



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

**Canada's Anti-terrorism Act:
an unjustified limitation of freedom
of information and privacy rights**

**Submission to
The House of Commons Subcommittee
on Public Safety and National Security**

**BC Freedom of Information and Privacy Association
March 2005**

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BC Freedom of Information and Privacy Association

103 - 1093 West Broadway, Vancouver, BC V6H 1E2

Ph: 604-739-9788 • Fax: 604-739-9148

Email: info@fipa.bc.ca • Web: www.fipa.bc.ca

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Executive Summary

This submission lays out the BC Freedom of Information & Privacy Association's position on the Anti-Terrorism Act (ATA). FIPA believes that the relationship between freedom of information, privacy and the ATA is one that profoundly impacts the health of democracy in Canada. Further, we believe that Parliament should be concerned about how the ATA's failure to respect privacy and information rights has the side effect of inhibiting Canada's ability to effectively fight terrorism and ensure public safety.

The ATA is a manifestation of the belief that civil liberties must be traded for greater security. FIPA does not share this belief. The ATA violates the rule of law and undermines the pillars of democracy and constitutionalism. It creates an environment where abuse of power is too easy and where the catch-phrase of "national security" is used to advance a variety of policy objectives, regardless of their actual relevance to ensuring public safety. The ATA was unnecessary at its conception and remains so today, not only because it is based on the false belief that civil rights must be traded for security, but also because the police powers and surveillance capabilities necessary to fight terrorism already existed before 9/11.

Privacy rights are put at risk by a number of provisions in the ATA:

- Security certificates, which can be issued by the Attorney General, prevent individuals from accessing or correcting their personal information held by the government.
- The enhanced powers of the Communications Security Establishment allowing it to intercept private communication without a warrant are flagrant violation of section 8 of the *Charter*.
- The ATA unjustifiably and unnecessarily lowers the requirements that law enforcement must meet to obtain warrants for search & seizure in an anti-terrorism investigation. These lower requirements, combined with lack of judicial review thereof, are deeply offensive to privacy rights and have resulted in racial profiling and criminalization of constitutionally-protected political dissent.

Access to information – a right which is implied in all democracies by the fundamental right of freedom of expression – is curtailed severely by the ATA:

- Again, security certificates issued by the Attorney General can prevent the release of any kind of information.
- Provisions of the newly updated Security of Information Act serve to undermine the government's promise to implement whistleblower legislation, by punishing whistleblowers where the government claims a national security interest.

FIPA is pleased that Parliament has undertaken a review of the ATA, and we remain optimistic that the committee will use this opportunity to reflect on the time that has passed since the tragic events of 9/11 and have a fresh look at what measures actually will be most effective in fighting terrorism. It would be a shame if the committee does not act on what it hears from Canadians.

FIPA recommends that the changes brought in by the ATA be rolled back. They are unnecessary and therefore wasteful, and potentially harmful to public safety. FIPA also recommends that, in the fight against terrorism, police powers be applied responsibly under a comprehensive regime of scrutiny and openness, as befits public servants in a democracy.

Finally, FIPA understands that the ATA is only one part of a much larger effort to fight terrorism, and therefore we urge the committee to recommend a comprehensive review of all anti-terrorism measures together and in the context of Canadian democracy and political culture.



March 18, 2005

Paul Zed, M.P., Chair
House of Commons Subcommittee on
Public Safety and National Security
Room 647, 180 Wellington Street
Ottawa, Ontario K1A 0A6

Dear Mr. Zed:

The BC Freedom of Information and Privacy Association (FIPA) welcomes this opportunity to present its comments on the Anti-Terrorism Act to the House of Commons Subcommittee on Public Safety and National Security.

Introduction

FIPA is a non-profit society dedicated to advancing freedom of information, open and accountable government and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

FIPA has focused this submission on the Anti-Terrorism Act ("ATA") itself and to the implications of the Act for Canadians' rights to privacy and access to information. However, we recognize that freedom of information and privacy rights are integral to numerous other issues of significance in a democracy. FIPA and other organizations have requested that the government examine the ATA in context with other related statutes and measures taken in the name of national security, both before and after 9/11. We urge this sub-committee to recommend an overall review of all these security measures and laws.

