Criminal Code*, it is an offence to knowingly provide or collect property, either directly or indirectly, intending or knowing that it is or will be used to carry out terrorist activities.[66] It is also an offence to knowingly collect, provide or make available property or financial services for the purpose of facilitating the activities of a terrorist group.[67] It is an offence to knowingly use or possess property for terrorist purposes.[68] Other sections of the *Code*, under the heading "Participating, Facilitating, Instructing and Harbouring" focus on these acts in relation to terrorist groups. For example, section 83.18 makes it an offence to knowingly participate in or contribute to, directly or indirectly, any activity of a terrorist group. This includes knowingly recruiting new individuals for the purpose of enhancing the ability of a terrorist group to facilitate or commit terrorist activities.[69]

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[63] In Canada membership and attendance of meetings of a terrorist organization are not criminal offences. Being a member of a terrorist organization, however, is a ground for inadmissibility under the *Immigration and Refugee Protection Act* R.S.C. 2001 c. 27, s. 78.
[64] See *Kurdistan Workers' Party v. Secretary of State for the Home Department*, [2002] EWHC 644 (Admin).
[65] David Cole and James X. Dempsey, "Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security" (New York: The New Press, 2d. ed., 2002) at 144; see also Robert M. Chesney, "Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security & Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism", Book Review (2003) 101 Michigan L. Rev. at 1408.
[66] *Criminal Code*, supra at note 42 s. 83.02.
[67] *Supra*, s. 83.03.
[68] *Supra*, s. 83.04.
[69] *Supra*, ss. 83.18-83.23.

Even where an organization is not proscribed as a terrorist organization, the perception that an organization may be under scrutiny by the RCMP or CSIS may have a chilling effect on both the associational and expressive activities of individuals and organizations. The United States Senate in 1989 described the danger to democratic values of overbroad and unjustified surveillance, including the use of informers, as follows:[70]

> The American people have the right to disagree with the policies of their government, to support unpopular political causes, and to associate with others in the peaceful expression of those views, without fear of investigation by the FBI or any other government agency. As Justice Lewis Powell wrote in the Keith case, "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power."
>
> Unjustified investigations of political expression and dissent can have a debilitating effect upon our political system. When people see that this can happen, they become wary of associating with groups that disagree with the government and more wary of what they say and write.

Particularly in an era of intelligence led policing, it may be difficult to discern the appropriate limits between gathering of information relevant to identification of terrorist activities and limiting legitimate political dissent.

7. Privacy

Almost all national security activities will affect privacy interests, as has been discussed above. This is inherent in the nature of national security investigations, where information about groups and individuals will be collected and analysed. For example, the RCMP will obtain and exchange personal information about individuals in the course of investigations. Individuals will be identified as potential sources of information, or as suspects. They may be placed under physical or electronic surveillance, and their contacts may be traced. They may be questioned. Undercover operatives may become involved, or informers identified and solicited to provide information about an individual. Information about the individual may be entered on computer databases and may be

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[70] Senate Select Committee on Intelligence, The FBI, and CISPES, S. Rep. No. 101-46, at 102, cited in Philip B. Heymann, "Civil Liberties and Human Rights in the Aftermath of September 11" (2001-2002) 25 Harv. J.L. & Pub. Pol'y 441 at 444.

provided to other police and intelligence agencies, both domestically and internationally. Whenever an investigator takes one of these steps, the broadly defined privacy interest of the individual will be invaded. The measures will be of varying degrees of intrusiveness. For example, the interception of private communications pursuant to warrant is a significant intrusion, subject to external judicial scrutiny. The decision to undertake physical surveillance to identify a pattern of behaviour does not require a warrant or judicial approval.

The individual may never know the nature and content of the information collected, the accuracy of the information, or the identity of persons to whom the information has been disseminated. As one commentator has noted:[71]

> Privacy … involves the ability to avoid the collection and circulation of such powerful information in one's life without having any say in the process, without knowing who has what information, what purposes or motives those entities have, or what will be done with that information in the future. Privacy involves the power to refuse to be treated with bureaucratic indifference when one complains about errors or when one wants certain data expunged. It is not merely the collection of data that is the problem – it is our complete lack of control over the ways it is used or may be used in the future.

If charges are laid and a prosecution is commenced, the individual will have the benefit of external scrutiny, including judicial scrutiny for *Charter* compliance. If not, the individual may never become aware of the extent to which the state has delved into his or her private life, and the information that may remain on computer databases.

IV. CONCLUSION

In this paper, we have identified the sources of the rights and freedoms we enjoy in our liberal democratic society. These include the *Charter*, human rights codes, international law, and freedom of information and protection of privacy acts. We have then identified the kinds of restrictions on rights and freedoms that might result from national security

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[71] Daniel J. Solove, "Privacy and Power: Computer Databases and Metaphors for Information Privacy" (2000-2001) 53 Stanford L. Rev. 1393 at 1426.

activities, which is a necessary step in identifying the appropriate balance between rights and freedoms and national security measures needed to maintain the security of our country and of all Canadians. In this regard, the words of the McDonald Commission ring true: “Canada must meet both the requirements of security and the requirements of democracy: we must never forget that the fundamental purpose of the former is to secure the latter.” [72] The purpose of this paper is to support the ongoing work of the Commission in its Policy Review mandate, so that any issues which arise which might influence the design of a review mechanism for the RCMP in its national security activities may be identified.

[72] McDonald Commission Report, *supra* at 43.