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

Policy Review

The Statutory Framework for the Activities of the RCMP with respect to National Security

A Background Paper
to the Commission's
Consultation Paper

December 10, 2004

This paper examines the statutory framework in which the RCMP operates. The first half focuses on the framework as it existed before Canada's response to the terrorist attacks of 11 September 2001 and the second half examines more recent statutory developments.

I. The Statutory Framework Before September 11, 2001

The RCMP had important law enforcement responsibilities with respect to national security before the enactment of the *Anti-terrorism Act*, S.C. 2001, c. 41 in December, 2001. These responsibilities primarily arose under the *Security Offences Act*, R.S.C. 1985, c. S-7, the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. 10 (the "*RCMP Act*"), the *Criminal Code*, R.S.C. 1985, c. C-46, the *Official Secrets Act*, R.S.C. 1985, c. O-5. With the exception of the *Official Secrets Act*, which was substantially amended by the *Anti-terrorism Act* and re-named the *Security of Information Act*, all of these Acts remain in force today as important components of the contemporary statutory framework.

The Security Offences Act

The same year as the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23 (the "CSIS Act") was enacted to provide Canada with a civilian intelligence agency, the *Security Offences Act* was also enacted in recognition of the RCMP's continued albeit changed role with respect to national security. Section 6 of that Act provides that RCMP peace officers "have the primary responsibility to perform the duties that are assigned to police officers" in relation to offences that arise "out of conduct constituting a threat to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*" or if "the victim of the alleged offence is an internationally protected person within the meaning of s. 2 of the *Criminal Code*." The duties of the RCMP include "the apprehension of the commission" of the above offences which, as will be seen, are generally contained in the *Criminal Code* and the *Official Secrets Act*.

The *Security Offences Act* recognized that even with the advent of a civilian intelligence agency, the police would still have important peace officers duties in relation to criminal investigations and the prevention of crime that affected national security. It also recognized that the RCMP as the federal police force, as opposed to municipal or provincial forces,

should have primary responsibility for investigating such criminal offences. The federal role was also recognized by providing that the Attorney General of Canada could prosecute criminal offences in the national security context.

Under the *Security Offences Act*, the RCMP is given primary responsibility to perform peace officer duties with respect to offences (primarily under the *Criminal Code* and *Official Secrets Act*) if the conduct constituted a threat to the security of Canada as defined in s. 2 of the *CSIS Act.* Threats to the security of Canada are defined in that Act as:

- espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed towards or in support of such espionage or sabotage,

- foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

- activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, (religious or ideological)[1] objective within Canada or a foreign state, and

- activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

There is also a specific statutory exclusion from the definition of threats to the security of Canada of “lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities” described above.

The Range of Offences under the Security Offences Act

Even before the addition of new offences relating to terrorism and terrorist groups in the 2001 *Anti-terrorism Act*, the list of offences that could fall under the above definition and the primary responsibility of the RCMP under the *Security Offences Act* was quite long.

[1] The words “religious or ideological ” were added by s. 89 of the *Anti-terrorism Act*.

Sabotage is prohibited under s. 52 of the *Criminal Code* and includes damage or destruction of property and impeding the working of things for a purpose prejudicial to the safety, security or defence of Canada or of the armed forces of any other state that is lawfully present in Canada. Espionage was covered under s. 3 of the *Official Secrets Act* which provided a broadly worded offence that applied when a person for any purpose prejudicial to the safety or interests of the State approaches any prohibited place, makes any note that is intended to be directly or indirectly useful to a foreign power or obtains, records or communicates any information useful to a foreign power. Other offences related to wrongful communications (s. 4) and harbouring spies (s. 8). As will be seen, this Act has been significantly expanded by the *Anti-terrorism Act* to cover various forms of prohibited assistance to terrorist groups as well as foreign powers.

Foreign influenced and clandestine activities would not in themselves be an offence but could be if they involved uttering threats under s. 264.1 of the *Criminal Code* or intimidation under s. 423 of the *Criminal Code*. These offences would only fall under the *Security Offences Act* if they were also detrimental to the interests of Canada.

The threat or use of serious violence against persons or property could include a wide range of *Criminal Code* offences relating to air or maritime safety, explosives, kidnapping, murder, mischief and arson. The definition of threats to the security of Canada includes not only threats and use of such violence but also activities within or relating to Canada directed towards or in support of the threat or use of such serious violence. The offences would only fall under the *Security Offences Act* as originally enacted if they were done for the purpose of achieving a political objective within Canada or a foreign state. As a result of amendments made in the *Anti-terrorism Act*, the acts would also be included if done for the purpose of achieving a religious or ideological objective within Canada or a foreign state.

The *Criminal Code* provides offences for not only completed offences such as murder and kidnapping but also for attempts to commit such crimes (s. 24), conspiracies or agreements to commit such crimes including some conspiracies involving people and

crimes outside Canada (s. 465), attempts to procure or solicit crimes (s. 464), a broad range of participation in such crimes including aiding or abetting (s. 21) or counselling such crimes (s. 22) and knowingly assisting a person to escape after a crime (s. 23). The RCMP has primary responsibility for investigating offences committed in advance to any complete crime such as a bombing or kidnapping.