We submit that the basic approach which underpins the ATA and other national security laws passed in the wake of September 11 serves to restrict rights in the following ways:

- Replacement of parliamentary debate, review and supervision with administrative fiat.
- Removal of judicial review of administrative and police actions.
- Presumption of non-disclosure and secrecy in areas deemed to be important to 'national security.'

The basic pillars of a democratic society include representative government, the Rule of Law, and freedom of expression and association. The ATA and its companion laws undermine these pillars to the point where the solidity of the entire structure could be threatened.

FIPA does not subscribe to the view that democratic principles must be sacrificed in order to protect the security of the nation.

In our view, the tragic events of September 11 have been used as a pretext for an expansion of police power and surveillance practices heretofore unacceptable to the vast majority of Canadians. Now that the dust of September 11 has settled, we believe that citizens are viewing the situation with clearer eyes. It is up to all of us – including Members of Parliament, public interest advocates and individual citizens – to ensure that the real cost of the lives lost on September 11 will not be a reduction in the civil liberties, personal privacy and access to information which characterize our democracy. Nor should we allow a reduction in the scrutiny of judges, Parliament, the media or the Canadian public.

Privacy Protection

Basis for Privacy Rights

Privacy rights and the right of a reasonable expectation of privacy are found in s.8 of the *Charter of Rights* and the cases interpreting it. Section 8 states, "Everyone has the right to be secure against unreasonable search and seizure."

Section 8 protects a reasonable expectation of privacy. Such an expectation of privacy depends on the context, and "an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the

government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement"¹

In *Hunter v. Southam Inc.*, Dickson J. also set out the Court's reasoning regarding balancing the reasonable expectation of privacy and the interests of law enforcement arm of the state:²

The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.³

Where the search is more invasive, the threshold of 'credibly-based probability' must also be higher before the search can be considered defensible and consistent with the *Charter*. It is important to remember that with the use of modern technology, a search can be highly invasive without ever threatening a person's bodily integrity. Indeed, in *R. v. Evans*, the Court made it clear that search and seizure need not involve any physical search at all.⁴ "The invasion of a reasonable expectation of privacy is what constitutes the search or seizure."⁵

The Supreme Court has looked at the reasonable expectation of privacy in a number of different contexts. They have held that commercial documents may include a reasonable expectation of privacy,⁶ but this may be lower than for personal information, especially when those documents are produced for regulated activities. It was also held that there was a reduced expectation for Employment Insurance information (*R. v. Smith*) and documents prepared for tax purposes, since they are subject to audit. Taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the Income Tax Act, and that they are obliged to produce during an audit.⁷

In *R. v. Plant*, Sopinka J. listed several factors that will determine the parameters of the protection afforded by s. 8 with respect to information privacy.⁸ These include consideration of such factors as:

- the nature of the information itself
- the nature of the relationship between the party releasing the information and the party claiming its confidentiality
- the place where the information was obtained
- the manner in which it was obtained, and
- the seriousness of the crime being investigated

Sopinka J. stated that section 8 seeks to protect a biographical core of information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.⁹ He also wrote that this is the type of information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

ATA Infringements on Privacy Rights

Privacy rights have been enhanced and articulated in greater detail by Parliament first through the Privacy Act, and later through the Personal Information Protection and Electronic Documents Act (PIPEDA). Some provincial Legislatures have enacted similar legislation. Unfortunately the protections set out in the Privacy Act, PIPEDA and elsewhere have been eroded by the ATA and other national security legislation.

In particular, security certificates issued by the Attorney General of Canada under the Canada Evidence Act (as enacted by the ATA) allow the government to oust the jurisdiction of both the Privacy and Information Commissioners. In the case of privacy, a person seeking release of his or her personal information under either the Privacy Act or PIPEDA has no right to that information and the Commissioner not only cannot review the information, but must keep it secret and send it back whence it came.

Canada Evidence Act

The relevant section of the Canada Evidence Act reads as follows:

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the Security of Information Act or for

the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

This section highlights some of the serious problems with the measures taken under the ATA. The certificate is issued by the government alone, with virtually no criteria for its application. The section exempts such certificates from the operation of the Statutory Instruments Act and the review provisions it contains. Sub section (8) of the section specifically ousts all other forms of review except the limited form set out in the Act:

38.13 (8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131.

