ANTI-TERRORISM IN CANADA: SELECT IMPACTS TO CIVIL LIBERTIES AND HUMAN SECURITY

By

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We accept this thesis as conforming
to the required standard.

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ABSTRACT

In 2001, the Canadian government faced enormous public and international pressure to create strict laws to address concerns about terrorism. Canada hastily enacted the *Anti-Terrorism Act* ("*ATA*"), a law that deeply impacts Canadian human rights and civil liberties. This paper contends that human security is a broad, over-arching policy goal. Civil liberties and human security are essential to the survival and sovereignty of the modern nation state as sources of insecurity become increasingly interconnected across international boundaries. This paper addresses select impacts of anti-terrorism laws and policies since 2001. Specifically, the paper discusses changes to the *Canada Evidence Act* (s.38); the establishment of INSET, a secretive, cross-border anti-terrorism police force; the draconian 'listing' provisions within the *ATA*; and also changes to the *Security of Information Act*. Since 2001, in the name of preventing terrorism and promoting human security, Canada has systematically and secretively undermined core democratic national values such as human rights, civil liberties and national sovereignty.

ACRONYMS

ACLU	American Civil Liberties Union
AG	Attorney General of Canada
ALF	Animal Liberation Front
Amnesty	Amnesty International Canada
Arar Commission	Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar
ATA	Anti-Terrorism Act, Canada 2001
BC	Province of British Columbia
BCCLA	British Columbia Civil Liberties Association
BCMA	British Columbia Muslim Association
CBA	Canadian Bar Association
CCLA	Canadian Civil Liberties Association
CCC	Criminal Code of Canada
CCP-NPA	Communist Party of the Philippines and the New People's Army
CDA	Canada
$CDN	Canadian Dollars
CEA	Canada Evidence Act
CIDA	Canadian International Development Agency
Charter	Canadian Charter of Rights and Freedoms
Crown	Attorney General and Government of Canada
CSE	Communication Security Establishment
CSIS	Canadian Security and Intelligence Service
DND	Department of National Defence, Canada
FC	Federal Court of Canada
FCA	Federal Court of Appeal of Canada
FBI	Federal Bureau of Investigation, USA
Gazette	Canada Gazette
GC	Government of Canada
GinC	Governor in Council
HIG	Hezb-e Islami Gulbuddin
ICCPR	International Covenant on Civil and Political Rights
ICLMG	International Civil Liberties Monitoring Group
INGO	International Non-Governmental Organization
INSET	Integrated National Security Emergency Teams
INTERPOL	International Criminal Police Organization
Kach	Kahane Chai
MAHSP	Master of Arts in Human Security and Peacebuilding
MEK	Mujahedin-e Khalq
MFA	Minister of Foreign Affairs, Canada
MLACMA	Mutual Legal Assistance in Criminal Matters Act
MND	Minister of National Defence, Canada
MPSEP	Ministry of Public Safety and Emergency Preparedness
NCR	National Capital Region
NDA	National Defence Act
NGO	Non-governmental Organization
OCIPC	Office of the Canadian Information and Privacy Commissioner
OECD	Organization for Economic Security and Cooperation in Europe

OFAC	Office of Foreign Assets Control, USA
OSA	Canadian Official Secrets Act
R&D	Rights and Democracy, NGO Montreal
RCMP	Royal Canadian Mounted Police
RRU	Royal Roads University
SCC	Supreme Court of Canada
SDNBPL	Specially Designated Nationals and Blocked Persons List
SIA	Security of Information Act, 2001
UBC	University of British Columbia
UK	United Kingdom
UN	United Nations
UNSTR	United Nations Suppression of Terrorism Regulations
USA	United States of America
$USD	American Dollars
USDT	United States Department of the Treasury
VPD	Vancouver Police Department
WCWS	West Coast Warrior Society

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"It is my responsibility to ensure that the collective security is not called into question or undermined by any process"

– Hon. Anne McLennan, Minister of Public Safety and Emergency Preparedness[1]

"...[asking how much of our freedoms we are willing to give up] inadvertently invites an inquiry into the freedoms to be surrendered, as distinct from the rights to be secured; a discourse on the dangers to our democratic way of life from counter-terrorism law rather than on the safeguarding of democracy itself from terrorist threat..."

-Hon. Irwin Cottler, Minister of Justice and Attorney General of Canada[2]

"The word warrior has been criminalized, but groups like the warrior society have always been a part of indigenous nations. What you see with warrior societies are men that are dedicated to the idea of standing up for their rights, protecting the land, protecting their nation and their people. There is no criminal aspect to that."

- James Ward, West Coast Warrior Society[3]

"Why do we have this reckless and very cavalier organization of secret police operating behind conspicuous lines here? We really have a fear that they're able to do this at any point to any one of our Indian people."

-David Dennis speaking to media in Vancouver June 29, 2005

[1] CBC News Jan 27, 2005 p1-2.
[2] Cottler p1-5.
[3] Miller p1-3.

INTRODUCTION

In the years following the seminal historical events of late 2001, the Government of Canada has imposed upon Canadians and those who enter our borders, laws consistent with international and continental Anti-Terrorism measures.[4] However, these measures and the new legal framework created to support them are not consistent with Canadian values of protecting civil liberties and promoting human security at home and abroad. Changes include but are not limited to, increased policing and intelligence forces with the establishment of special teams such as INSET, changes to laws and regulations to give more power and a cloak of secrecy to government agents, the creation of laws to muzzle those who would speak out against these changes including judges, and the establishment of draconian lists in order to restrict the movements of citizens across borders. This paper presents only certain select topics from what is an exhaustive list of all the dramatic and far-reaching changes that have taken place in Canada's legal, security, and intelligence regimes since 2001. This essay will explore only a few of these areas in some depth. It is the sincere hope of the author that this essay will encourage you, the reader, to further inform yourself as political and social events unfold over the coming years and our collective civil liberties are undoubtedly further undermined in the name of "terror."

If Canada is to maintain a secure future for its citizens, it is essential that our liberties and essential freedoms be not only protected but also promoted. Our security comes not from higher fences, bigger prisons, more secretive tribunals or unexplained arrests – rather it comes from the confidence of a well-educated, brave, honourable, caring community of citizens each concerned with the welfare of the others. These social characteristics essential

[4] The author would like to note that this paper is based on research conducted prior to December 31st, 2005.

to a functioning and healthy democracy are considerably undermined by the recent developments in anti-terrorism response by the Canadian government, a response which has been considerably based on the fascist legal reform taking place south of the border in the United States of America, exemplified most glaringly by the *Patriot Act*. Groups such as the American Civil Liberties Union have begun to inform and address the dramatic change in public life ushered in by these reforms in the US, and challenges are ongoing at every level of the court system in the US. However, here in Canada less attention seems to be paid to what amount to strikingly similar laws, policies and institutions, albeit our own homegrown and uniquely Canadian versions. Secrecy provisions are an essential component of all of these reforms towards increased state control and arbitrary, unmonitored policing and intelligence power. In the flurry of fear and panic that followed the events of 2001, security and intelligence communities around the world, in particular those in the US and the UK, but also in Canada as well, were able to gain overwhelming concessions and remove restrictions, which had long held. What we see now is a police and intelligence apparatus which, in the wrong hands or perhaps even in the right ones, has all of the necessary legal and political tools at the ready to dramatically transform Canadian democracy.