Offences relating to the undermining by covert unlawful acts or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada could include offences such as treason and seditious speech or conspiracy as prohibited under ss. 46 and 61 of the *Criminal Code* respectively. Offences involving sedition are notoriously vague, but were restricted by the Supreme Court in the famous decision of *Boucher v. The King*[2] as requiring "an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority." Treason and sedition have been rarely-charged crimes in the post-World War II era, but they remain valid criminal offences that can be investigated and enforced by the RCMP.

The definition of threats to the security of Canada includes various activities not only within Canada, but also relating to Canada or against Canada. Section 7 of the *Criminal Code* extended jurisdiction to various crimes committed outside of Canada. These crimes included hijacking or endangering the safety of an aircraft, seizing control of a ship, various offences against internationally protected persons, hostage taking, offences in relation with nuclear material, torture, war crimes, and crimes against humanity.

The definition of threats to the security of Canada as incorporated in the *Security Offences Act* excludes "lawful advocacy, protest or dissent" unless it is carried out in conjunction with the enumerated threats to security examined above. Here it is important to distinguish between the different statutory mandates of CSIS and the RCMP. The RCMP is concerned with unlawful activity, while CSIS has a mandate to provide intelligence related to threats to the security of Canada, for the purpose of advising the

government. CSIS therefore has jurisdiction to inquire into lawful protest or advocacy that is carried out in conjunction with the defined threats to Canadian security whereas the RCMP as a police force should generally only concern itself with the prevention and investigation of unlawful matters. The RCMP might investigate advocacy, protest or dissent carried out in conjunction with the defined threats if they were unlawful in the sense that they violated either federal or provincial laws such as trespass and labour laws. Section 18 of the *RCMP Act* contemplates that peace officers on the RCMP will enforce not only the laws of Canada, but also "the laws in force in any province in which they may be employed."

The RCMP also has primary responsibility if the victim of the offence is an "internationally protected person" defined in s. 2 of the *Criminal Code* as a foreign head of state, minister of foreign affairs and other representatives of states and international organizations of an intergovernmental character and the family members that accompany such persons on foreign trips. Section 431 of the *Criminal Code* made it an offence to attack the official premises, private accommodations or means of transport of an internationally protected person; s. 424 made it an offence to threaten such an attack and s. 7 made it an offence to conduct certain attacks outside Canada. In addition, the RCMP would have primary responsibility with respect to other criminal offences such as killings and kidnappings directed against internationally protected persons in Canada as well as attempts, conspiracies, counselling and assisting in such crimes.

A large number of criminal offences could fall under the reference in the *Security Offences Act* to offences arising out of conduct constituting threats to the security of Canada or cases in which the victim of the alleged offence is an internationally protected person.

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[2] *Boucher v. The King*, [1951] S.C.R. 265 at 301. See generally M.L. Friedland, *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980) at 17-26.

Police Powers with respect to National Security Offences

Section 18 of the *RCMP Act* provides that it is the duty of members who are peace officers subject to the orders of the Commissioner:

- to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

- to execute all warrants, and perform all duties and services in relation thereto that may be lawfully performed by peace officers;

- to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

This definition of the duties of police officers includes not only the enforcement of federal and provincial laws and the execution of warrants, but also includes "the preservation of the peace" and "the prevention of crime". Section 6 of the *Security Offences Act* underlines this preventive role by giving the RCMP primary responsibility for "the apprehension of the commission" of offences arising out of conduct constituting a threat to the security of Canada or victimizing an internationally protected person.

Police powers available to the RCMP before the 2001 amendments included the ability to obtain search warrants (*Criminal Code*, ss. 487, 487.01, 487.092, 487.11), warrants for electronic surveillance[3] and arrest powers and warrants (*Criminal Code*, ss. 494-5. 511, 529.1-6.), the forfeiture of offence-related property (*Criminal Code*, s. 490.1) and the ability to apply for recognizances or peace bonds (*Criminal Code*, ss. 810-810.2).

[3] Section 186 would require the judge to be satisfied that less intrusive investigative measures would fail and would generally limit the authorization to 60 days. The information would generally be kept confidential under s. 187, but s. 196 would require written notification to the object of the intercept within 90 days of the period of authorization or renewal. Section 195 also imposed yearly reporting requirements on the Solicitor General. Less onerous restrictions applied to electronic surveillance where one person to a private conversation consented to the intercept. See *Criminal Code*, ss. 184.1-184.6.

II. The Statutory Framework After September 11, 2001

Since September 11, 2001, there have been important statutory developments that affect the activities of the RCMP with regards to national security. The most important development has been the creation of new crimes of terrorism and new police powers in the *Anti-terrorism Act*. In addition, that Act expanded the *Official Secrets Act* (renamed the *Security of Information Act*) to apply not only to prohibited communications with foreign powers, but also with terrorist groups. It also expanded the *Proceeds of Crime (Money Laundering) Act*, S.C. 2000, c. 17 (renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*) to apply to terrorist financing.

New Crimes of Terrorism

The *Anti-terrorism Act* (Bill C-36)[4] added a new part II.1 entitled "Terrorism" to the *Criminal Code.* It provides a definition of "**terrorist activity**" which does not in itself create a crime but is incorporated in new offences and new police powers in the *Criminal Code* that will be examined below.

A terrorist activity is defined in s. 83.01(1)(a) as an act or omission that is committed in or outside of Canada that would constitute various offences in ss. 7(2) - 7(3.37) of the Code that implement various international law instruments in relation to hijacking and damage to aircraft and ships, the taking of hostages, use of nuclear material, crimes against internationally protected persons, terrorist bombings and terrorist financing.