As with much of the ATA, this provision could be used in a number of circumstances where terrorism has little or no application. The definition of "foreign entity" could include foreign government-owned corporations, or even private companies with government contracts. Given the prevalence of privatisation and public-private partnerships, it would not be difficult to see these certificates being used to block the release of documents which could be potentially embarrassing for the government or its private sector partners. Not only do they apply to the proceedings where a production order has been made, but they also apply to anyone seeking access to the information through the Privacy Act, PIPEDA or the Access to Information Act.

National Defence Act

The enhanced powers of the Communications Security Establishment, laid out in s. 273.64 and s.64, to intercept private communications under these sections are not subject to judicial review, as are police wiretaps under the Criminal Code. The only safeguard is that the Minister is required to ensure the privacy rights of Canadians are safeguarded in making the authorisation. Frankly, this is not of great comfort, since the person who believes the interception of communications is necessary is also supposed to guard the privacy of those whose private communications are being intercepted. The conflict of interest should be apparent.

If the government is of the view that judicial authorization is impractical, the review role of the Commissioner should be modified to allow him or her to review these authorizations before they are made active, rather than looking at them afterward to see if CSE was justified.

CCC s.83.28 Investigative hearing procedures.

When this new type of coercive hearing is combined with the existence of 'security certificates' under the Immigration and Refugee Protection Act, where an accused and counsel are prevented from knowing the details of the case being made by the state, privacy rights in Canada are significantly curtailed.

The accused in such hearings is compelled to testify and answer questions, contradicting one of the basic principles of criminal law, that accused persons are entitled to avoid incriminating themselves. It also violates the right to due process and to a fair and open trial.

We have also begun to see the use of these procedures in cases where terrorism can most charitably be described as having a very tenuous link to the conduct of the individual in question.

Racial Profiling and Other Privacy Threats

There is a great danger in giving officials power to restrict information or infringe of individual privacy, especially with diminished and reduced oversight and scrutiny by the courts or other third parties. Group think, prejudice and administrative convenience can cause serious harm to the lives and livelihoods of those who are victims of capricious administrative actions. It can also discourage the authorities wielding these powers from looking at all possibilities and encourage them to act where they may not have reasonable and probable cause for action.

Protection of Canadians' privacy rights hinges to a great extent on credibly-based probability replacing mere suspicion. National security can also be said to hinge on this, in that through judicial scrutiny, mistakes can be prevented. For example, this test will assist law enforcement officials in distinguishing between a radical dissenter and a terrorist. It also mitigates personal biases, hopefully preventing arrests or interrogation for the aptly named offence: Driving While Black.¹⁰ In both cases, the test for credibly-based probability ensures that the individual's right to privacy is protected.

The most obvious manifestations to date of privacy violations are the cases of profiling based on race or religion. There have been numerous instances of this. According to a coalition of Muslim-Canadian organizations, Muslims have been increasingly targeted since September 11.¹¹

The problem of profiling arises because the bar for obtaining warrants for search and seizure under the ATA has been set much lower than it traditionally has been in criminal law. The ATA allows hearings for search and seizure warrants to be held in secret, and removes the requirement of probable cause. Further, the subject of a warrant need not be the target of a national security investigation.¹² In the case of international communication, law enforcement need not obtain a warrant at all.¹³ This situation is only aggravated by the overly broad definition of terrorism in the Act.¹⁴

It would be instructive at this point to consider some of the cases of profiling in Canada. Pue describes the case of Liban Hussein, who in the fall of 2001 was arrested and had all his assets frozen on the suspicion that he had links to terrorism. Eventually it became clear that there was no evidence linking him to terrorism, but at this point, it was too late, he had already lost his "business...and his prospects."¹⁵ A study by the Canadian Bar Association (CBA) revealed that Arab and Muslim community leaders as well as university students had been threatened with preventative detention or extradition if they did not provide 'voluntary' interviews or information about other members of the Arab and Muslim communities.¹⁶ More recently Senator Mobina Jaffer told reporters that she and members of her family had been stopped by law enforcement officials because of their race.¹⁷