The definition of terrorism and of national security is an essential element of this discussion, upon which much of the legal implications of political decisions rest. The definition of "terrorist activity" in the *Criminal Code of Canada* as amended by the *Anti-Terrorism Act* is as an action that takes place either within or outside of Canada that: is an offence under one of the UN anti-terrorism conventions and protocols; or is taken for political, religious or ideological purposes and intimidates the public concerning its security, or compels a government to do something, by intentionally killing, seriously harming or endangering a

person, causing substantial property damage that is likely to seriously harm people or by seriously interfering with or disrupting an essential service, facility or system. [5]

Though alarming on several levels, the inclusion of a purposive clause is of paramount concern in this definition. It is not to say that the motivations of those aiming to commit crimes of terrorism and terrorist acts should not be of concern to the Canadian public or to the Canadian police and intelligence forces, but rather that the inclusion of this aspect automatically forces the issue into an investigation by those same organizations when it may not be at issue. It is like mandating the use of political, religious and ideological profiling by the justice system in general – which in today's geopolitical climate often amounts to racial profiling. By including this section in the definition, police and intelligence forces become bound by law and policy to investigate, prepare argument and ultimately prove in court issues relating to political, ideological and religious motivation for terrorism.

This is problematic on several levels. Firstly, this is not an exhaustive nor is it an inclusive list of the various exhibited motivations for terrorism in our times. Secondly, it drives any terrorism investigation towards profiling and political repression of activist groups, as explored in detail later in this essay. And finally, it creates narrow definition of terrorism that is applicable only to our current political conception of the crime, i.e. it is insufficiently acontextual as an important legal definition. The Government of Canada, as represented by the Ministry of Justice, states the following:

> "Under this definition, there is an interpretive clause that states for greater clarity that an expression of political, religious or ideological beliefs alone is

[5] Criminal Code of Canada, Definitions.

> not a "terrorist activity," unless it is part of a larger conduct that meets all of the requirements of the definition of "terrorist activity." (i.e., conduct that is committed for a political, religious or ideological purpose, is intended to intimidate the public or compel a government, and intentionally causes death or serious physical harm to people.)"[6]

This statement ignores the nature of a living criminal or intelligence investigation and the policy implications of the text of a legal definition mandating the scope of police and security actions. The United Nations has been unable to conclusively settle on a single definition for the crime of "terrorism." It has been argued at the UN that a working definition must not include this type of motivation clause. The intentional omission of any mention of motivation is a view forged by experience on the ground in the decades-long terrorist conflicts where the UN has played some role such as Palestine and Gaza, Northern Ireland, Basque Spain and Sri Lanka.

Various other definitions have been considered over the years; such as the *League of Nations Convention* definition of 1937 "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public". Or the UN resolution of 1999, that although not approved by all member states, still provides a guideline for understanding this topic.

> "1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed; 2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations

[6] Canada Anti-Terrorism Act.

> of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them". [7]

By any definition, it remains doubtless that terrorism occupies a key political role in our times. It is clearly a threat to the security of states and the lives of individual citizens inhabiting states. However, it proves more menacing as an acceptable motivator for governments to transform our political environment by eradicating rights and civil liberties gained through centuries of civil action. It is used as lever by governments to justify deployment of military and quasi-military forces both at home and abroad. It also threatens our civic well-being as it is used by police and intelligence security forces as justification to arrest, seize and detain citizens without adequate monitoring or civilian oversight. Necessary supervision by elected officials and the general public is not possible under the concealment of anti-terrorism law. And in this tainted civic environment, we citizens all suffer.

This paper will outline several key areas of the impacts of anti-terrorism law on Canadian civil life and civil liberties. A compromise has been reached between the necessities of detail and breadth, which it is hoped will not appear as jarring to the reader. Such has been the vast impact on individuals of these changes, and so complex the analysis of the legal issues at stake that the form of this essay must follow as the ideas lead.

A review of the *ATA* itself in the most general terms is followed by a highly detailed legal analysis of but one of the series of amendments to a key Act of Parliament, in this case the *Canada Evidence Act*. It is important to note that several other acts were also extensively amended by the *ATA*, the *Criminal Code of Canada* (discussed briefly at various points in this

paper), the *Official Secrets Act* (covered towards the end of this essay) as well as the *Proceeds of Crime (Money Laundering) Act* and others not discussed here for reasons of brevity. Access to information is also a key concern when doing any research or writing regarding the anti-terrorism regime in Canada and around the world. Even inquiries into these areas of the law raise suspicion and secrecy requirements are so strict in certain conditions even a Judge seized of a matter under the new *CEA* for example may not disclose she is seized as such even to another court in complete secrecy or else be held liable under the *CEA ATA* amendments. One can imagine how this high degree of secrecy can impact independent research and review of law and policy. For this reason, the research methodology chosen for this paper has been to rely on publicly available materials and primary sources such as legal documents where available, eschewing direct interviews with subjects in favour of a broad policy-focused approach with one exception. Impacts on individual citizens come to the fore in the part of this essay dealing with the actions of INSET policing teams in British Columbia. This section was deliberately researched using only secondary and publicly available sources with no direct interviews with those subjected to unlawful search or seizure.

There is a critical intersect between the actions of police and intelligence forces and the powers provided to them by us, the citizens of a democratic state. This essay means to illustrate a broad, often unseen trend towards the erosion of Canadian civil liberties following the *Anti-terrorism Act* 2001 both in law and in deed. Two main examples are used to this end, firstly, the legal change is illustrated by the *Canada Evidence Act* s.38 amendments, and secondly the change to the rights of accused persons 'on the ground' is illustrated with the example of INSET cross-border policing teams and their recent problematic pattern of

[7] UN General Assembly Resolution 51/210.

actions in British Columbia. Finally, it is necessary to include some additional information on other laws and practices amended by the *ATA* such as listing provisions and the former *Official Secrets Act*. It should be noted that there is one major gap in this essay's survey of *ATA* impacts to civil liberties namely the *Immigration and Refugee Protection Act* security certificates. This paper deals with only a select group of topics in this area, only a few of myriad other impacts on Canadian civil liberties and human security.

