The *Anti-terrorism Act*, 2001: A Misleading, Useless and ... Dangerous Law

Brief submitted to the Special Senate Committee on the Anti-terrorism Act and the Subcommittee on Public Safety and National Security of the House of Commons Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

Ligue des droits et libertés
May 9, 2005

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About the Ligue des droits et libertés

The Ligue des droits et libertés is an independent, non-partisan not-for-profit corporation that was founded in 1963. Its objectives are to defend and promote the universal and indivisible rights recognized in the International Bill of Human Rights. The Ligue des droits et libertés, a member of the International Federation for Human Rights (FIDH), is one of the oldest rights organizations in the Americas.

Preamble

When Bill C-36 was introduced, in the weeks following September 11, 2001, and again after it was brought into force and when other security measures were announced (such as Bill C-24, identity cards or the Ridge-Manley "Smart Border" agreement), the Ligue des droits et libertés criticized the haste of the measures and the absence of any real public debate.

Three years later, we believe that parliamentarians not only have a duty to question the *Anti-terrorism Act*, but also have a responsibility to generate and promote a real public debate in respect of both the full exercise of fundamental rights and the identity of the real threats to our security, and the causes of those threats and the means by which they may be eliminated.

We are puzzled to see that the responsible ministers (Justice and Public Security) who testified before the Committee early in its deliberations were already calling for the main elements of the *Anti-terrorism Act* to be re-enacted without even having heard the testimony to be given. In their minds, it was important, and sufficient, to observe that over 50 percent of the population of Canada supported these measures, suggesting that the legislation is appropriate because a survey has said so.[1] On the other hand, we would note that another recent survey pointed to Canadians' general lack of knowledge about their rights and freedoms.[2]

Against this background, the Ligue des droits et libertés wonders whether we are to think that "the die is cast", and that the re-enactment of these measures, with a few changes, is inevitable.

We must not only take the true measure of a threat and ensure that we are indeed facing "a public emergency which threatens the life of the nation",[3] but also, and primarily, promote rights and freedoms as the foundation of society. It is not sufficient to incorporate a reference to the *Canadian Charter of Rights and Freedoms* into a statute, and then put everything in the hands of the courts. The courts are not, and must not be, the sole guardians of our fundamental values.

Parliamentarians have the serious responsibility of considering the reasonableness and proportionality of legislation that interferes with rights and freedoms. As Dickson J. wrote, the values and principles essential to a free and democratic society embody "... respect for the

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[1] *Charkaoui et les autres*, Josée Boileau, Le Devoir, February 22, 2005: [TRANSLATION] "The federal Minister of Public Security, Anne McLellan, clinched the argument last week when she appeared before the Senate Committee responsible for reviewing the Anti-terrorism Act. The Act is balanced, because, according to an EKOS survey, 50 percent of Canadians think so! Even better, 41 percent of people believe that the Act should go even farther. The Minister concludes from this that it should not be touched – an opinion shared by the federal Minister of Justice, Irwin Cotler, who was questioned by the same Committee yesterday.

[2] 50 percent of Canadians are apparently unable to name a right guaranteed by the *Canadian Charter of Rights and Freedoms*: "Canadians and the Charter of Rights and Freedoms", Léger Marketing/Canadian Press Public Opinion Poll, October 2002.

[3] *International Covenant on Civil and Political Rights*, Article 4.

inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society".[4]

We therefore ask that parliamentarians generate a real public debate, one that is informed and transparent, about the need for all of the measures to combat terrorism and the extent to which those measures are consistent with the fundamental principles of our society. It is also the duty of parliamentarians to advance the effective implementation of the values essential to a democratic society. It is in this spirit that the Ligue des droits et libertés submits this brief to the Committees of each of the two Chambers that are responsible for reviewing the *Anti-terrorism Act*.

[4] *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 63.

Introduction

The *Anti-terrorism Act* was assented to on December 18, 2001, in an atmosphere or urgency and after little discussion, barely three months after the events of September 11. The Act, which is 170 pages long, amends some twenty other statutes, primarily the *Criminal Code*, the *Evidence Act* and the *Official Secrets Act*. In addition, the Act, which is exceptional legislation, is unlimited in time and alters our judicial system in a significant and permanent manner.

In this brief, we intend to show that the la *Anti-terrorism Act* is misleading, useless and dangerous:

- misleading: this Act could lull us into the illusion that terrorism is the only threat to the security of human societies, allowing other threats to security, which are very real and just as significant, to be overshadowed;

- useless: the *Criminal Code* already provides police services with ample powers for taking action; and

- dangerous: the Act introduces a whole set of measures into the *Criminal Code* that violate the principles of fundamental rights that have been established over the centuries.

We would also submit that the *Anti-terrorism Act* must be evaluated in the context of all of the other measures that have been adopted since September 11 that also jeopardize the principles that must be taken as givens in our democratic societies. Creating data banks about entire populations and the sharing of those files between states, cross-tabulating those data in order to establish lists of suspect individuals, often relying on surnames that identify groups that are stereotypically associated with terrorism, broad powers of surveillance over travel and communications – these are all examples of the problem.[5]

The Ligue des droits et libertés also wishes to draw attention to the fact that the absence of political oversight of police services, widespread surveillance of the public and watering down the concept of the presumption of innocence are all characteristics of a police state.