Abuses of privacy rights through unreasonable search and seizure have also resulted in the criminalization of dissent. The same CBA study notes a raid on native activists as well as RCMP and CSIS documents claiming that environmentalists and anti-globalization present threats to national security.¹⁸

Free access to, and distribution of, personal information without consent or cause is a hallmark of the ATA. According to BC's Information and Privacy Commissioner, there is nothing stopping CSIS from sharing information about Canadians with US officials, or obtaining information from them. Further, the Act allows information collected for national security purposes to be shared with other agencies for ordinary law enforcement purposes.¹⁹

Combined, these provisions of the ATA create quite a remarkable situation. Search and seizure can be carried out without due process, thus eliminating the safeguards that would otherwise prevent biases or political objectives from getting confounded with the legitimate aims of preventing terrorism. This information can then be used as the basis for preventative arrest, or shared with officials in the United States, who can then do with it as they see fit within the scope of their own anti-terrorism laws.

Access to Information

Importance of Access Rights

Freedom of information goes to the core of what democracy is about: government for the people and by the people. Freedom of information is one vehicle through which citizens can participate in their government, and in particular scrutinize its decisions and hold it accountable. In this spirit the late Prime Minister Pierre Elliot Trudeau said:

Democratic progress requires the ready availability of true and complete information. In this way people can objectively evaluate their government's policy. To act otherwise is to give way to despotic secrecy.²⁰

Freedom of information is also implicit in freedom of expression,²¹ one of the most sacredly held tenets in a liberal democracy such as Canada:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.²²

The concept of freedom of information is no less relevant in relation to matters of national security, and perhaps more so, given that national security is frequently the reason invoked to broaden secrecy and limit citizen access to information. This is certainly the case with the ATA.

Access to information need not be viewed as adversarial, with public servants or politicians pitted against citizens. Openness provides a means of "...testing assumptions and mindsets..." which is necessary to generate good intelligence analysis and policy decisions.²³ Those interested in the safety of Canada and the protection of human rights

should welcome this scrutiny in an open and collegial manner. This kind of openness would go a long way in preventing the problems related to violations of privacy discussed earlier.

Potential and Realities of Abuse

The primary vehicles of secrecy in the ATA are the limitations on judicial review²⁴ and the authority granted to the Attorney General to issue "confidentiality certificates" to exempt information from the Access to Information Act (see privacy section above). It also prevents the Information Commissioner from investigating²⁵ this exercise of discretionary power by the Attorney General.

These measures completely block all avenues available to citizens to hold their government accountable. It should be clear to anyone who casts a sceptical eye on these provisions of the ATA, that the risk of improper use is great. Secrecy provides the umbrella under which corruption thrives, and where there is no opportunity for scrutiny, citizens have no means to correct the wrongs or seek justice.

The words of W. Wesley Pue summarize most succinctly this position:

We should not, however, confer powers on individuals because we trust them. This is not because we have reason to distrust particular individuals who hold office, but because experience shows that power corrupts and absolute power (the kind "trust" seeks) corrupts absolutely. When a sort of "umpire's discretion" takes the place of rules, the Rule of Law is lost entirely. Any Statutory scheme constructed on such principles should fail judicial review as both overbroad and unconstitutionally vague.²⁶

The Security of Information Act

The ATA also took the opportunity to reinvigorate the Official Secrets Act, now called the Security of Information Act. This legislation was due for updating, since it was originally brought in by the British government just before WWI to prevent the agents of the Kaiser from stealing the plans to the Royal Navy's dreadnoughts, a frightening prospect, at least at that time. The Canadian equivalent was brought in just before WWII.

Essentially, this law prevents anyone anywhere from sending anything not approved for release by the government to anyone for any

purpose. If a reporter receives a brown envelope containing information not specifically released by the government, he or she can be prosecuted under this law just for receiving the package. Without going into the long and very chequered history of prosecutions under this law both in Canada and the UK, suffice it to say that governments don't like leaks in the ship of state any more than they like leaks in their dreadnoughts. They will take extreme steps to prevent whistleblowers from going public, and with a legal hammer such as the Security of Information Act, they can make life difficult for anyone.