Canada is admired throughout the world as a bastion of liberal thought, good government and a tolerant, nay celebratory, multicultural society. However, in recent years Canadian governments, security agencies and public officials have succumbed to enormous pressure from our militaristic southern neighbour to increase what are often euphemized as "security measures" in the interests of our collective continental security. This trend towards the erosion of civil liberties and national sovereignty appears to show no signs of slowing.

ANTI-TERRORISM ACT 2001

Following the events of September 2001 in the United States and in the context of social, economic and political panic that ensued, Canada enacted the *Anti-terrorism Act* (*ATA*) with an aim to provide increased powers to law enforcement and human security forces in the counter-terrorism effort.[8] The *ATA* was an omnibus piece of legislation containing major enactments or amendments to a number of federal statutes, including the *Canada Evidence Act* (*CEA*) and several others.[9] Broadly criticized from the outset by civil society groups and the Bar, the *ATA* includes a provision for review by committee in both houses within three years of enactment yet the modifications to the *Canada Evidence Act* have no sunset clause[10]. That legislative review is ongoing in both houses of parliament at the time of writing.[11]

Human security, at its core, deals with the creation and maintenance of safe, secure human societies. Differences arise, often political or ethical though also strategic, in defining what characteristics of social order lead to the greatest security. This paper presupposes that the values and legal norms of basic human rights, as generally recognized internationally, are considered essential to the creation and propagation of human security at its very core. These basic human rights at their most broad are considered to include civil liberties such as

[8] Anti-terrorism Act, S.C. 2001.
[9] *Canada Evidence Act*, R.S.C., 1985, c. C-5, s.38 (as am. by Anti-terrorism Act, S.C. 2001). Other acts amended include: the *Criminal Code*, the *Security of Information Act* (amending and renaming the *Official Secrets Act*); the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, the *Charities Registration (Security Information) Act*, and the *National Defence Act* (setting out for the first time in statute the mandate of the Communications Security Establishment (CSE)).
[10] Armstrong, pp73-78.
[11] June 24, 2005. Legislative review was fixed by section 145 of the ATA. The ATA received Royal Assent on December 18, 2001. Section 145 reads as follows: (1) "Within three years after this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose." (2) "The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as may be authorized by the Senate, the

freedom of expression, freedom of association and assembly, freedom of movement within national borders, as well as protections against unlawful arrest, search and detention such as the writ of habeas corpus and related national criminal law provisions.

CANADA EVIDENCE ACT s.38

Amendments to the *CEA* s.38 brought about through the *ATA* raise a panacea of problematic incursions into the civil liberties of Canadians. The amendments violate the right to disclosure and create a high risk of unfair trial. They also raise the risk that an unfair trial could take place but remain secret. Kathy Grant argues that the terms set out for potential disclosure orders issued by Attorney General following a judge's decision to authorize disclosure are overbroad. Grant also argues that, in general, the provisions in s.38 are unnecessarily vague, creating increased risk of civil liberties violations.[12] In *Canada (Attorney General) v. Ribic* (*Ribic*) the Federal Court of Appeal has fleshed out the analytical steps for applications for disclosure under CEA s.38.04 with a clear preference for "balancing" rather than "bridging" competing interests of civil liberties and national security. [13] This idea of "bridging as opposed to "balancing" is also recommended by Jean Louis Roy with the NGO *Rights and Democracy* in his submissions to the Special Senate Committee on the *Anti-terrorism Act* in May 2005.[14]

In the following section is an examination of the amendments to s.38 of the *CEA* by the *ATA*. Particular attention will be paid to areas where civil liberties are at risk due to these

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House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends."

[12] Grant, p***.

[13] *Canada (Attorney General) v. Ribic (F.C.A.), [2005].*

[14] Proceedings of the Special Senate Committee on the Anti-terrorism Act.

amendments, in areas such as confidentiality of procedures and reversal of the assumption of disclosure. In addition, some discussion of *Charter of Rights and Freedoms* (*Charter*) issues raised by the *CEA* s.38 amendments is included.

Definitions

In particular, two of the definitions in s.38 *CEA* contribute to the adverse effect on civil liberties due to the *ATA* amendments. These are "*potentially injurious information*" (Fr. « *renseignements potentiellement préjudiciables* ») and "*sensitive information*" (Fr. « *renseignements sensibles* »).[15] Potentially injurious information means "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security". Sensitive information is similarly defined as "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard".[16] These definitions are criticized by Grant as being both overbroad and vague.

[15] *CEA* s.38. Definitions: "*potentially injurious information*" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. "*sensitive information*" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard. R.S., 1985, c. C-5, s. 38; 2001, c. 41, ss. 43, 141.

[16] *CEA* R.S., 1985, c. C-5, s.38; 2001, c.41, ss.43, 14.

Notice requirements

Section 38.01 CEA defines notice requirements for parties who may disclose or be aware of the potential for disclosure of potentially injurious information or sensitive information under the Act.

> s.38.01(1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

There is a requirement that the Attorney General be notified as soon as possible of the possibility of disclosure by a participant of any potentially injurious or sensitive information under s.38.01 (1) which that participant may be required to disclose, expect to disclose or cause disclosure of. Notice must contain information regarding the nature, date and place of proceeding where a participant anticipates disclosure to occur. The requirement for notice to the Attorney General by a participant in a proceeding of potential disclosure is raised upon belief by that participant that the information is sensitive information or potentially injurious information as defined in the Act s.38. Section 38.01(2) provides for a requirement to notify the Attorney General of imminent potential disclosure of sensitive information by any participant who believes such information is about to be disclosed, regardless of whether notice has been given under s.38.01(1).

> s.38.01(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the

> matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

This means that if an accused wishes to disclose information which may aid in their defence but would also qualify as potentially injurious or sensitive information then notice to the Attorney General as well as the person presiding over the proceeding is required. The person presiding is then charged with the task of preventing disclosure. This section creates unacceptable barriers to a fair defence by the accused. Sections 38.01(3) and (4) provide for the extension of these notice requirements to officials, other than participants in the proceeding.

Section 38.01(6) and (7) set out certain exceptions to the general requirements for notice to the Attorney General. The relevant sections read as follows:

> s.38.01(6) This section does not apply when (a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding; (b) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16; (c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or (d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

There are also institutional exceptions provided for in s.38.01(7) and (8). Section s.38.01(8) in particular sets outs the power of the Governor in Council to add or delete any item from the schedule of exceptions. The relevant provisions read as follows:

> s. 38.01(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).
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> s. 38.01(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference. 2001, c.41, s. 43.