[5] International Campaign Against Mass Surveillance, Declaration published on April 20, 2005, which may be found on the Web at: http://www.i-cams.org/

Part 1 A centuries-old tradition of protecting security of the person

...here is a law which is above the King
and which even he must not break.
This reaffirmation of a supreme law
and its expression in a general charter
is the great work of Magna Carta;
and this alone justifies
the respect in which men have held it.

Winston Churchill, 1956

Canadian society is hair to centuries of efforts to protect individuals against arbitrary action by the state, and of achievements in that regard.

The origins of that process are found in *Magna Carta*, the agreement made between the lords and King John on June 14, 1215. That great document is where we find a principle that has since then always been regarded as sacred: the right not to be deprived of liberty unless that deprivation of liberty is subject to the limits permitted by the laws:

> *(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.*
>
> *(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.*
>
> *(40) To no one will we sell, to no one deny or delay right or justice.*

Without going into the historical development of legal rights in detail, we think it is important to note that the *Charter of Rights and Freedoms* that was incorporated into the *Constitution Act, 1982* lists a number of *legal guarantees* (some of which are the descendants of the rights guaranteed by *Magna Carta*). Those legal guarantees are constitutionally protected – that is, under section 32 of the Charter, every Act of Parliament must honour those guarantees, except as provided in section 1:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Otherwise, under sections 32 and 33 of the Canadian Charter, every Act of Parliament must comply with the Charter, unless it expressly provides otherwise, and such an exception can be valid only for a period of five years.

In the case of the *Anti-terrorism Act*, Parliament, probably wagering that the courts would find the numerous, serious violations of the *legal guarantees* that it presents as acceptable in a “free and democratic” society, did not make use of the “notwithstanding” clause.

The following are some of the *legal guarantees* provided by the Charter:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention:

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right:

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and;

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[Emphasis added.]

As we shall see later, in Part 4, the *Anti-terrorism Act* has permanently endangered all of those rights. Moreover, it has done this in a context in which, if the Attorney General so decides, the accused can be convicted on secret evidence, which is disclosed only to the judge.

Hugessen J. of the Federal Court of Canada, to whom the task falls of hearing this secret evidence *in camera*, outside the presence of the accused and his or her counsel, has publicly expressed his discomfort with the role he is being asked to play:

> We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined.[6]

We believe that be concerned when an eminent and respected judge, who is bound by judicial restraint, offers such remarks.

We consider it important to set out the full text of Article 4 of the *International Covenant on Civil and Political Rights*, which Canada has ratified and has thus undertaken to comply with:

> **Article 4**
> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.
>
> [Emphasis added.]

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[6] James K. HUGESSEN, "Watching the Watchers: Democratic Oversight", address to the conference *Terrorism, Law & Democracy: How is Canada Changing following September 11?*, in *Terrorism, Law and Democracy*, Montreal: Yvon Blais, 2002.

It is clear to us that many of the provisions in the *Anti-terrorism Act* violate the Covenant. For example, Article 9, which contains a number of the rights recognized in the Canadian Charter, which we set out above, provides:

> **Article 9**
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Canada therefore evidently has an obligation, under Article 4, to "inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated", and an obligation to give notice of the date on which it "terminates such derogation". This implies that such derogations can only be temporary.

From the judgment of the Supreme Court of Canada in the Air India case, we know that the courts are very reluctant to interfere in the assessment that the legislative and executive branches have done of the "public emergency" that the terrorist risk creates at present. In that judgment, released in the fall of 2004, Iacobucci and Arbour JJ., writing for the majority, said:

> Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Yet, at the same time, while respect for the rule of law must be maintained in the response to terrorism, the Constitution is not a suicide pact, to paraphrase Jackson J.: *Terminiello v. Chicago*, 337 U.S. 1 (1949), at p. 37 (in dissent).[7]
>
> [Emphasis added.]

[7] *Application under s. 83.28 of the* Criminal Code *(Re)*, [2004] 2 S.C.R. 248, para. 6.

That means that Parliament cannot entirely look to the judges of the Supreme Court to narrow the scope of the provisions of a statute that grants broad discretion to law enforcement agencies: there is a serious risk that the Court will shelter behind deference to the political choices made by parliamentarians, as was also the case in a recent judgment of the Judicial Committee of the House of Lords.[8] In that judgment, it was the discriminatory distinction between British citizens and foreigners that prompted the Committee to find that the British law was unenforceable, because it did not comply with the anti-discrimination provisions of the *European Convention on Human Rights*. The Lords supported the assessment of the risk that had been made by the Government and Parliament.

In Canada, we also know, from very concrete experience, what happens when excessive and arbitrary powers are assigned to the executive branch and to law enforcement agencies. It was not so long ago – October, 1970 – when, in response to certain terrorist acts that had been committed in Quebec, Parliament invoked the *War Measures Act*, an old law that had been enacted in 1914 and invoked only during the two world wars. That was the first time that it had been used in peacetime.