We currently have the case of a Canadian journalist, Juliet O'Neill of the Ottawa Citizen, being investigated and having her house turned inside out by the RCMP using section 4 of the Security of Information Act. There is no indication that the RCMP had exhausted other ways of investigating the case, and some may reasonably presume that there was an element of intimidation in the way they proceeded. This is in addition to the possibility of a 14 year sentence for violating the Act.

Other provisions are also problematic.

The new section 16 (2) makes it an offence to communicate "to a foreign entity or to a terrorist group information that the Government of Canada or of a province is taking measures to safeguard." The vagueness of this wording could include virtually any information which is not specifically approved for release by the government. This would fit quite nicely with the wording of section 4.

The accused would also have to have communicated the information:

1. If the communicator "believes, or is reckless as to whether," the Government is taking measures to safeguard the information, and
2. If Canadian interests are harmed as a result.

These conditions have a circuitous quality to them. Governments generally safeguard information they are not actually releasing to the public, notwithstanding the preamble to the Access to Information Act. One hopes that the harm test would be stringently interpreted by the courts and that something more than the government's say so would be required to meet it. As it stands under the new Security of Information Act, a journalist filing a report or a well-motivated whistleblower leaking information in the public interest could run the risk of a long prison sentence. The same concerns exist regarding s. 17, which deals with "special operational information".

Finally, we are concerned at the lack of a time limit on the designation of "persons permanently bound to secrecy" under Sections 8 through 15. These are government officials and others barred for life from disclosing certain types of information. This provision is not only unreasonable, it is probably unworkable and it would likely undermine respect for the very security services it seeks to protect.

Abuse of Secrecy

Let us consider some of the experiences that have taught us why it is dangerous, as described by Pue, to confer powers on individuals on the basis of trust. We have already reflected on several examples where the lack of scrutiny has led to violations of the right to privacy in Canada since September 11. Now we turn more broadly to examples of abuse of secrecy affecting domains other than the right to privacy. These are examples from among our allies, whose governments have the same basic motivations as that of Canada or any other liberal democracy.

In the early 1990s in the UK, the Government tried to hide evidence from the court, using a "public interest" defence that would later prove the defendants not guilty. The directors of the engineering firm Matrix Churchill were charged with selling machine tools to Iraq in violation of the arms embargo. The documents the Government attempted to withhold indicated that the Government had lifted the embargo without informing Parliament, and had known about the Matrix Churchill deal from the beginning.²⁷

In the 1980s, Leander, a public servant in Sweden was dismissed from his job on national security grounds. When he sought access to his personal information that contained the basis for his dismissal, he was refused. He appealed to the European Court of Human rights, which without having seen the evidence against him, agreed with the Swedish Government on the necessity of withholding the records. Ten years later it was revealed that the Swedish authorities had misled the Court, and that Leander had been dismissed because of his political beliefs.²⁸

Scrutiny of public officials is part of what makes the democratic system work. Secrecy is necessary, but only in a narrowly defined set of circumstances,²⁹ and then only with appropriate, preferably judicial, review. The kind of secrecy provided for in the ATA, where decisions are made in secret and all avenues of review are closed, is *carte blanche*, and invites mistakes and abuse. The suggestion that this *carte blanche* secrecy is necessary in the fight against terrorism fails on its face.

Nothing good can come from this level of secrecy. In the words of the eminent thinker, Lord Acton: "Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity."³⁰

Broader Concerns

A Mistaken Approach

The Government's approach to fighting terrorism, as it is manifested in the Anti-Terrorism Act, is fundamentally flawed. It is based on a false dichotomy that pits security against liberty. Pue writes: "...thinking in terms of dichotomies such as these is both misleading and dangerous. Clear thinking is needed if we are to begin to properly assess the issues that face our society as it confronts the threat of international terrorism."³¹ Further, definitions used in the Act are too broad,³² thus amplifying the risks of error and abuse described earlier.