Prohibition of disclosure

Section 38.02(1) provides the general prohibition against both disclosure of information about which notice is given as well as the fact itself that notice has been given to the Attorney General under s.38.01 (1) to (4) or the AG and Minister of National Defence under s.38.01(5). This section is subject to the exceptions mentioned above in section 38.01(6). The prohibition against disclosing the fact that notice itself has been given applies to all parties involved, including the judge seized of a matter where disclosure under s.38 is at issue. This circumstance arose in the case *Ottawa Citizen*. The Federal Court was caused great consternation to find itself muzzled from even disclosing it was seized of a matter that had been, however erroneously, discussed in open court in front of the media during related proceedings under the *Criminal Code of Canada* at the Ontario Court of Justice. The section reads as follows:

> s.38.02(1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding (a) any information about which notice is given under any of subsections 38.01(1) to (4); (b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5); (c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or (d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

The entities listed in the schedule are described in greater detail in s.38.02(1.1). This section states that notice to disclose must be given to the Attorney General by an entity is listed in the schedule if they make a decision or order that might result in disclosure of sensitive or potentially injurious information. The entity is prohibited from disclosing or causing disclosure of the information until 10 days has elapsed after notice being given to the AG. The schedule lists both entities and specific purposes listed in relation to an entity.

Exceptions to section 38.02 are provided in s.38.02(2). If authorization to disclose is provided in writing by the Attorney General for Canada or if judicial authorization to disclose has been provided, then disclosure is not prohibited. Judicial authorization to disclose is defined as when a judge has authorized disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of a judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeals are available. Authorization to disclose, when provided in writing by the Attorney General of Canada, is specifically defined in subsection 38.02(2)(a) as being under section 38.031 or subsection 38.04(6).

In addition, this section of the *CEA* provides under subsection 38.03(2) that within 10 days of first receiving notice about information under any of subsections 38.01(1) to (4), the Attorney General of Canada shall notify in writing every person who provided notice about that information including his or her decision with respect to disclosure.

Military Proceedings

For military proceedings, the rules differ slightly and are provided in section 38.01(5), which provides that if a proceeding is taking place under the *National Defence Act* notice is required to both the Attorney General and the Minister of National Defence. In addition, military proceedings are provided for under s.38.03(2) which reads: "s.38.03(2) In the case of a proceeding under Part III of the *National Defence Act,* the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence."

Attorney General of Canada Authorization of Disclosure

Section 38.03(1) allows the Attorney General of Canada to authorize disclosure of all or part of the information and facts at issue at any time and subject to any conditions he or she considers appropriate. The relevant section reads as follows;

> s.38.03(1) the Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

At the Attorney General of Canada's discretion, a decision regarding disclosure must be sent to every party who provided notice within 10 days of the AG's first receiving notice. This is the point where the AG can provide authorization to disclose if he or she chooses to do so. The AG must provide notice of his or her decision regarding disclosure within a 10 day time frame under s.38.03(3).

Disclosure of Information

Information may be disclosed on the basis of a disclosure agreement as set out in section 38.031(1). If, within 10 days of receiving notice, the Attorney General chooses to authorize disclosure of some or all of the information at issue, there is the provision in this section to allow for a voluntary disclosure agreement between the person who wishes to disclose part or all of the facts and the Attorney General of Canada. This provision was used in *Ribic* following the decision by the Attorney General to authorize disclosure of certain aspects of the testimony evidence at issue in that case. Entering into an agreement under subsection 38.031(1) then raises a prohibition under s.38.031(2) against applications to the Federal Court under s.38.04(2)(c) with respect to the information about which notice was given. The relevant section reads as follows:

> s.38.031(1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) and (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

The main purpose of the s.38 amendments to the *CEA* is to limit access by accused persons and the public to disclosure of information that the Attorney General and Government of Canada may not wish to be revealed. This can be for a variety of reasons, though the public perception of the *ATA* is that it relates only to matters of terrorism and security – once the breadth of the definitions mentioned above is taken into account, the effective operation of s.38 is to create a dramatic change in the relationship between Crown and accused. By dramatically altering the disclosure rules from Crown to accused, the *ATA* changes make it easier for the Crown not to disclose under the guise of the potential for disclosure of information to injure international relations, national defence or national security, or because the government is taking measures to 'safeguard' information for those purposes. Since the mere interest of government in restricting access to information and a reasonable relevance to international relations, national security, or national defence is sufficient to justify non-disclosure, accused persons are left with little recourse with which to prepare an adequately fair defence.

Application for Disclosure

It is at the discretion of the Attorney General of Canada to apply to the Federal Court for an order with respect to disclosure of information about which notice was given under s.38.01(1) to (4). The AG can make this application at any time and in any circumstances pursuant to s.38.04(1). General applications to the Federal Court for disclosure of information about which notice was given under section 38.01(1) to (4) are provided for under section 38.04(2). The relevant section permitting applications for disclosure by various parties reads as follows:

> s.38.04(2) If with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under 38.031, authorizes the disclosure of only part of the information or disclosure subject to conditions,
>
> (a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;
> (b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and
> (c) a person who is not required to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to the Attorney General of Canada is required if a person applies for disclosure under any of the sections listed above in s.38.04(2) (a) to (c).[17] In addition, there is a confidentiality requirement for any applications under s.38.04. Subject to requirements under s.38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she "considers appropriate to protect the confidentiality of the application and the information to which it relates."[18] This provision provides extra discretion for the administrative protection of the security of court documents and records.

Statutory Procedure for Disclosure

In the *Canada Evidence Act*, parliament has laid out procedural steps in s.38.04(5) to be followed once a judge is seized of an application for disclosure under s.38.04(2) of

[17] *CEA* s.38.04(3).

information about which notice has been given under s.38.01(1) to (4). The text of the statute reads as follows:

> s.38.04(5) As soon as the Federal Court is seized of an application under this section, the judge
>
> (a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the National Defence Act, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of the persons who should be given notice of any hearing of the matter;
> (b) shall decide whether it is necessary to hold any hearing of the matter;
> (c) if he or she decides that a hearing should be held, shall (i) determine who should be given notice of the hearing, (ii) order the Attorney General of Canada to notify those persons, and (iii) determine the content and form of the notice; and
> (d) if he or she considers it appropriate in the circumstances may give any person the opportunity to make representations.

This procedure is followed in *Ribic* and fleshed out in greater detail in the reasons of that case, as described below.