In addition, s. 83.01(1)(b) defines a terrorist activity as an act or omission, within or outside Canada, that is:

- committed for a political, religious or ideological purpose, objective and cause,
- with the intent of intimidating the public with regard to its security, including its economic security, or compelling a person, government, or a domestic or an international organization to do or to refrain from doing any act, and

[4] Technical amendments generally relating to translation issues were subsequently made to the Act in *An Act to Amend the Criminal Code and other Acts*, S.C. 2004, c. 12.

- intentionally causes death, seriously harms or endangers a person, causes substantial property damage that is likely to seriously harm people, or causes serious interference with or disruption of an essential service, facility or system.

- Interfering with or disrupting an essential service is not a terrorist activity if it occurs as a result of advocacy, protest, dissent or stoppage of work that is not intended to harm or endanger a person or pose a serious risk to health and safety.

A "terrorist activity" includes a conspiracy, attempt or threat to commit any such act or omission described above, counselling or procuring a person to commit such acts and being an accessory after the fact.

An interpretative clause in s. 83.01(1.1) states that an expression of political, religious or ideological thought, belief or opinion alone is not a "terrorist activity" under s. 83.01(1)(b) unless it constitutes an act or omission that satisfied the definition in that paragraph.

Another important definition that is incorporated in many of the new offences is the definition of a **"terrorist group"**. It means:

- an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity and includes an association of such entities, or

- an entity that has been listed by the Governor in Council on the basis that it is satisfied that there are reasonable grounds to believe that the entity has knowingly carried out, participated in or facilitated a terrorist activity or it is knowingly acting on behalf of, at the direction of or in association with such an entity.

New Financing of Terrorism Offences

It is an offence to:

- wilfully and without lawful justification or excuse provide or collect property, either directly or indirectly, intending or knowing that it will be used to carry out certain terrorist activities or acts intended to cause death or serious bodily harm to a civilian for the purpose of intimidating the public or compelling a government or international organization to do or refrain from doing any act (s. 83.02);

- collect, provide or make available property or financial services for the purpose of facilitating the activities of a terrorist group or for benefiting any person who is facilitating or carrying out a terrorist activity or knowing that the property or financial services will used in whole or part to benefit a terrorist group (s. 83.03);

- use or possess property for the purpose of facilitating or carrying out a terrorist activity or possess property intending or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity (s. 83.04);

- for a person in Canada or a Canadian outside Canada to knowingly deal with property owned or controlled by a terrorist group or provide financial or other related services in relation to such property for the benefit or at the direction of a terrorist group (s. 83.08);

- for a person in Canada or a Canadian outside of Canada to fail to disclose forthwith to the RCMP Commissioner and the Director of CSIS property in their possession or control that they know is owned or controlled by a terrorist group or information about a transaction or proposed transaction in respect of such property (s. 83.1);

- for various financial institutions to fail to report monthly on whether they are in possession or control of property owned or controlled by a listed entity (s. 83.11).

Those who make reports in good faith under ss. 83.1 or 83.11 are exempted from civil or criminal proceedings for the reports.

Enforcement Powers in relation to the new Financing Offences

The Attorney General of Canada has powers under ss. 83.13 and 83.14 to seize and forfeit property that is owned or controlled by a terrorist group or property that has been or will be used to facilitate or carry out a terrorist activity. Search warrants and restraint orders are obtained from a Federal Court judge with the judge examining the information in private and without the other side being present. No adverse inference can be drawn from a failure to provide evidence of persons having personal knowledge of material facts. The warrant or restraint order is issued if there are reasonable grounds to believe that a forfeiture order may be made. Under s. 83.14, a forfeiture order can be obtained if it is established on a balance of probabilities that the property in question is owned or controlled by a terrorist group or property that has been or will be used to facilitate or carry out a terrorist activity. There are various provisions requiring notice to those who own, control or appear to have an interest in the property. Property will not be subject to forfeiture if the judge is satisfied that a person with interest in the property has exercised

reasonable care to ensure that the property would not be used to facilitate or carry out a terrorist activity and is not a member of a terrorist group. In the case of a dwelling that is a principal residence, the judge must also consider the impact of a forfeiture on the immediate family and whether such family members appear innocent of any collusion or complicity in terrorist activity.

New Terrorism Offences

It is an offence to:

- knowingly participate in or contribute to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of a terrorist group to facilitate or carry out terrorist activities. This participation offence may include recruiting, providing or receiving training, entering or remaining in any country for the benefit or at the direction of or in association with any terrorist group and regardless of whether any terrorist activity was facilitated, whether the participation actually enhanced the ability to carry out a terrorist activity or whether the accused knew the specific nature of any terrorist activity (s. 83.18);

- knowingly facilitate a terrorist activity, regardless of whether the person knows that a particular terrorist activity was planned or any particular terrorist activity was foreseen or planned when facilitated or whether it was carried out (s. 83.19);

- commit any indictable offence for the benefit of, at the direction of, or in association with a terrorist group (s. 83.2);

- knowingly instruct another person to carry out any activity for the purpose of enhancing the ability of any terrorist group to carry out a terrorist activity (s. 83.21);

- knowingly instruct another person to carry out a terrorist activity (s. 83.22);

- knowingly harbour or conceal any person who he or she knows has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity (s. 83.23).