An important guideline for limitations of liberties appears to have been completely ignored by the Government: The *Oakes* test was developed by the Supreme Court to evaluate whether a limitation on *Charter* rights is within the scope of the s. 1 general limitations clause. It states:

To establish that a limit/infringement of a right or freedom is justified under a piece of legislation, two main criteria must be met:

1. The objective of the limiting measures must be "sufficiently important" (must relate to concerns that are "pressing and substantial").
2. The government must show that the means/way chosen to effect this limit are "reasonable and demonstrably justified" (involves a form of "proportionality test").

Three important parts of the proportionality test:

- a) Measures used to limit must be carefully designed to achieve the objective in question (can't be arbitrary or unfair).
- b) Measures used should impair as little as possible the right or freedom.
- c) There must be a proportionality/balancing between the effects/consequences of the measure/limit and the objective being sought (i.e., the more severe the limit/infringement, the more important the objective must be).³³

While the ATA passes the first part of the test, it fails on all three of the remaining sub-parts in part two of the test. According to the Court, if the measures fail on any of the tests, then they fail altogether.

In the fall of 2001, while the ATA was being debated, a special committee of the Senate took the time to consider the implications of the Act. They found that "Bill C-36 gives powers that if abused by the executive or security establishments of this country could have severe implications for democracy in Canada."³⁴ It is unfortunate the Government did not heed this warning.

Lack of Necessity

Dr. Kent Roach of the University of Toronto said in an interview with the Ottawa Citizen: "Everything that occurred on September 11 was illegal before September 11..."³⁵ It is clear that additional legislative measures were not necessary to make the investigation and prosecution of terrorism possible or effective. "There were more than sufficient Criminal Code offences well suited to the prosecution of violent acts of terrorism, planning for terrorism and acts aimed to aid others commit terrorist acts. There were also more than adequate investigative powers available for police and CSIS."³⁶ There was no need to grant Ministerial discretion to authorize unreasonable search and seizure, and then the ability to hide this authorization from judicial and public scrutiny.

This is of course not the first time in history that unnecessary measures have been enacted to combat a threat to national security or public safety. According to Stuart, the anti-gang measures added to the Criminal Code in 1997 were also unnecessary, for the same reasons.³⁷ Use of these excessive powers has itself proven that the powers were not necessary. For example, of the 160 people arrested under Britain's Prevention of Terrorism Act at the height of IRA activity in 1992, only 31 were charged.³⁸ It was a rather unnecessary and wasteful sweep.

Opportunism in Policy Development

As one considers the mistaken approach of the ATA, combined with the lack of necessity, it is easy to become sceptical of its purpose. As the American economist, Paul Krugman, pointed out soon after September 11, there is a risk that the fight against terror could be hijacked and used as a vehicle for other unrelated policy proposals.³⁹ This threat is applicable in the Canadian context as much as the American one.

Documents obtained by Dr. Alasdair Roberts through the Access to Information Act, reveal that restrictions imposed on freedom of information as part of the ATA were being contemplated several months before the attacks on New York and Washington.⁴⁰ The documents revealed something of public officials' thinking on the subject of freedom of information. They complained that the Office of the Information Commissioner frequently demanded "tangible demonstration of potential harm" that might occur if information was released. A PCO memo written in May 2001 revealed that security and intelligence officials considered the Access to Information Act to be a "growing problem."⁴¹

This phenomenon has also been observed elsewhere. In Britain, Waldham and Modi allege that a number of measures which appeared to have nothing to do with September 11 were 'smuggled' into the Anti-Terrorism Crime and Security Act.⁴² In April of 2004, the Vancouver Police Chief called for more funding for his force, claiming that Vancouver is a 'haven' for terrorists and he needs additional funding to combat it.⁴³ He was quickly rebuked by BC's Solicitor General.

It is unfortunate that such a tragic event as September 11 is being used for pedestrian political goals. The lives lost on September 11 should not be used as pretext for a shopping spree by Law Enforcement for their perennial wish list of increased surveillance powers and reduced scrutiny by judges, Parliament, the media and the Canadian public.