Procedure

A proceeding under s.38 cannot go ahead until proceedings in lower courts on the same or substantially similar grounds are completed. In *Ottawa Citizen Group Inc. v. Canada (Attorney General) (Ottawa Citizen)*, Lutfy J. at the Federal Court level decided that judicial economy and the statutory scheme set out in s.38 *CEA* support the view that *Criminal Code* proceedings

[18] *CEA* s.38.04(4).

under s.487.3 must be completed before the court is able to heard applications under s.38 *CEA*.[19] If a parallel *Criminal Code* hearing is already underway on the issue of disclosure, then that proceeding must be completed prior to pursuing a separate Federal Court proceeding for non-disclosure using s.38. Lutfy, C.J. states "Judicial economy and the scheme envisaged in section 38 support the view that the *Criminal Code* proceeding should be completed before further pursuing this application".[20] He also states at para [33] of *Ottawa Citizen* that "notification under section 38.01, the Attorney General of Canada's authorization or notification under subsections 38.03(1) or (3) respectively and any application to this Court under section 38.04 could have followed the decision [...at the Ontario Court of Justice level...]". This would have been consistent with the procedure and process set out by the *Federal Court in Canada (Attorney General) v. Ribic*.[21]

In *Ottawa Citizen*, a journalist involved in the investigation of matters relating to Maher Arar made an application before the Ontario Court of Justice to terminate or vary a sealing order pursuant to section 487.3 of *the Criminal Code*. The order was made in respect of documents seized with seven different search warrants.

In the absence of the applicants and their counsel, the court questioned the Attorney General's representatives concerning the secret material. The court considered this to be an inquiry into the nature of the material in dispute, held only in order to allow the court to better understand the issues before both the Ontario Court of Justice and the Federal Court. Lutfy C.J. for the Federal Court in *Ottawa Citizen*, did not consider that this examination was done with the purpose of determining whether the disclosure of the information would be

[19] *Ottawa Citizen Group Inc. v. Canada (Attorney General)* [2004]F.C.J. 1303.
[20] *Ottawa Citizen* para [5].
[21] *Ottawa Citizen* para [33]. *Ribic*, 2002 FCT 839.

injurious to national security. The court's finding, on the basis of evidence presented during the sessions where the accused was not present, is inconsistent with the assertion that the hearing was held simply to assess the issues at hand in both courts. Based on that evidence, Lutfy C.J. found that a principal aspect of the national security interest relied upon by the Attorney General of Canada coincided substantially with a principal ground being raised under *Criminal Code* s.487.3 at the Ontario Court of Justice, namely causing injury or compromising the same investigation.

Lutfy C.J. in the *Ottawa Citizen* decisions, provides helpful criticism of s.38 and openly invites review by those charged with reviewing the *ATA* in Parliament. As part of the earlier of the two Federal Court Ottawa Citizen decisions in a section entitled "Post scriptum: too much secrecy???" Lutfy C.J. expresses the court's frustration with s. 38 and the layers of inconsistency in the administration of justice generated by the new requirements for extreme secrecy in matters of national security.[22] For 20 years, Lutfy C.J. has had experience with Federal Court hearings under section 38 that were held in private.[23] He appears to be especially frustrated with s.38.02(1)(c) *CEA* which specifies that no one is to disclose that a notice of application under s.38 has been filed with the Federal Court... including the Federal Court itself. In *Ottawa Citizen*, this reached ridiculous proportions where the Federal Court application under s.38 was discussed in open court but the Federal Court itself remained bound by the *CEA* not to acknowledge whether the application had even been made, "not even to a person who would have reasonably known this to be so from the public information in the Ontario Court of Justice."[24] He goes on to say "it is unlikely that

[22] *Ottawa Citizen* para [34-45].
[23] *Ottawa Citizen* para [34]. ref. S.C. 1980-81-82, c.111, s.4, (Schedule III).
[24] *Ottawa Citizen* para [37].

Parliament could have intended that the drafting of section 38 would result in such a consequence."[25]

Finally, a procedural provision exists in s.38.05 in regards to reports in relation to the proceedings. This section provides that a person presiding or designated to preside, or barring that, if no person is designated then a person who has the authority to designate a person to preside, may report to the judge on any matter relating to the proceeding which that person considers may be of assistance to the judge. That person presiding (or similarly situated) may provide the judge with a report within 10 days of receiving notice.[26]

Disclosure agreement

If an agreement is made between the Attorney General and the person who made the application for disclosure, then the procedure is considered terminated under section 38.04(6). Prior to termination of the proceeding under subsection 38.04(6) if the AG authorizes disclosure of all or part of the information or withdraws certain conditions to which the disclosure is subject then the Court's consideration of that aspect of the review of the information shall also be terminated. The relevant statutory provisions read as follows:

> s.38.04(6) After the Federal Court is seized of an application made under paragraph (2) (c) or in the case of an appeal from, or a review of, an order the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of, (a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in

[25] *Ottawa Citizen* para [38].

> paragraphs 38.02(1(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and (b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.
>
> s.38.04(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

Statutory Provisions for Disclosure

Criteria and analytical steps for allowing disclosure are set out in s.38.06 of the *Canada Evidence Act*. This is the section of the Act that has been recently interpreted by the Federal Court of Appeal in *Ribic,* and further detail is provided below about the analysis developed in that case. The relevant section of the *Canada Evidence Act* is s.38.06 that begins:

> s.38.06(1) Unless a judge concludes that the disclosure of the information would be injurious to international relations, national defence or national security, the judge may, by order, authorize the disclosure of the information.

This subsection allows the judge the authorization to allow disclosure if the information is found not to be injurious to the factors mentioned above. By issuing an order, the judge does not guarantee disclosure of the information. The AG retains somewhat of a veto power

[26] *CEA* s. 38.05.

even after a judge has decided the information is not injurious to the public interest in international relations, national security or national defence. The key part of s.38.06 is subsection (2) which reads:

s.38.06(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of the facts relating to the information.

If a judge does not find that the information is not injurious, or that the balancing test in *Ribic* and s.38.06(2) is not met, then the judge must by order confirm the prohibition of disclosure. This requirement is set out in section 38.06(3) and the text of the act reads:

> s.38.06(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order confirm prohibition of disclosure.

Common Law Test for Disclosure

The test for disclosure under s.38 is found in the 2003 leading Federal Court of Appeal criminal case *Canada (Attorney General) v. Ribic (F.C.A.)*.[27] The facts in this case relate to a criminal proceeding. Ribic was seeking disclosure and cross-examination of two witnesses in

[27] *Canada (Attorney General) v. Ribic* (F.C.A.) [2005] 1 F.C. 33, 2003 FCA 246.

regards to a hostage taking in Bosnia in 1995 while the accused was a member of Serb forces. The Attorney General opposed disclosure of the testimonies on the basis that it would be injurious to national security, national defence or international relations. *Ribic* sets out the test for determining disclosure under s.38, applying parts of the test in the civil case *Jose Pereira Hijos, S.A. v. Canada (Attorney General).*[28] *Ribic* clearly establishes the role of the Federal Court Trial Division on an application under s.38.04 of the Act for an order regarding disclosure of information. However, there is no challenge to the constitutionality of s.38 in *Ribic*.