Under s. 83.18(4) information that might otherwise be classified as intelligence (ie. whether the accused uses a name, word or symbol that is associated with a terrorist group or whether the accused frequently associates with any of the persons who constitute a terrorist group) is stated to be evidence that the court may consider in a prosecution for

participation in a terrorist group. The distinction between the law enforcement activities of the RCMP and the gathering of security intelligence will be discussed below.

Terrorism Offences

Most of the above new offences (ie. ss. 83.02 to 84.04 or 83.18 to 83.23) are classified as **"terrorism offences"** under amendments to s. 2 of the *Criminal Code*. **"Terrorism offences"** also include an indictable offence under any Act of Parliament

- that is done for the benefit of, at the direction of, or in association with a terrorist group;
- where the act or omission constituting the offence also constitutes a terrorist activity; or
- a conspiracy, attempt, counselling or being an accessory after the fact with respect to any of the above offences.

The above definition of terrorism offences is potentially very broad. Although a robbery would not normally be a terrorist offence, it could be so classified if committed for the benefit, at the direction of, or in association with a terrorist group. A majority of the Supreme Court has recently affirmed that terrorism offences as defined by s. 2 of the *Criminal Code* include offences such as murder that existed before the enactment of the *Anti-terrorism Act* in 2001. Iacobucci and Arbour JJ. expressed agreement with the "characterization of a "terrorism offence" as "a descriptive compendium of offences created elsewhere in the Criminal Code"".[5]

Consent of Provincial or Federal Attorney General Required

Pursuant to s. 83.24, the consent of either the provincial or federal Attorney General is required to commence proceedings in respect of all terrorism offences. Section 2 of the *Criminal Code* was also amended to give the Attorney General of Canada concurrent jurisdiction to prosecute offences relating to terrorism. As discussed in the police independence paper, this prior consent or fiat requirement qualifies the doctrine of police

[5] *Application re Section 83.28 of the Criminal Code*, 2004, SCC 42 (*Application re s. 28*) at para. 59.

independence from the Executive with respect to criminal investigations. It was designed to provide a check on the commencement of terrorism related prosecutions. This safeguard could apply both to concerns that the commencement of proceedings could compromise intelligence sources and investigations and also concerns about the adverse effects that the commencement of proceedings could have on a particular individual.

Other New Offences

The *Anti-terrorism Act* adds a number of other offences to the *Criminal Code*. These include an expansion of first degree murder to include killings during terrorist activities (s. 231.06), an expanded offence of threats against an internationally protected person (s. 424), threats against United Nations personnel (s. 424.1) and attacks on them (s. 431.1), hate-motivated mischief against religious property (s. 430(4.1)) and the placement of explosives or other lethal devices in public places (s. 431.2(2)).

The *Public Safety Act*, S.C. 2004, c. 15, Part IV added a new terrorism offence of a hoax in relation to terrorist activities. The accused must not believe that such a terrorist activity will occur and also have the intent to cause any person to fear death, bodily harm, or substantial damage or interference with property (s. 83.231 of the *Criminal Code*).

New RCMP responsibilities

The *Act to amend the Foreign Missions and International Organizations Act*, S.C. 2002, c. 12 provided that the RCMP has the primary responsibility to ensure the security of intergovernmental conferences in which two or more states participate. Section 10.1(2) of the Act provides that the RCMP "may take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances." Section 10.1(4) provides that the federal government may enter into agreements with the provinces "to facilitate consultation and cooperation between the Royal Canadian Mounted Police and provincial and municipal police forces".

Police Powers with Regard to Terrorism Offences

The *Anti-terrorism Act* provided the police including the RCMP with new powers with respect to investigations of terrorism. In a recent case, the Supreme Court has indicated that the purpose of one of these new powers, the investigative hearing, should be characterized as the prevention and prosecution of terrorism offences and not the broader concept of national security.[6]

Investigative Hearings

Sections 83.28 and 83.29 provide for a procedural mechanism to gather information for the purpose of investigating or preventing terrorism offences from persons believed on reasonable grounds to have relevant information. A peace officer, on the consent of the Attorney General, may apply to a judge in private and without the other side being present for an order that requires individuals with information relevant to an ongoing investigation of a terrorist offence to appear before a judge and provide that information.

Investigative hearings may be ordered where the judge is satisfied that

- there are reasonable grounds to believe that a terrorism offence has been committed, and that information about the offence, or the whereabouts of the suspected perpetrator, is likely to be obtained as a result of the order; or

- there are reasonable grounds to believe that a terrorism offence will be committed, and that the person has direct and material information relating to the offence, or information that may reveal the whereabouts of the suspected perpetrator and that reasonable attempts have been made to get the information from the person against whom the order is sought.

The person named in the order has the right to legal counsel, but must answer questions and produce things as required by the order, subject only to claims of privilege or non-disclosure that will be decided by the judge presiding at the investigative hearing. The person has no right to refuse to answer questions or produce things on the ground of self-crimination, but such information and any evidence derived from it cannot be used in current or future criminal proceedings against the person, except in prosecutions for perjury or giving contradictory evidence.