Deleting Hate Propaganda from Computers

This provision, CCC s.320.1, has little if anything to do with preventing terrorist attacks. The government has not proven the link between terrorism and hate propaganda. It is further evidence of how the threat of terrorism has been used by the government to institute measures which curb the freedoms of Canadians, in this case, freedom of expression. The Criminal Code has provisions for this purpose. The creation of new penalties for hate crimes seems at odds with the increased difficulties faced by the Muslim community:

Although the ATA amended the *Criminal Code* to create new sanctions for hate crimes, it does not address plain discrimination in any other explicit way. It would seem that where the ATA can be applied in a manner that discriminates against people on the basis of inherent or

imputed characteristics, rather than on the basis of overt self-expression, *Charter* issues have not been explicitly addressed. Even so, if an argument against the ATA definition under ss. 2(a), 2(b) and 15 of the *Charter* were to succeed, it still would not catch the possible criminalization of imputed (rather than expressed) beliefs based on the mostly non-s.15 grounds of ideology and political belief. ⁴⁴

Risking Public Safety

In her 2004 report to Parliament, the Auditor General criticized the Government's spending and oversight of security measures. The Auditor General said that the Government failed to improve the ability of security information systems to communicate with each other, and that a number of existing security measures are not monitored or applied effectively. ⁴⁵ Ineffectiveness in the use of *existing* security measures a full two and a half years after the ATA was enacted is not acceptable. Before expanding surveillance powers and limiting freedom of information, the Government should have exhausted the existing avenues of investigation and prosecution in the fight against terrorism. The Government is perhaps not taking the threat of terrorism seriously enough.

One major threat to national security that comes as a result of the ATA is the expansion of secrecy. Increased secrecy and reduced judicial scrutiny can lead to repeated bad decisions. ⁴⁶ For example, the biases that lead to racial profiling or the criminalization of dissent, in addition to violating privacy rights, are also a waste of time. While law enforcement officials spend their time chasing environmentalists or Arab men in their 20s, there are a number of real terrorists they're not tracking down. Judicial oversight of search and seizure would eliminate some of this waste, and thus the risk that time spent on non-terrorists doesn't let real terrorists slip by unnoticed.

In 1994 the Clinton administration established the Commission on Protecting and Reducing Government Secrecy, in order to evaluate the role of secrecy in the post-Cold War era. ⁴⁷ The Commission found that "...the best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall." ⁴⁸ They made this recommendation in part because at the height of the cold war, secrecy had added to the danger. ⁴⁹

Finally, the flawed basis of the ATA, combined with the “shopping list mentality” may indeed prove to be great threats to national security. As Pue writes:

It is a real possibility that security establishment “hitchhikers” empowered by widely shared, though misleading, notions of crime and safety, have dangerously distorted Canada’s constitutional balance, while simultaneously diverting attention from the difficult challenges involved in enhancing public safety.⁵⁰

The Government, in its approach to fighting terrorism, appears to be leaving open some serious risks to public safety. For example, while it has sought and acquired great additional powers, it has not effectively used those already in place. And its sweeping increase of secrecy introduces several risks which at first appear counter-intuitive. The problems described above, which result directly from the Government’s approach, support the conclusion that an attitude of respect on the part of the Government for fundamental freedoms, would not, as the security vs. liberties dichotomy suggests, weaken our ability to fight terrorism. In fact, had the Government held this attitude, it would have taken a different path and been open to alternative solutions, thus eliminating these serious weaknesses.

Conclusions

It is FIPA’s position that the Anti-Terrorism Act was at its conception unnecessary, and remains so today. However, if it were simply unnecessary and not also deeply harmful to the health of Canada’s democracy, we would not be so concerned. More than a violation of the Charter, the ATA is a violation of Canadian political culture. It creates a regime where information is not shared enough with the Canadian people, allowing secrecy and bad decision-making to thrive, and where information is shared too much with foreign governments and other entities, such that Canadian Citizenship is devalued.

It is also interesting to note that those whose ideology falls within the mainstream often need to be reminded not only of the legitimacy of political dissent, but also that dissent makes a rich contribution to democracy. That some members of Parliament, a noble house of debate, need to be reminded of this is perhaps a testament to the damage democracy has sustained in the war on terrorism.