It is important to note that under s.38.02, that the application to a judge are not judicial review proceedings and are not aimed at reviewing a decision of the AG not to disclose sensitive information. In fact, the prohibition to disclose is raised by the statute itself in s.38.02(1)(a) which reads "38.02(1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding (a) information about which notice is given under any of subsections 38.01(1) to (4)."[29] The role of the judge is to make an initial determination whether the statutory prohibition of disclosure should be lifted or not. Section 38.06(3) states that where a judge does not authorize disclosure, that judge shall by order confirm the prohibition. Section 38.04 provides that a judge is "required to make his or her own decision as to whether the statutory ban ought to be lifted and issue an order accordingly."[30] In *Ottawa Citizen*, the Federal Court was bound not to disclose it had been seized of a s.38 matter until consent was given by the Attorney General to the applicants to publish the notice of application of the proceeding, if they chose to do so.[31]

[28] *Jose Pereira Hijos, S.A. v. Canada (Attorney General),* (2002) 299 N.R. 154 (F.C.A.).
[29] *CEA* R.S., 1985, c. C-5, s.38; 2001, c.41, s.38.02. *Ribic* para [14].
[30] *CEA* R.S., 1985, c. C-5, s.38; 2001, c.41, s.38.02. *Ribic* para [15].

The Ribic test breaks the s.38 analysis into three steps. First, a judge must determine relevance "the first task of a judge hearing an application is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the Stinchcombe rule, that is to say in the case at bar information, whether inculpatory or exculpatory, that may reasonably be useful to the defence."[32] If the information is not found to be relevant, analysis stops here.

Step two is an analysis pursuant to s.38.06 of whether or not the disclosure of the information would be injurious to international relations, national security or national defence. At this stage, "it is a given that it is not the role of the judge to second-guess or substitute his opinion for that of the executive" and requires only that the views of the Attorney General be reasonable and have a basis in factual evidence in order to be accepted by the court.[33] If the information, though relevant, is found to be injurious, the analysis stops here and the statutory prohibition is confirmed.

Step three of the test is a balancing test, aimed at "determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure."[34] The test for balancing interests is more stringent than the usual relevancy rule. The court rather applies the standard set out in the civil case on point regarding the Estai fishing vessel matter and s.38 *CEA*, *Jose Pereira Hijos, S.A. (Pereira)*.[35] In *Pereira*, "whether a question is relevant in the context of s.37 and s.38 determination is not to be viewed in the narrow sense of whether it is relevant to an issue pleaded, but rather to its relative importance in proving the claim or in

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[31] *Ottawa Citizen* para [39].
[32] *Ribic* para [17].
[33] *Ribic* para [18].

[34] *Ribic* para [21]

defending it." That a particular fact was not "crucial" to the case was a significant factor in determining whether the importance of disclosure was outweighed by the importance of protecting the specified public interest in *Pereira*. In addition, the court in *Ribic* adopts part of the "necessary" analysis in *R. v. Leipert* which dealt with informer privilege. The court in *Ribic* also deals with the form of disclosure.[36] In *Leipert*, the court states that "the only exception to the privilege is found where there is a basis to conclude that the information may be necessary to establish the innocence of the accused." Therefore, the balancing test in *Ribic* has two key elements, "crucial" and "necessary".

Under s.38.07 the judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

Admissible Evidence

Evidentiary issues are considered by the Act in s.38.06(3.1) and (4). Section 38.06 sets an extremely low standard for admissibility of evidence by a judge in a proceeding regarding information about which notice has been given. In section 38.06(3.1) a judge "may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence." In addition, persons who wish to introduce evidence which is otherwise prohibited may request an order permitting disclosure in a form or under conditions which satisfy a judge and comply with s.38.06(2). Pursuant to s.38.06(5) a judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding

[35] *Jose Pereira Hijos S.A. v. Canada (Attorney General)* (2002) 299 N.R. 154 (F.C.A.) at *Ribic* para [22].

when considering admissibility under subsection 38.06(4). The text of this section is reproduced below:

> s.38.06(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Review and Appeals

There is an automatic reference to the Federal Court of Appeal for review if a judge determines that the a party whose interests were adversely affected by an order made under s.38.06(1) to (3) was not given the opportunity to make representations under s.38.04(5)(d). In addition, it is possible under s.38.09 to appeal any order made under subsections 38.06(1) to (3) to the Federal Court of Appeal. The limitation period for appeal is 10 days from when the order is issued pursuant to s.38.09(2). There is an exception to this limitation period, also in s.38.09(2) allowing a party to bring an appeal "within any further time that the Court considers appropriate in the circumstances." Appeals to the Supreme Court of Canada are also subject to a 10 day limitation period or within any further time that the Supreme Court of Canada considers appropriate in the circumstances pursuant to s.38.1.

[36] *R.v. Leipert* 1997 SCC 367, [1997] S.C.R. 281.

Special Rules and Other Matters of Procedure

There are also some special rules set out in s.38.11(1) providing that a hearing under subsection 38.04(5) or an appeal or review of an order under s.38.06(1) to (3) shall be heard in private and at the request of the AG shall be heard in the National Capital Region. In addition, based on s.38.11(2) the Attorney General of Canada may make representations *ex parte*. For military proceedings, both of these special rules apply also to the Minister of National Defence. Finally, all court records for matters relating to a hearing, review or appeal are to be kept confidential and the court may order the records to be sealed and kept in a location to which the public has no access.[37] A judge may make any order that the court considers appropriate in order to protect the confidentiality of the information related to the hearing, appeal or review.[38]

Attorney General Veto Certificates

After any decision which may authorize the disclosure of the information by any court and under any act of Parliament, the Attorney General may personally and unilaterally issue a certificate prohibiting disclosure for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity or for the purpose of protecting national defence or national security under section 38.13(1). If the information is involved in a military proceeding then the personal agreement of the Minister of National Defence is also required under section 38.13(2). A copy of the certificate shall be served on a wide range of parties, listed in the text of the statute below:

[37] *CEA* s.38.12(2)

s.38.13(3) The Attorney General of Canada shall cause a copy of the certificate to be served on

(a) the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;

(b) every party to the proceeding;

(c) every person who gives notice under section 38.01 in connection with the proceeding;

(d) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada had received notice under section 38.01;

(e) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;

(f) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and

(g) any other person who, in the opinion of the Attorney General of Canada, should be served.

The certificate must be filed with the person responsible for the records to which the proceeding relates, the Registry of the Federal Court, and the registry of any court that hears an appeal from orders under s.38.06(1) to (3). If a certificate is issued then pursuant to section 38.13(5) then, notwithstanding other provisions of the *Canada Evidence Act*, the disclosure of information shall be prohibited in accordance with the terms of the certificate. The *Statutory Instruments Act* does not apply to a certificate. The AG shall publish a certificate in the *Canada Gazette* without delay. Except in accordance with s.38.131, a certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, set aside or

[38] *CEA* s.38.12(1)

otherwise dealt with pursuant to s.38.13(8). Certificates expire 15 years after the day they are issued.[39]

Fiat

If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, then the AG may issue a fiat and serve it on the prosecutor pursuant to section 38.15(1). Further detail on fiat provisions is set out in the remaining subsections of s.38.15.