The Supreme Court of Canada has recently reviewed this new procedure in cases arising out of their first use in Canada, in relation to the trial concerning the terrorist bombing of Air India. In *Application re s. 83.28*, the Supreme Court upheld the constitutionality of the procedure. Iacobucci and Arbour JJ. held for the majority that the procedure did not violate s. 7 of the Charter given protections in s. 83.28(10) that compelled evidence or evidence derived from that evidence could not be used against the person in subsequent criminal prosecutions, as well as the important role that the presiding judge and counsel representing the subject of the investigative hearing would play in the new procedure. The Court indicated that s. 7 of the *Charter of Rights and Freedoms* would prevent the use of an investigative hearing if the predominant purpose was to determine penal liability and that it required that the compelled evidence also not be used in subsequent extradition and deportation proceedings.[7] The majority of the Court rejected arguments that the procedure violated judicial independence and impartiality and stressed the important role of the judge in investigative hearings in ensuring the protection of common law, evidentiary and constitutional rights, as well as the presumption that such hearings be open. Two judges dissented on the basis that the procedure violated the institutional independence of the judiciary by requiring them to preside over police investigations[8] and three judges dissented on the basis that the particular use of the investigative hearing in relation to the Air India trial constituted an abuse of process because it was an attempt by the Crown to gain information about a witness in an ongoing criminal trial.

In the companion case of *Re Vancouver Sun*[9], the Court held that the rebuttable open court principle applied to the conduct of investigative hearings as opposed to the application for a judge to authorize an investigative hearing which, like an application for

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[6] Ibid. at paras. 39-40.
[7] Ibid. at para. 78-79.
[8] Ibid. at para. 180.
[9] 2004 SCC 43.

a search warrant, would be held in private.[10] Two judges dissented on the basis that such a presumption "would normally defeat the purpose of the proceedings by rendering them ineffective as an investigative tool" and would harm the rights of third parties and the administration of justice.[11]

Under s. 83.31, federal and provincial Attorneys General are required to prepare annual reports on the use of investigative hearings and s. 83.28 is subject to a renewable five year sunset under s. 83.32.

Recognizance with Conditions (Preventive Arrest)

Section 83.3 allows a police officer, with the consent of the Attorney General, who

- believes on reasonable grounds that a terrorist activity will be carried out; and
- suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity,

to lay an information under oath before a provincial court judge. The judge may then compel the person named to appear before the judge.

Sections 83.3(4) and (5) provide for arrest without warrant by which a police officer may arrest a person and bring him or her before a provincial court judge within a specified period of time. In order to make such a preventive arrest without warrant, a peace officer must have a reasonably-grounded suspicion that detention of the person is necessary to prevent a terrorist activity, that the conditions for the laying of an information exist but exigent circumstances make it impracticable to lay an information or an information has

[10] The Court added this caveat: "It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case -- to our knowledge -- in which it has been used." Ibid at para. 41. The Court added that: "(e)ven in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released." Ibid at para. 58.

[11] Ibid. at para. 60.

already been laid and a summons issued. If an information has not been laid and the person is subject to arrest without a warrant, the police officer shall lay an information and obtain the consent of the Attorney General without unreasonable delay and as soon as possible unless the person has been released.

Section 83.3(6) requires the person detained in custody to be taken before a provincial court judge within 24 hours or as soon as possible. A show cause hearing is contemplated under s. 83.3(7) to determine if further detention is necessary to ensure the person's attendance, prevent a terrorist activity or interference with the administration of justice or to maintain confidence in the administration of justice. This hearing may be adjourned by a judge, but only for a maximum of a further 48 hours if the person is still in custody.

If satisfied that there is reasonable grounds for the suspicion that the imposition of a recognizance is necessary to prevent a terrorist activity, the judge under s. 83.8 can order that the person enter into a recognizance to keep the peace and to comply with reasonable conditions for a period not exceeding 12 months. If the person refuses to enter into the recognizance, the judge under s. 83.8(9) can commit the person to prison for a term not exceeding 12 months.

Under s. 83.31, federal and provincial Attorneys General are required to prepare annual reports on the use of the recognizance with conditions provisions and the Minister responsible for policing at the federal and provincial levels are required to report on the use of the arrest without warrant provisions in s. 83.3. The section is subject to a renewable five year sunset under s. 83.32. In addition to these two sunset provisions, the entire *Anti-terrorism Act* is subject to a comprehensive review of its provisions and operations that must commence by 18 December 2004 and result in a report to Parliament by 18 December 2005.

The *Anti-terrorism Act* also amended s. 810.01 of the *Criminal Code* to enable any person who fears on reasonable grounds that another person will commit a terrorism offence to apply, with the consent of the Attorney General, for a recognizance similar in

terms to those available under s. 83.3. The Attorney General's reporting requirements under s. 83.31 do not apply to such peace bonds.

Enhanced Electronic Surveillance Provisions

The *Anti-terrorism Act* amended the *Criminal Code* so that wiretapping provisions apply to all terrorism offences. The new terrorism offences, as well as new offences relating to internationally protected persons and explosives, were added to the predicate offences for electronic surveillance. The exemptions and extended time periods previously provided for criminal organization offences were extended to terrorism offences. Under these amendments, the requirement that other less intrusive investigative techniques not be successful do not apply to terrorism offences (ss. 185 (1.1), 186 (1.1)), the authorization period was increased to one year as opposed to the normal 60 days (s. 186.1) and a judge can grant an extension of no more than three years before a person is notified of the electronic surveillance (s. 196(5)).

Warrants with respect to Hate Propaganda

The *Anti-terrorism Act* added s. 320.1 to the *Criminal Code* which allows warrants to be obtained from courts to delete hate propaganda from Canadian computer systems such as an internet site regardless of where the owner of the material is located.