As many others have noted, the net effect of ATA together with other legislation is to move Canada further towards a restrictive state in which civil liberties are compromised in favour of the security needs of the state. As Whitaker notes,

C-36 is actually a proto-National Security Act, which taken together with certain other statutes such as the CSIS and Security Offences Acts (1984), the Immigration and Refugee Protection Act and the amended Foreign Missions & International Organizations Act (2001), the Proceeds of Crime (Money laundering) Act, and the as yet to be enacted Public Safety Act, C-36 forms the statutory basis for the various elements of the national security state.⁵¹

Whitaker goes on to note the weaknesses of the review and accountability responsibilities of the government, as follows:

Perhaps the single most important shortcoming of C-36 was the failure of the government to create an appropriately wide and comprehensive accountability, review, and oversight mechanism to cover all aspects and institutional manifestations of the national security policy function. The scandal that has grown around the case of Maher Arar, forcing a special public inquiry points to the weakness of the present fragmented, discontinuous, 'jerry-built' accountability structures and practices.

Given the degree to which the powers of the police and security forces have been increased, it is incumbent upon the government to ensure that these powers are applied responsibly under a comprehensive regime incorporating such necessary procedures.

The final words are taken from Thomas Walkom of *The Toronto Star*:

Terrorist crimes were illegal in Canada long before Sept. 11, 2001. The federal government has never satisfactorily explained why new powers were needed.

Now that Parliament is reviewing anti-terror legislation, it has the chance. The grab bag that is Bill C-36 should be rolled back. Instead the government should introduce more reasonable measures. And it should be forced to justify, point by point exactly why it needs whatever new powers it seeks.

References

- ¹ *Hunter v. Southam Inc.*, at 159-60, *per* Dickson J. (as he then was).
- ² OIPCBC, 89.
- ³ 167-168.
- ⁴ para 11
- ⁵ OIPCBC, 89.
- ⁶ *Thompson Newspapers Co. v. Canada*
- ⁷ *R. v. Jarvis*
- ⁸ at 293.
- ⁹ *R. v. Plant*, at 293.
- ¹⁰ Two recent cases of “Driving While Black” in Canada (“Police discriminated against black boxer: ruling.” and “Police chief orders probe in 'driving while black' case.”) show that racial profiling is a problem in Canada, contrary to popular belief, and may also manifest itself in the War on Terrorism.
- ¹¹ Stuart, 154.
- ¹² OIPCBC, 78.
- ¹³ See OIPCBC, 79 regarding the mandate of the Communications Security Establishment and Stuart, 160 regarding discretionary power of the Minister of Defence.
- ¹⁴ Pue, 272-273.
- ¹⁵ 288.
- ¹⁶ Pue, 288.
- ¹⁷ See MacCharles.
- ¹⁸ Pue, 288.
- ¹⁹ OIPCBC, 77-78
- ²⁰ Cited in the Annual Report of the Information Commissioner for Canada 2001-2002.
- ²¹ Mendel, 17.
- ²² Cited in Mendel, 17.
- ²³ Monk, 43.
- ²⁴ Mendel, 10
- ²⁵ Monk, 46 and Roberts.
- ²⁶ 284.
- ²⁷ Waldham and Modi, 78.
- ²⁸ Mendel, 7-8.
- ²⁹ Pue, 270
- ³⁰ Cited in Monk, 42.
- ³¹ 268
- ³² Pue, 272-273.
- ³³ *R. v. Oakes*
- ³⁴ Cited in Pue, 272.
- ³⁵ See Cobb.
- ³⁶ Stuart, 154.
- ³⁷ Stuart, 164-165.
- ³⁸ Waldham and Modi, 91.
- ³⁹ Cited in Pue, 291.
- ⁴⁰ See Roberts.
- ⁴¹ See Roberts.
- ⁴² 92.
- ⁴³ “Vancouver 'haven' for terrorists: police chief”
- ⁴⁴ Davies, 15.
- ⁴⁵ Cited in Lawford & Roberts, 7-8.
- ⁴⁶ Mendel, 6.
- ⁴⁷ Monk, 42.
- ⁴⁸ Cited in Said, 12.
- ⁴⁹ Cited in Monk, 42.
- ⁵⁰ 292.
- ⁵¹ Whitaker, 91.

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