As a result of the *War Measures Act* being invoked, hundreds of individuals were arrested and incarcerated for no reason, on mere suspicion, with no charges ever laid against a majority of them. In response to the outrage that this situation brought about in the early 1980s, the federal government had to compensate those people and apologize to them publicly. To avert such situations in future, it was decided to repeal the *War Measures Act* and replace it with the *Emergencies Act*.[9]

We urge you to take another look at that Act, to see the infinite precaution taken in drafting it, to avert the excesses that had been brought about by using the former Act. First, there is a preamble, which reads as follows:

> WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;
>
> AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, to take special <u>temporary</u> measures that may <u>not be appropriate in normal times</u>;
>
> AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and <u>must have regard to the *International Covenant on*</u>

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[8] *A (FC) and others (FC)* v. *Secretary of State for the Home Department*, [2004] UKHL 56, judgment dated December 16, 2004.

[9] *Emergencies Act*, the full title of which is *An Act to authorize the taking of special <u>temporary</u> measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof* (emphasis added), assented to on July 21, 1988, R.S.C. 1985, c. 22 (4th Supp.).

> *Civil and Political Rights*, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency;
>
> [Emphasis added.]

Unlike the *Anti-terrorism Act*, that preamble makes express reference to the international commitments made by Canada under the *International Covenant on Civil and Political Rights*, and expressly submits to them. It is interesting to compare that preamble to the preamble to the *Anti-terrorism Act*, which clearly reflects the negligence demonstrated in December 2001:

> WHEREAS acts of terrorism constitute a substantial threat to both domestic and international peace and security;
>
> WHEREAS acts of terrorism threaten Canada's political institutions, the stability of the economy and the general welfare of the nation;
>
> WHEREAS the challenge of eradicating terrorism, with its sophisticated and trans-border nature, requires enhanced international cooperation and a strengthening of Canada's capacity to suppress, investigate and incapacitate terrorist activity;
>
> WHEREAS Canada must act in concert with other nations in combating terrorism, including fully implementing United Nations and other international instruments relating to terrorism;
>
> WHEREAS the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the Canadian Charter of Rights and Freedoms;
>
> AND WHEREAS these comprehensive measures must include legislation to prevent and suppress the financing, preparation, facilitation and commission of acts of terrorism, as well as to protect the political, social and economic security of Canada and Canada's relations with its allies; ...[10]

Unlike the *Anti-terrorism Act*, the *Emergencies Act* provides that it can apply for a limited time only. It defines the kind of emergency that can give rise to a proclamation of a national or international emergency very stringently. This is how a public order emergency is defined in section 16:

> "public order emergency" means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency; ...
>
> [Emphasis added.]

There is no such reference to the concept of “national emergency” in the *Anti-terrorism Act*.

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[10] Preamble to the *Anti-terrorism Act*, S.C. 2001, c. 41

The *Emergencies Act* even provides for an entire procedure for compensating individuals whose rights may have been affected by the application of the Act (sections 46 to 55).

We must be concerned about the fact that when the *Anti-terrorism Act*, which permanently alters the protections of our rights and freedoms, was enacted, it did not include the series of precautions that were taken when the *Emergencies Act* was enacted.

Part 2 A misleading law ...

that does not respond to the real threats to human security

In my view, climate change is the most severe problem we are facing today, more serious even than the threat of terrorism. As a consequence of continued warming, millions more people around the world may in future be exposed to the risk of hunger, drought, flooding, and debilitating diseases such as malaria.

Sir David King[11]

The terrorist threat, and efforts to acquire the "security" that is incessantly invoked, must be assessed and viewed in a broader context. The important report submitted to the Secretary General of the United Nations in December 2004, *A More Secure World: Our Shared Responsibility*, identifies an impressive list of threats to peace and international security, as well as a number of major challenges:

- War between states;
- Violence within states (civil wars, massive human rights violations, genocide, etc.);
- Poverty, infectious diseases and environmental degradation;
- Nuclear, radiological, chemical and biological weapons;
- Terrorism;
- Transnational organized crime.[12]

Terrorism is not the only threat to the security of the planet and its inhabitants: it is all of the major global problems that must be attacked urgently, particularly when some situations where there is poverty or oppression create the conditions in which terrorism flourishes. Nor must the draconian measures that states adopt in their fight against terrorism come, themselves, to be a new planetary threat, this time to the rule of law and fundamental freedoms, which are the very foundation of our democracies and that in many cases have been achieved at a high price.

More than three years have passed since the attacks of September 11, 2001. The attack of March 11, 2004, in Madrid, shows that we are not immune to further attacks. However, the fears that September 11, 2001, marked the start of a wave of unprecedented terrorist attacks, attacks that would be increasingly deadly and would use unheard of methods, have not materialized. No "weapon of mass destruction", no secret laboratory for manufacturing such weapons, has been discovered in Afghanistan, in Iraq or in the western world.