The Security of Information Act

The *Anti-terrorism Act* substantially amended the *Official Secrets Act* and renamed it the *Security of Information Act*. As amended it constitutes an important piece of the legislative framework for national security. Before the 2001 amendments both terrorist groups and terrorist activities were not part of the Act and the Act focused on foreign powers. The Act now focuses on terrorist groups as well as foreign powers and has the same definition of terrorist groups and terrorist activities as under the *Criminal Code* amendments examined above. The definition of a foreign power now also includes governments in waiting and governments in exile as well as associations of foreign governments, governments in waiting and governments in exile with one or more terrorist groups.

Section 3 provides a new and comprehensive definition of **"a purpose prejudicial to the safety or interests of the State"** as the following:

- offences against the laws of Canada for a political, religious or ideological purpose or to benefit a foreign entity or a terrorist group
- a terrorist activity inside or outside of Canada
- endangerment of live, health and safety
- interference with public or private services and computer or computer programs
- damage to certain persons or property outside of Canada
- impairment or interference with the Canadian Forces
- impairment with Canadian security and intelligence capabilities
- impairment with Canadian responses to economic threats or instability
- impairment with Canadian diplomatic, consular and international relations
- use of toxic or radioactive or explosive devices contrary to international treaty
- the doing or omitting to do anything in preparation for the above activities.

The term "purpose prejudicial to the safety or interests of the State" is incorporated in many offences under the Act. These offences include under s. 4 the otherwise un-amended offence of wrongful communication, use, reception or retention of confidential or other information. This section has been referred to Parliament for review.

Section 5 provides for an offence of unauthorized use of uniforms, falsification of reports, forgery, personation and false documents for the purpose of gaining admission to a prohibited place or for any other purpose prejudicial to the safety or interests of the State. Section 6 makes it an offence to offence to approach or pass over a prohibited place for any purpose prejudicial to the safety or interests of the State at the direction or for the benefit of or in association with a foreign entity or a terrorist group.

Other offences include communicating without unlawful authority safeguarded information to a foreign entity or a terrorist group if the person believes or is reckless about whether the information is safeguarded and intends or is reckless about whether the communication will increase the capacity of the foreign entity or terrorist group to harm Canadian interests (s. 16(1)). A separate offence has applies when a person intentionally and without lawful authority communicates information that he or she believes or is reckless as to whether the Government of Canada or of a province is taking measures to safeguards and harm results to Canadian interests (s. 16(2)). Even if there is no intent to harm or no harm, s. 17 creates another offence that applies to those who intentionally and without lawful authority communicate special operational information to a foreign entity or terrorist group so long as the accused believes or is reckless as to whether the information is special operational information as defined in s. 8 of the Act. Such information includes the identity of those who are or who will be asked to be confidential intelligence sources or subject to a covert investigation or collection of information or intelligence by the Government of Canada. Section 18 applies to people with security clearances who intentionally and without lawful authority communicate or agree to communicate safeguarded information to a foreign entity or a terrorist group.

Section 20 makes it an offence for a person at the direction or for the benefit of or in association with a terrorist group or foreign entity to induce or attempt to induce by threat, accusation, menace any person to do anything that will harm Canadian interests or increase the capacity of a foreign entity or terrorist group to harm Canadian interests. He threat, accusation, menace or violence prohibited in this offence does not have to occur in Canada.

Section 21 makes it an offence for a person for the purpose of enabling or facilitating an offence under the Act knowingly to harbour or conceal a person who he or she knows has committed an offence under the Act or is likely to do so. Section 22 makes it an offence to do anything specifically directed towards or done in preparation for the purpose of

committing offences under ss. 16, 17 or 20 of the Act.[12] The prohibited acts of preparation include:

- entering Canada at the direction of or for the benefit of a foreign entity or terrorist group;
- obtaining, retaining or gaining access to any information;
- knowingly communicating to a foreign entity or terrorist group a willingness to commit the offence;
- at the direction of a foreign entity or terrorist group, asking a person to commit the offence; and
- possessing any device or software useful for concealing the content of information or for covert communications.

Section 23 extends liability to conspiracies, attempts, counselling or being an accessory after the fact in relation to all of the offences in the Act. Section 26 also provides that with respect to certain persons, including Canadian citizens, offences under the Act can be committed outside of Canada.

There are complex provisions in ss. 8-15 relating to individuals bound to secrecy, providing offences for leaks and establishing a limited public interest defence. Unlike in some previous versions of the act, the *Security of Information Act* does not have special police powers.

Consent of the Attorney General of Canada Required for Prosecution

Section 24 requires the consent of the Attorney General of Canada before any prosecution.

Proceeds of Crime (Money Laundering) and Terrorist Financing Act

The *Anti-terrorism Act* substantially amended the *Proceeds of Crime (Money Laundering) Act* and re-named it the *Proceeds of Crime (Money Laundering) and*

[12] The offence of economic espionage is also included but excluded in this paper because of its focus on

Terrorist Financing Act. The focus here will be how it supplements the financing of terrorism offences added to the *Criminal Code* and how it may provide a source of information for the RCMP in their national security activities. Terrorist activity has the same meaning under this act as under the *Anti-terrorism Act* discussed above and terrorist activity financing offence means offences under ss. 83.02, 83.03, 83.04 and 83.12 of the *Criminal Code*. Threats to the security of Canada has the same meaning as under the *CSIS Act* discussed above.