Special Provisions for Criminal Matters

Protection of the right to a fair trial of an accused is contemplated in the *CEA* s.38.14. It provides in subsection 38.14(1) "that the person presiding at a criminal proceeding may make any order he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that court order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13." In imagining potential orders which might arise in the context of a criminal proceeding in relation to s.38, the Act contemplates in s.38.15(2) orders dismissing specified counts of an indictment or information, orders for a stay of proceedings, or any order finding against a party on any issue relating to information the disclosure of which is prohibited.

[39] *CEA* s.38.13.

Arar Commission Rules of Procedure

The provisions of s.38 have also been adopted into the Rules of Procedure of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*.[40] This adoption into the rules of a public inquiry unreasonably limits the public's access to the administration of justice in a forum designed to investigate irregularities in the conduct of government officials. Doubtless, by the very nature of the information sought by the Commission, applications under s.38 to protect information under government "safeguard" render such a commission unable to adequately investigate inappropriate or illegal behaviour. Mention of s.38 is made in the *Rules of Procedure and Practice* of the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (*Arar Commission Rules*) in article 50(b)(i) and (ii).[41] The relevant sections of the *Arar Commission Rules* read as follows:

> 47. The Commissioner shall convene an *in camera* hearing in the absence of parties and their counsel to consider a request by the Attorney General of Canada or any other person to have specific information received *in camera* and in the absence of the parties and their counsel because of National Security Confidentiality. The Attorney General of Canada or the person seeking an *in camera* hearing in the absence of parties and their counsel shall bear the burden of establishing why it is necessary to have specific information received *in camera* and in the absence of the parties and their counsel because of National Security Confidentiality.
>
> 50. The procedure following a Rule 47 hearing shall be as follows:
>
> (b) The ruling shall be provided to the Attorney General of Canada and, to the extent that a claim for National Security Confidentiality is rejected or the

[40] Arar Inquiry Rules.
[41] Arar Inquiry Rules.

> Attorney General of Canada objects to the disclosure of information contained in the ruling, such rejection or objection shall constitute notice pursuant to s.38 of the *Canada Evidence Act*. Further,
>
> > (i) the Commissioner shall not disclose the ruling or cause it to be disclosed until a period of 10 days has elapsed after notice of the ruling has been received by the Attorney General of Canada; and
> > (ii) the Attorney General of Canada shall notify the Commissioner in writing 10 within 10 days, on a confidential basis, whether the Attorney General of Canada intends to apply to the Federal Court for a determination under section 38 of the *Canada Evidence Act*.

The incorporation of s.38 into the rules creates an environment of additional secrecy, additional restrictions to disclosure, and reminds the *Commission of Inquiry* of additional powers and discretion granted to the Attorney General.

Two examples of "public interest" as defined in s.37 *CEA* are provided in s.38. In any proceeding, the Attorney General may apply to the Federal Court for non-disclosure of "sensitive information" or "potentially injurious information".[42] No detrimental consequences need flow from disclosure of sensitive information in order to justify non-disclosure. However, the *ATA* amendments to the *CEA* do provide for the disclosure of sensitive information if it is not injurious to international relations, national defence or national security, or if any injury is outweighed by the interest in disclosure.[43]

[42] CEA, s.38.04 "Potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. "Sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

[43] CEA, s.38.06(2).

Requirement of Judges to Read All Submissions

In a 1983 Federal Court case, under s.36.2(1) of the *Canada Evidence Act* as it then was, prior to amendment in 2001 by the *Anti-terrorism Act*, an application for disclosure was refused on grounds of injury to national security and international relations.[44] The determination under s.36 in 1983 was made on the basis of a balancing of conflicting public interests, namely the public interest in secrecy of information for the purposes of national defence outweighing the public interest in disclosure in litigation. *Goguen* is not mentioned or applied in any of the leading cases since enactment of amendments to the *Canada Evidence Act* by the *Anti-terrorism Act* in 2001. Also it is important to note that *Goguen* was decided prior to the leading cases in Canadian law relating to disclosure generally, for example, *Stinchcombe (1991)*, *Chaplin (1995)*, and *Chiarelli (1992)* - all of these contain essential principles which are affirmed and mentioned in the leading case on s.38 CEA from 2003, *Ribic*.

Goguen gave a judge discretion to choose to examine the material at issue in a s.36 application under public interest immunity for national security reasons. It is unlikely that an application would be made in 2005 under s.36 for this reason since s.38 has been amended to specifically provide for the purpose of non-disclosure for reasons of national security, national defence or international relations. At the first stage of the test set out in *Ribic*, the relevance test derived from *Stinchcombe*, the court is specifically instructed to make determinations based on evidence, "this step will generally involve an inspection or examination of the information for that purpose."[45] Then, in the second part of the *Ribic* test, the judge is again instructed to "consider the submissions of the parties and their

[44] Maurice Goguen and Gilbert Albert v. Frederick Edward Gibson [1983] 1 F.C. 872.
[45] *Ribic* para [17].

supporting evidence" in making a determination of injuriousness.[46] The second step is also described as necessarily involving, from the perspective of determining injuriousness to national security, national defence or international relations, "an examination or inspection of the information at issue."[47] A judge must also be satisfied that executive opinions submitted by the government of Canada represented by Attorney General or in some circumstances the Minister of Defence, are opinions with a factual basis which has been established by evidence. On this point *Ribic* adopts the UK House of Lords in *Home Department v. Rehman* (2001).[48] *Ribic* clearly states that the court must examine the information at issue. At no point in *Ribic* is there a mention of discretion to examine or not examine evidence on the part of the judge.

Comments on s.38 by the CBA

In an article dated November 30th, 2001, the Canadian Bar Association made the following points and called for more changes to address "flawed, and constitutionally suspect parts of [*ATA* C.36]."[49] The article in Lawyers Weekly points out problems with "the justice minister's sweeping powers to issue certificates to prevent disclosure of information for the broad purposes of 'protecting international relations or national defence or national security' are somewhat limited" and that "there will be provision for a review by a Federal Court of Appeal judge, and a ministerial certificate will have a life of 15 years, unless renewed." The article quotes Simon Potter, then Vice-President of the Canadian Bar Association as predicting that several aspects of Bill C-36 will be challenged under the Charter.

[46] *Ribic* para [18].
[47] Ibid.
[48] *Home Department v. Rehman* [2001] 3 W.L.R. 877 (H.L.) at page 895. *Ribic*, ibid para [18].
[49] Schmitz.