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[11] Sir David King, senior adviser to the Prime Minister of the United Kingdom, Tony Blair, quoted in *Science*, January 10, 2004

[12] *A More Secure World: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges and Change, submitted to the General Assembly of the United Nations on December 2, 2004, document A/59/565.

Despite the fact that no terrorist attack has occurred in North America since September 11, 2001, the Minister of Public Security, Anne McLellan, says, without offering a shred of evidence, that the terrorist threat has not diminished since September 11 and that it has even grown. The Minister of Justice, Irwin Cotler, went even farther when he said: "We're talking about an existential threat to the whole of the human family."[13] In a symposium on counter-terrorism, David Harris, who was formerly in charge of strategic planning at CSIS, said that the ordinary Canadian, an educated and discerning person, which includes the average judge, is a generation behind in understanding the nature, extent and severity of the threat that we are facing today, and how we could wake up one morning and discover that two or three major cities have disappeared.

In an article published in April 2005, the *Washington Post* referred to a "dramatic increase" in terrorism in 2004.[14] A detailed analysis of the results from one of the sources referred to in the article sheds some interesting light on those figures, which are alarming at first sight.[15] First, the rise in the number of deaths, from 7,256 to 10,337 between 2002 and 2004, is virtually entirely due to the war in Iraq, where deaths attributed to terrorism rose from 3 to 2,354 for those years.[16] Also during that period, from January 1, 2002, to December 21, 2004, terrorism caused 3 deaths in North America, none of them in Canada.[17] Over a much longer period – January 1, 1968, to May 5, 2005 – terrorism caused 338 deaths in Canada and 3,573 in the United States, virtually all of which are attributable to a single event in each country: the Air India bombing in Canada (329 deaths) and the attacks of September 11, 2001, in the United States (about 3,000 deaths). The data in the study also show that terrorism is prevalent in regions where human rights are systematically flouted, as in Chechnya, and confirm what was said by the UN Special Rapporteur, Kalliopi K. Koufa, in her interim report, *Terrorism and Human Rights*:

> In reviewing contemporary terrorism, one might roughly observe that those States with the best human rights records are the States with the least likelihood of problems with domestic terrorism [and] the States least affected by international terrorism. It follows that an obvious step to reduce terrorism is the full realization of human rights and the practice of genuine democratic processes throughout the world, among States and in every State. All efforts must be made to address better the realization of human rights, in particular in

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[13] [translated into French in the original version of this brief]

[14] Susan B. GLASSER, Washington Post, April 28, 2005; Page A07

[15] That important source is the *Terrorism Knowledge Base*, a Web site organized by the U.S. Department of Homeland Security, the Rand Corporation and DFI Government Services, which may be seen at http://www.tkb.org/Home.jsp

[16] We can only point out the degree to which this demonstrates that war is not the solution to terrorism.

[17] Despite the low death rate, the study identified an astonishing 40 "attacks" in the United states from 2002 to 2004. This is explained by the fact that actions such as those by the *Earth Liberation Front*, which account for 26 of the 40 acts identified, are regarded as terrorist acts, although that organization's goal is "To take all necessary precautions against harming any animal, human and non-human". This clearly illustrates the grey zone in which the concept of a "terrorist act" exists.

> relation to self-determination, racism, internal ethnic and political representation, and class-based economic or cultural divisions in society.[18]
>
> [Emphasis added.]

It is difficult to reconcile the alarmist words about terrorism quoted earlier with the objective results of the study we quoted above. However, by identifying terrorism as the most important threat to human security, other threats that claim many more victims are relegated to the back burner. Infections diseases, AIDS and the scarcity of drinking water, to name only those few, kill millions of people every year. The billions that have been invested, in Canada and elsewhere, in the fight against terrorism could save hundreds of thousands of lives if they were invested in eliminating those scourges.

Reaction to the attacks of September 11, 2001, make us think of how an individual reacts when his or her weakened immune system goes into overdrive when confronted with a pathogen. The damage inflicted by the reaction of the immune system is much more serious than the damage caused by the pathogen. The entire body of measures taken in the name of fighting terrorism, including the *Anti-terrorism Act*, seems to us, in some ways, to represent a greater threat to the future of our democratic societies than terrorism itself.

The Secretary General of the United Nations, Kofi Annan, once again said, at the plenary closing session of the International Summit on Democracy, Terrorism and Security in Madrid, on March 10, 2005: "Because terrorism is a threat to all states, to all peoples." He added:

> [Terrorism] is a direct attack on the core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflicts.

The Ligue des droits et libertés endorses that statement entirely: terrorism threatens fundamental values. It is also true that Canadian and Quebec society cannot think themselves immune to potential terrorist acts.

But the Ligue des droits et libertés also endorses the important caveat expressed by Kofi Annan in that same declaration, concerning the way to combat terrorism. If governments sacrifice human rights and the rule of law in that fight, the Secretary General said, they will be handing victory to the terrorists. The Ligue also places the greatest weight on the harsh judgment that the Secretary General expressed regarding the body of measures that have been adopted recently, in the world, to combat terrorism:

> I regret to say that international human rights experts, including those of the UN system, <u>are unanimous</u> in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms.
>
> [Emphasis added.]