Part 1 focuses on record keeping and reporting of suspicious and other prescribed transactions. Pursuant to s. 7, banks, credit unions and certain other companies must report every financial transaction that occurs in respect of which there are reasonable grounds to suspect that the transaction is related to a money laundering offence or a terrorist activity financing offence to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). The same entities must also under s. 9 report certain other transactions to FINTRAC including international electronic fund transfers over $10,000 and large cash transactions over $10,000. FINTRAC is an independent agency established in 2000 that is at arm's length from law enforcement agencies and other entities to which it is authorized to disclose information.

Part 2 focuses on the cross border movement of currency and monetary instruments. Section 12 imposes reporting duties and ss. 15-17 provide for searches of the person, conveyances, baggage and mail on the basis of reasonable suspicion of unreported currency. These powers can be exercised by officers as defined under the *Customs Act*, R.S.C. 1985, c. 1. There are also forfeiture provisions in this Part.

Part 3 of the Act as amended now authorizes FINTRAC to analyze financial transactions and to disclose certain information to the police when there are reasonable grounds to suspect that information would be relevant to an investigation of a terrorist activity financing offence. In addition, the Act as amended requires FINTRAC to disclose

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national security.

information to CSIS when FINTRAC has reasonable grounds to suspect that information would be relevant to threats to the security of Canada.

FINTRAC is authorized to disclose "designated information" to the appropriate police force, if it has reasonable grounds to suspect that this information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence. (s. 55(3)) FINTRAC must record in writing (s. 55(5.1)) the reasons for disclosing this information which can include names, addresses, amounts and account numbers (s. 55(7)).

FINTRAC can also disclose this information to CSIS if it has grounds to suspect that the information would be relevant to threats to the security of Canada (s. 55.1). FINTRAC is also required to record in writing its reasons for disclosing this information to CSIS (s. 55.1(2)). There are separate provisions for the Attorney General (s. 60) or CSIS (s. 60.1) to obtain court warrants to obtain information from FINTRAC.

The Minister of Finance (or other designated Minister) or FINTRAC may enter into arrangements with a foreign state or an international organization regarding the exchange of information. The disclosure of designated information is restricted to purposes relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence (ss. 56 and 56.1). The Centre shall record its reasons in writing for disclosing information to foreign states or international organizations under s. 56.1(4).

Section 80 provides exemptions for a peace officer or a person acting under the direction of a peace officer to commit some of the offences under the act if those offences are committed for the purpose of investigating a money laundering offence or a terrorist activity financing offence. There is no reporting requirement such as is required under s. 25.1 of the *Criminal Code* with respect to otherwise illegal activities.

Pursuant to an amendment in the *Public Safety Act*, s. 100, FINTRAC is now also authorized to collect information that it considers relevant to money laundering or the

financing of terrorism that is in "commercially available databases or that is stored in databases maintained by the federal or provincial governments for purposes related to law enforcement or national security" and are subject to an agreement.

United Nations Suppression of Terrorism Regulations

The *United Nations Suppression of Terrorism Regulations* SOR/2001-360 were enacted pursuant to the *United Nations Act* and the United Nations Security Council Resolution 1373 that decided that all member states shall freeze without delay the assets of those who commit or attempt to commit terrorist acts and required member states to prohibit the provision and collection of funds for terrorist activities. The Regulations made on 2 October 2001 establish a list of persons who there are reasonable grounds to believe have carried out, attempted to carry out or participated or facilitated the carrying out of a terrorist activity. Section 3 prohibits the provision and collection of funds for the use of a listed person by any person in Canada or any Canadian outside Canada. Section 4 states that no person shall knowingly deal directly or indirectly with any asset owned or controlled by a listed person. Section 6 prohibits the assistance or promotion of any activity prohibited by ss. 3 or 4. Pursuant to s. 7, financial institutions must determine if they have any assets that belong to a listed person and disclose such assets. Section 8 states that any person in Canada or any Canadian outside Canada who has in its possession or control assets they believe are owned or controlled by a listed person must report this information to the RCMP or CSIS.

New Police Powers to Perform Acts otherwise Unlawful

In *An Act to Amend the Criminal Code (Organized Crime and Law Enforcement)* S.C. 2001, c. 32, public officers, including customs officers as well as police officers, were given the power to commit acts that would otherwise constitute an offence. The police officer must be engaged in the investigation of criminal activity or enforcement of an act of Parliament, must be designated by a senior officer responsible for law enforcement and must believe on reasonable grounds that the commission of the act or omission as compared to the nature of the offence or criminal activity being designated is reasonable and proportional in the circumstances. (*Criminal Code*, s. 25.1(8)). If the activity is likely to result in loss of or serious damage to property, additional authorization from a

senior officer is required (s. 25.1(9)). There are also provisions for public officers directing third parties to commit offences (s. 25.1(10)). The intentional or criminally negligent causing of death or bodily harm to another person, the wilful attempt to obstruct justice and the violation of the sexual integrity of an individual is never justified under this section (s. 25.1(11)).