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[18] E/CN.4/Sub.2/2001/31, para. 129, 27 June 2001.

For Kofi Annan, this was an opportunity to reiterate a fundamental principle: “Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.”

There is no indication that this principle was considered when the *Anti-terrorism Act* was enacted, and it is imperative that it be considered when the Act is reviewed.

Part 3 A useless law …
the powers already exist

Shall we fail to remember that nothing can so weaken security as the loss of liberty?

Ramsey Clark[19]

The *Anti-terrorism Act* that was enacted by the Canadian government is useless, when we consider the various powers already provided by the *Criminal Code*, as it stood prior to the incorporation of the new legislation, and by the twelve international anti-terrorism treaties to which Canada has already adhered.

In the brief that it filed when Bill C-36 was enacted, the Canadian Bar Association (CBA) rightly pointed out that "[t]he government currently has many legal tools to combat a terrorist threat" and that "... existing provisions of the Criminal Code provide an impressive "arsenal" to combat terrorist organizations".[20]

We would note some of those provisions:

- Section 2: definitions of "criminal organization," "criminal organization offence" and "offence-related property" (proceeds of crime);
- Section 7: extraterritorial offences on aircraft, ships and fixed platforms, offences involving internationally protected persons and offences involving nuclear material;
- Section 17: removal of "compulsion" as a defence for certain offences, including piracy, causing bodily harm, kidnapping, hostage-taking, etc.;
- Section 21: participation in an offence by persons who aid or abet, conspiracy;
- Section 22: participation by persons who counsel the commission of an offence;
- Section 23: accessory after the fact;
- Section 24: attempt.

Among the offences against public order in Part II, we would note:

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[19] Ramsey CLARK, *Crimes in America*, Simon & Schuster, 1970. Ramsey Clark was formerly the Attorney General of the United States.

[20] CANADIAN BAR ASSOCIATION, *Submission on Bill C-36 – Anti-terrorism Act*, Author, Ottawa, October 2001.

- Sections 74 and 75: piratical acts;
- Section 76: hijacking;
- Section 77: endangering safety of aircraft or airport;
- Section 78: taking an offensive weapon or explosive substance on board an aircraft;
- Section 78.1: various similar offences committed on board a ship or fixed platform;
- Sections 79 to 82.1: offences relating to the handling of dangerous substances;

and offences relating to firearms and other weapons, set out in Part III:

- Section 430(2): mischief that causes actual danger to people's lives, subject to life imprisonment;
- Section 431: attack on official premises, private accommodation or means of transport of an internationally protected person, subject to imprisonment for 14 years;
- Section 433 *et seq.*: arson and other fires;
- Section 495: the power of peace officers to arrest without warrant, where there are reasonable grounds to believe that the accused has committed or is about to commit an offence.

The *Criminal Code* already contains a solid arsenal of provisions for combating terrorism. The provisions of the law that create new offences do nothing to guarantee that Canadian society will be better protected. Punishment for violent and dangerous behaviour has been codified in federal statutes for a long time. As we shall see in the next part, the exceptional provisions in the *Anti-terrorism Act* are a permanent temptation to law enforcement agencies and governments to shore up wobbly or badly presented evidence by evading the traditional rules of procedure and evidence, though they are the result of centuries-old wisdom.

Part 4 A dangerous law …
that is contrary to the very foundations of democracy

Our laws must provide moral leadership and cannot therefore be themselves immoral.

Ramsey Clark[21]

More than three years after it was enacted, the *Anti-terrorism Act,* which the Parliament of Canada enacted in haste and without an adequate consideration of its far-reaching repercussions, still looks just as dangerous. In the name of fighting terrorism, that Act significantly negates or weakens a number of the precise rights and liberties that it purports to protect. It puts an end to the fundamental right to a public trial, when the case involves an offence in the nature of a terrorist act, and it instead sets up a scheme of secret trials; it grants broad powers over public information to a handful of federal ministers who are accountable to no one; it gives police and intelligence services vast powers to investigate and make preventive arrests; mere suspicion is now enough to trigger and justify police action; and so on.

The new Act is in direct contradiction with a number of rights that are part of what each of us calls "freedom", and that are all among the foundations of a free and democratic society. We would like to make mention of certain of those rights that we identified earlier, which are found in the Canadian Charter or the *International Covenant on Civil and Political Rights*:

- the presumption of innocence;
- the right to privacy and to be secure against searches and any kind of invasion of privacy;
- the right not to be stopped, questioned, arrested or detained based on mere suspicion or on racial, religious or ethnic profiling;
- the right of every individual to a public, just and fair trial, and the right to appeal;
- the right to make full answer and defence;
- the right to be secure against arbitrary imprisonment and torture;
- the right to bail while awaiting trial, and to have the validity of detention reviewed by way of *habeas corpus*;
- the right of asylum;
- the right to information and to freedom of the press;
- freedom of expression, including the right to demonstrate publicly and collectively.

Below, we list a number of aspects of the *Anti-terrorism Act* that seemed particularly worrisome to us.

Introduction of procedures and trials involving secrecy

The *Anti-terrorism Act* introduced new "procedural" rules into the *Criminal Code* and the *Evidence Act*, rules that negate rights as fundamental as the right to a public trial and the right to

[21] *Ibid.*

make full answer and defence, as well as the right to be presumed innocent. That procedure exists alongside the rules that we have had to date, and it will apply to any offence relating to terrorism, "terrorism" being interpreted in a very broad sense (see below). People will thus have a right to a secret trial, in which the accused will have no access, or only partial access, to the details of the charges against them or of the evidence, and in which the actors – judges, lawyers and witnesses – and what they say may remain unknown to the public; and also trials with no real right of appeal (*Anti-terrorism Act*, Part 3).

The issuance of "security certificates", which have been issued at present against a number of immigrants who had been landed under the *Immigration and Refugee Protection Act*, and about which the general public has heard on several occasions in the last few months, clearly illustrates the kind of justice system that was created in Canada, a few years ago, for non-citizen residents. It is that unfair justice system that the *Anti-terrorism Act* seeks to extend to all citizens. We thus find ourselves with secret judicial proceedings and unable to make full answer and defence. This experience is absolutely dumbfounding both for the "accused" and for the lawyers trying to defend them. These proceedings scandalize Canadians, who are discovering this new way of doing justice.

It is this type of "justice", characterized by secrecy, with nothing that can guarantee fairness, to which people *suspected* of a terrorist offence will now be subject. The case of Adil Charkaoui, which we will address at the end of this part, clearly illustrates the danger we are speaking of here.

A definition of terrorist activity that is open to abusive applications

Even after a number of efforts to tighten the definition at the time the Act was passed, the crime of "terrorism" is defined so vaguely and so broadly that it can be applied to acts that have nothing to do with what everybody means by "terrorism" – primarily, *violent acts against civilians*. They may be acts that endanger not only individuals or groups, but also "national security", "national defence", foreign relations, and "economic security" (and also, the security of companies, since they are "persons" within the meaning of Canadian law). And legal practitioners agree that it can cover political dissent.[22]

It also introduces a "political" dimension into the criminal law, in that the vague definition of the offence relies on the motives (political, religious or ideological) of the individual or group in question, and on their objectives, rather than on a clear definition of acts that are subject to

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[22] The High Level Panel on Threats, Challenges and Change proposed a definition of terrorism to the Secretary General of the United Nations, Kofi Annan, that Mr. Annan adopted in the statement he made in Madrid on March 10, 2005, to the International Summit on Democracy, Terrorism. He said:

> The Panel calls for a definition of terrorism which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act. I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it.

The detailed proposals may be read in *A More Secure World: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges and Change, submitted to the General Assembly of the United Nations on December 2, 2004, document A/59/565

punishment. It represents a danger to democracy, by establishing a connection between the realm of ideas and political action and the realm of criminal activity. We hardly need point out that this is a characteristic of repressive governments, under which individuals are prosecuted precisely because they seek, through ideas and actions, to "compel [a government] to do or refrain from doing any act".[23]

Broad powers of investigation and arrest

The *Anti-terrorism Act* gives intelligence and police services broad powers of investigation and preventative arrest, which can be used on the basis of mere suspicion (no longer on the basis of "reasonable grounds"), without the need to obtain warrants for the express purpose. The Act is not so exacting when it comes to the nature of the accountability, to Parliament and the public, that it imposes for the easily arbitrary use of those broad powers.

Intelligence services, the Communications Security Establishment (CSE) in particular, see the *Anti-terrorism Act* as their mandate for the surveillance of communications, a mandate that is broader than at present, and unburdened by a number of the constraints to which it had been subject until now. When we know that the government wants still more, that is, that it wants the surveillance of all communications and all public and private computerized databanks, relating to every member of the public, to be authorized "Lawful Access" project), there is reason to be worried, and to be afraid that in short order, all of Canadian society will become subject to police surveillance at every moment.

Arbitrary control of information and secrecy, in the hands of a few people

Under the *Anti-terrorism Act*, the government acquires the power to establish a list of entities and individuals who are considered to be "terrorists", based on secret information that the groups and individuals in question may not know, and so in respect of which they have no right of defence, or real right of appeal.

The federal government, and more specifically a few ministers, now have enormous discretion in relation to any action or any information that is connected with terrorism, however tenuously – a power for which they do not have to answer either to Parliament or to the public. They have become the sole judges of what, in this respect, will be brought to public attention because it is in the public interest or, conversely, kept secret in the name of vaguely defined criteria such as "public security", "national defence" or the protection of "international relations". That control may now be exercised over two realms: the administration of justice, government administrative activities in general, commissions of inquiry, and so on, and all debates that may occur in Parliament, in the Senate or even in the provincial legislative assemblies.

The chaotic and entirely surprising conduct of the Commission of Inquiry into the Maher Arar case, which is public but is in the process of transforming itself into a secret investigation, can be taken as a measure of the disturbing extent of the new powers that have been handed to the government to control the democratic dissemination of information.[24]

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[23] Definition proposed by the *Anti-terrorism Act*.