The new provision provides a number of accountability measures. The public officer who commits the act must as soon as feasible file a written report to a senior officer under s. 25.2 and public annual reports must be filed under s. 25.3. As soon as feasible and no later than a year, a person's whose property was lost or seriously damaged must be notified under s. 25.4 unless the Minister responsible for the RCMP is of the opinion that notification would compromise an ongoing investigation, compromise an undercover officer or confidential informant, endanger the life or safety of any person, prejudice a legal proceeding or be otherwise contrary to the public interest.

Issues for Discussion

Defining the National Security Mandate

One of the challenges faced by the Commission in making recommendations about an arm's-length review mechanism for the RCMP with respect to national security is defining what activities of the RCMP actually relate to national security. Is the definition of "threats to security of Canada" in s. 2 of the *CSIS Act* and incorporated in the *Security Offences Act* an adequate definition of the RCMP's national security activities? If not, what should be added or taken away from this definition? Should investigations into terrorism offences as defined in the *Criminal Code* be added to the definition of national security matters? What about the various offences under the *Security of Information Act*? What about offences relating both to money laundering and terrorist financing in the new *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*? For example, does it make sense to separate review of money laundering by organized crime from terrorist financing for the purpose of review? Should the definition of national security be taken from existing laws or should it be defined in a functional manner taken from the national security activities of the RCMP and its interaction with various other agencies?

The various legal definitions of national security would include many offences. For example, a terrorist offence includes all indictable offences committed for the benefit of or in association with terrorist groups. This could include offences such as fraud or robbery. What are the implications of the breadth of possible offences with national security implications for the development of an appropriate review body? Does the breadth of the national security mandate suggest that an agency such as the Commission for Public Complaints Against the RCMP is an appropriate body to review the national security activities of the RCMP in light of its existing jurisdiction to review a broad range of police activities? Or alternatively is it desirable to have a review body like the Security Intelligence Review Committee that specializes in matters of national security perform some or all of the review functions?

What would be the effects of having RCMP activities classified as involving national security reviewed by a different body than other RCMP activities? Conversely what would be the effects of having the national security activities of CSIS reviewed by SIRC, but not those of the RCMP or other federal agencies? Should a review process for the RCMP with respect to national security also be able to review other police activity that may not be related to national security? If so, on what grounds? Should it be able to review the activities of other federal agencies with a national security mandate?

Distinguishing between Law Enforcement and Intelligence

Even before the 2001 *Anti-terrorism Act*, the RCMP had primary responsibility under the *Security Offences Act* for the apprehension of the commission of a broad range of offences involving conduct affecting the security of Canada and internationally protected persons. This definition included *Criminal Code* offences relating to attempts, conspiracy, and counselling of such crimes. New terrorism offences and new offences under the *Security of Information Act* also criminalize activities well in advance of the commission of any complete crime. Do the duties of the RCMP to prevent, apprehend and investigate such offences blur a distinction between the gathering of security intelligence and the conduct of a criminal investigation and other law enforcement

activities relating to the apprehension and prevention of offences? Is it possible or desirable to distinguish the process of criminal investigation from intelligence-gathering when designing a review mechanism for the activities of the RCMP in relation to national security?

New and Existing Police Powers

Another important consideration is the RCMP's various police powers. For example, how might the judicial role at investigative hearings, as well as the requirement that the Attorney General approve and then report on the use of such procedures, affect a review mechanism that might apply to the role that the RCMP would play in such procedures? How might the private nature of applications for investigative hearings and perhaps of some actual investigative hearings affect the mandate of a review mechanism and procedures for dealing with confidential information?

How might the judicial role in preventive arrests, as well as the requirements that the Attorney General approve applications under s. 83.3 and then report on the use of such procedures, affect a review mechanism that may apply to the role that the RCMP may play in preventive arrests?

How might the enhanced powers for electronic surveillance affect a review mechanism for the RCMP with respect to national security matters? In some jurisdictions, special bodies review electronic surveillance warrants. Should a review body have special responsibility for review of electronic surveillance? How would it deal with confidential information? Should a review body also have special responsibility for the RCMP's use of other covert law enforcement techniques that do not require a judicial warrant? These include the use of undercover officers or informants and the commission of otherwise unlawful acts.

The Role of the Attorney General

The consent of the Attorney General is required to commence proceedings for a terrorism offence and under the *Security of Information Act*. It is also required for the exercise of

some police powers such as investigative hearings, and peace bonds (preventive arrests). How does this requirement affect the review process that should be recommended?

RCMP's National Security Activities in Co-ordination with Other Agencies

How should a review mechanism accommodate the fact that some legal powers such as search powers under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* may be exercised by those who are not members of the RCMP, but who may increasingly work in co-ordination with the RCMP? To what extent should a review mechanism monitor the flow of information between the RCMP and FINTRAC? Should it have any jurisdiction over the latter body such as monitoring the performance of actions that would otherwise be an offence under that Act?

Should a review body have jurisdiction to inquire into the conduct of all federal employees who work with the RCMP with respect to national security? What would be the implications of such a mechanism for existing review bodies, such as SIRC? How should national security activities involving the RCMP working with municipal, provincial, foreign and international agencies be subject to review?

Coordination with Other Review and Accountability Mechanisms

How would a review mechanism for the RCMP build upon and coordinate with existing mechanisms designed to provide accountability? How would it be coordinated with the existing jurisdictions of both the RCMP review bodies and the Commission for Public Complaints Against the RCMP? How would it coordinate with the various reporting and notification mechanisms that exist with respect to investigative hearings, preventive arrests, electronic surveillance and authorized acts that would otherwise be illegal?