[24] Although public hearings of the Arar inquiry resumed temporarily in May 2005, a significant portion of the evidence remains secret, inaccessible to the public and to Maher Arar himself.

We will refer to only three examples of the significant new powers that the anti-terrorism measures give to the executive branch, at the expense of the legislative branch, and even the judiciary:

- The power of the Attorney General to withhold evidence notwithstanding a judgement of the Supreme Court ordering that it be disclosed (s. 38.13(5) of the *Evidence Act* as amended by the *Anti-terrorism Act*);

- The power of a Minister to sign a security certificate, with the power of the Federal Court limited to determining whether the decision is "reasonable", and in respect of which the Security Intelligence Review Committee may conduct no review;

- The power of the Attorney General to require that the courts participate in police investigations (new s. 83.28 of the *Criminal Code*).

As set out in the *International Covenant on Civil and Political Rights* (Article 4), it is essential that the *Anti-terrorism Act*, and other laws and measures of the same type, be only exceptional measures, and that they be perceived as such by the public and its elected representatives, to avoid them becoming the norm in a society, which would then no longer claim to be democratic. On this point, the Ligue des droits et libertés firmly shares the concern expressed by the Canadian Association of University Teachers (CAUT) and the Canadian Bar Association regarding the risk that measures that infringe rights and liberties may grow to be commonplace.

No requirement for rigorous accountability and dangerous incorporation of the *Anti-terrorism Act* into the *Criminal Code*

The Act does not contain a requirement for rigorous accountability, to Parliament or to the public, for the use of powers that those who hold them should regard as exceptional and temporary – and yet an obligation of that nature is self-evidently necessary in a democratic society that chooses not to place naïve trust in its leaders and their agents, and seeks to protect rights and freedoms.

The *Anti-terrorism Act* is so constructed that the Attorney General and the ministers avoid any accountability for their exercise of the broad powers to control information and use secrecy measures, in the name of "national security". The Attorney General must submit an annual report to Parliament relating to only two aspects of the Act: preventive arrests and hearings to gather information (s. 83.31 Cr. C.). And there again, the Act authorizes the Attorney General to say nothing in that report that would be contrary to the public interest, again in the opinion of the Attorney General (s. 83.31(4) Cr. C.).

Four illustrations of the futility and danger of using the exceptional procedures in the *Anti-terrorism Act*

The use of the exceptional measures in the Air India, Adil Charkaoui, Maher Arar and Juliet O'Neill cases ended up being a demonstration of the extreme danger in not relying on the wisdom expressed in the traditional procedural and evidentiary guarantees.

Air India

The tragedy of the Air India case resulted in one of the longest trials ever held in Canada, ending with the acquittal of the accused, primarily because of the poor quality of the evidence. It must

be noted that at the time when the events occurred, CSIS destroyed the compromising recordings, because it did not have enough translators.

This is a case in which government representatives used the provisions of the *Anti-terrorism Act* to evade the usual rules of fair trials, in order to make up for the weaknesses in the testimony, the reliability of which was seen to be problematic, and thus to try to make up for the negligence of the law enforcement agencies that had destroyed evidence.

The attack on the Air India flight was the basis for the first ruling, and to date the only ruling, of the Supreme Court concerning a provision of the *Anti-terrorism Act*: the provision relating to judicial evidence-gathering. In a judgment divided 4 to 3, the Supreme Court deferred to the executive and legislative branches to determine the reasonableness of the violations of the rights protected by the Canadian Charter.[25]

Adil Charkaoui

Adil Charkaoui is the subject of a security certificate issued under the *Immigration and Refugee Protection Act:* it is contended that he represents a danger to national security because he is a member of a terrorist "sleeper cell". Paradoxically, a judge of the Federal Court released him under supervision pending the hearing of the proceeding, on the ground that the time that had passed since the events relied on nullified the apprehended danger.

As in the Air India case, the intelligence agencies have destroyed evidence. In addition, by the Attorney General's representative's own admission, this is common practice. But what, then, is the ground for issuing a security certificate against this individual? Why does the government not have him tried, if he is indeed a member of a terrorist group?

These are only two of the many questions that disclose the abuses that are prompted by the security certificate process. Does the negligent failure of law enforcement agencies to preserve evidence appropriately, or the risk of an acquittal, mean that Adil Charkaoui should not be able to defend himself in a just and fair trial? Are the provisions of the *Anti-terrorism Act* concerning the secrecy of evidence and concerning security certificates ultimately no more than a way to make up for wobbly evidence or debatable police practices?

Maher Arar and Juliet O'Neill

Two other cases must be added to those: the cases of Maher Arar and Juliet O'Neill, the *Ottawa Citizen* reporter whose home and office were searched because of critical articles she had written about the role alleged to have been played by the Royal Canadian Mounted Police in the deportation of Maher Arar to Syria by the United States government.

Rather than being genuinely used to track down terrorism, the *Anti-terrorism Act*, and "security" measures, have ultimately served no purpose but to justify sending someone to be tortured and efforts to obstruct a public inquiry, in the case of Maher Arar, and denying freedom of the press and the right to privacy, in the case of Juliet O'Neill.

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[25] *Application under s. 83.28 of the* Criminal Code *(Re)*, [2004] 2 S.C.R. 248, *supra*, p. 11.

As a last point, the *Anti-terrorism Act* is dangerous because it has been incorporated into the *Criminal Code*, many sections of which have thereby been amended, and the intent has been that it should prevail over laws such as the *Privacy Act*,[26] the *Personal Information Protection and Electronic Documents Act*[27] and the *Access to Information Act*.[28] There is therefore every reason to believe that what has been portrayed as exceptional will quickly become the norm.[29]

[26] R.S.C. 1985, c. P-21.

[27] S.C. 2000, c. 5.

[28] R.S.C. 1985, c. A-1.

[29] As shown in the brief submitted by the Association of University Teachers, pp. 47 *et seq*.

CONCLUSION

Upholding human rights
is not merely compatible
with successful counter-terrorism strategy.
It is an essential element.

Kofi Annan[30]

The *Anti-terrorism Act* is, first and foremost, a "political" law – political both in the motives behind its enactment and in its content. It was enacted to reassure the Canadian public in response to the fright caused by the attacks of September 11, 2001, and to persuade the public that the government had matters firmly in hand for guaranteeing its security.[31] But most importantly, it is part of a collection of measures[32] taken by Canada to respond to the demands from our American neighbour concerning the security of its northern border, and to maintain the flow of cross-border trade.

The *Anti-terrorism Act* is only one piece, although undoubtedly a central one, in a series of measures that are constantly multiplying, in the stated aim of combating terrorism. When we consider that backdrop, we can then more accurately assess all of the impacts that the *Anti-terrorism Act* has had on rights and on the very fabric of Canadian democracy.

The *Anti-terrorism Act* is dangerous because it was decided to incorporate it into the *Criminal Code* and other Canadian legislation, instead of enacting a separate statute, whose coverage would be limited to very specific situations. Once incorporated into the body of Canadian legislation, it amended many fundamental sections of the *Criminal Code* and of other equally important statutes, such as the *Privacy Act* and the *Access to Information Act*. A huge foreign body, with infinite ramifications, has been introduced into Canadian society by the *Anti-terrorism Act*. That Act also cannot help but make profound changes to relations between the government and its agents and us, the Canadian public.

We have no choice: this law will act like a cancer in all of our laws if it is not repealed. If it stays, we will have good reason to be afraid that what is still considered to be exceptional, and even an aberration, in contradiction with many of our most precious rights, will gradually and quickly become the "normal" way for our society to do things. But what we will then be is a society that has adopted the structures of a police state. We consider the analysis in this respect submitted

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[30] Address by the Secretary General of the United Nations delivered in Madrid on March 10, 2005, setting out the global strategy for fighting terrorism.

[31] Kent ROACH, *September 11: Consequences for Canada*, McGill Queens University Press, Montréal-Kingston, 2003.

[32] *Ibid.*

in the brief of the Canadian Association of University Teachers regarding the risk of such a fatal transformation, one that would be a tragedy for our democracy, to be wholly correct.[33]

In the submission of the Ligue des droits et libertés, the security agenda, the rise of suspicion and fear on the part of individuals, and the impression people have that law enforcement agencies must absolutely have access to every possible method and that the executive branch must be able to act independently of Parliament and compel the courts to conduct police investigations, are just as much of a threat to rights and freedoms as the legislation or security measures themselves.

This change in people's mindset denigrates the importance of rights and freedoms, and amounts to a frontal attack on democracy itself, by making people believe that promoting and respecting fundamental rights and freedoms are a roadblock on the path to security and protection against the threat of terrorism.

ACCORDINGLY, because, as we have seen, this law is misleading, useless and dangerous, in that it very seriously endangers our democratic way of life,

we ask:

THAT the *Anti-terrorism Act* be repealed, because it is useless in the fight against terrorism, having regard to the tools that are already available to the government and to law enforcement agencies. We ask that it be repealed because this law constitutes a significant limitation on the exercise of a number of fundamental freedoms, and because it seriously undermines Canada's democratic way of life.

THAT there be rigorous oversight of the manner in which the powers of surveillance, enforcement and investigation that re given to intelligence and police services, and also the powers of ministers, are exercised.

THAT the triggering factor for enforcement action by the police and intelligence officers be, as it was before, "reasonable grounds to believe" that a crime has been committed, and not mere suspicion of "terrorist" activity;

THAT police and intelligence officers take enforcement action only pursuant to specific warrants;

THAT reports on the activities of police and intelligence services be prepared by independent commissioners and submitted to Parliament regularly;

THAT penalties be provided for abuses committed by the officers responsible for enforcing the Act; and

THAT victims of abuses have a remedy in damages.

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[33] "Regarding the Review of the Anti-terrorist Act", Ottawa, February 2005, pp. 47 *et seq*.

Ligue des droits et libertés
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