In the CBA submissions to the Senate legislative review committee on the Anti-terrorism Act made in spring 2005, there is a brief discussion of the *Canada Evidence Act* provisions in s.38. Please find a summary of their submissions entitled "*Non-disclosure of Information – Canada Evidence Act, section 38.04*" reproduced below:

"The *Anti-terrorism Act* added provisions to the *Canada Evidence Act* that turn section 38 applications into an absurd process. The Federal Court has no discretion to determine whether a hearing should proceed in public and whether materials before it should be made public. Secrecy is mandated throughout. Section 38 should be amended to make public the fact of an application and to ensure that proceedings are as open as possible, taking security considerations into account."[50] The CBA recommends that the *Canada Evidence Act* s.38 et seq. be amended to make public the fact of an application to the Court, and to ensure that proceedings are open to the public to the greatest extent possible taking security considerations into account. The CBA also recommends that section 38.06 be amended to preclude the use of summaries of evidence in criminal proceedings.[51]

Amnesty International Submissions to the Senate Committee

Amnesty International Canada, in submissions to the *Senate Committee on the Anti-terrorism Act* on May 16th 2005, provides certain criticisms of the changes to s.38 of the *Canada Evidence Act* under the Anti-terrorism legislation.[52] Under the heading "Secrecy and International Relations," Amnesty states that the *Anti-terrorism Act* included significant revisions to the

[50] CBA Anti-Terrorism Act Review Submissions, p25.
[51] CBA Anti-Terrorism Act Review Submissions, p25.
[52] Amnesty International Anti-Terrorism Act Review Submissions, p8.

Canada Evidence Act. Those changes "established a draconian and highly secretive procedure whereby the government can, in any proceeding, block the public disclosure of 'potentially injurious information' or 'sensitive information.'"[53] The organization points out that "the hearing as to whether the information should be disclosed is held *in camera* and in fact, the mere fact that the hearing is even being held cannot be publicly disclosed. Ultimately, if the government disagrees with the court's ruling it can issue a certificate which simply forbids the disclosure of the information."[54] Amnesty International's concerns relate to the definitions provided in s.38 of the *CEA*, in particular, the inclusion of "international relations" within the scope of what can be defined as "potentially injurious" or "sensitive" information. They state that by including "international relations in the definition, this "exceeds the limits on fair trial rights established in international law."[55] In addition, the submissions contain concerns over information being withheld from the public, from an accused in a criminal trial, or from parties to other types of legal proceedings "simply because it might embarrass Canada in its dealings with another government or become an inconvenience in international negotiations dealing with a trade or other issue."[56]

There are three main recommendations in the Amnesty International submissions. The first is to strike "international relations" from the definitions section. The second is that "Section 38 of the *Canada Evidence Act* should be amended to ensure that the public is only excluded in instances strictly in keeping with the limitations recognized in article 14(1) of the *International Covenant on Civil and Political Rights*. Similarly, there should be no ban on public disclosure of the mere fact that the court proceeding is underway unless it can be convincingly demonstrated that a ban on public notification of that fact conforms to article

[53] Amnesty International Anti-Terrorism Act Review Submissions, p9.
[54] Ibid.
[55] Ibid.

14(1)."[57] Finally, the third recommendation in the submissions is that "Section 38.13 of the *Canada Evidence Act* should be amended so as to require the government to demonstrate *on a balance of probabilities* that disclosure of disputed information *would* be injurious to national defence or national security."[58]

Additional human rights groups commented to the Senate and House Committees on the *Anti-Terrorism Act* during the 3year review in 2005. These groups all raised serious concerns about civil liberties and human rights impacts of this legislation on Canadian society. Those who made submissions include: Rights and Democracy based in Montreal, the Canadian Civil Liberties Association, The Office of the Canadian Information and Privacy Commissioner and the International Civil Liberties Monitoring Group.

[56] Ibid.
[57] Amnesty International Anti-Terrorism Act Review Submissions, p10.
[58] Ibid.

INSET TEAMS

The INSET, or Integrated National Security Enforcement Teams, arose out of the ashes of the RCMP's NSIS, or National Security Intelligence Sections, in the wake of 9-11. Nominally the purpose of this refocusing and centralization of police manpower was to increase the capacity for collection, sharing and analysis of intelligence among partners with respect to targets that are a threat to national security. INSET is part of a trend towards continental security measures in North America, an agenda pushed strongly by the US Government of George W. Bush since 2001. While touted as merely creating an enhanced investigative capacity and enhancing collective ability to combat threats to national security, the INSET has rapidly evolved into a gun-happy anti-activist arm of the US Military, FBI and US police forces operating legally within Canada. This should be of severe concern to all those interested in maintaining Canadian sovereignty as well as protecting the rights and civil liberties of Canadians.

The official composition of INSET groups across the country in Vancouver, Toronto, Ottawa and Montreal include the following groups: RCMP, federal partner agencies such as the Canada Border Services Agency (CBSA), Citizenship and Immigration Canada (CIC), the Canadian Security Intelligence Service (CSIS) as well as various provincial and municipal police service branches. Less obvious partners are the US Federal Bureau of Investigation (FBI), US Central Intelligence Agency (CIA), US Military and various state and local police branches in the USA. These American partners participate in INSET activities as "partners" though as the following case histories will suggest, they often have the opportunity to powerfully impact investigations with a speed and accuracy that illustrates their power within the INSET cross-border policing "partnership." The case of David Barbarash, an animal

rights activist loosely implicated in a minor property crime in the State of Maine who was subsequently arrested and raided by police, is a clear example of how US forces call the shots and Canadian partners jump to arrest our own citizens under Anti-terrorism policy. Over $64 million CDN has been invested in INSET policing by the Canadian taxpaying citizen from 2002-2007.

> The mandate of INSETs is to: 1. Increase the capacity to collect, share and analyze intelligence among partners, with respect to targets (individuals) that are threat to national security. 2. To create an enhanced enforcement capacity to bring such targets to justice. 3. Enhance partner agencies' collective ability to combat national security threats and meet specific mandate responsibilities.

Mohamed Aramesh: Case Example

Mohamed Aramesh fell to his death from West End Vancouver apartment "while trying to escape police who entered his seventh floor apartment after receiving a warrant to look for drugs."[59] Before Aramesh could be arrested, "he attempted to jump from his balcony to an adjacent one, lost his footing and fell to his death."[60] The warrant was executed by INSET with the assistance of the Vancouver Police Department.[61]

It seems unusual that INSET would be required for a routine drug search. Only days after Aramesh fell to his death, the drug search warrant was sealed by the courts. [62]INSET executed the warrant on the same day Aramesh sent an email to friends in Iran, Pakistan and

[59] Asian Pacific News Service June 30, 2005.
[60] Fong, August 2003.
[61] Fong, August 2003.
[62]Fong, p1.

Afghanistan who all belong to the Balouch tribal group.[63] Media reports suggest INSET suspected that Aramesh had terrorist connections, though no evidence is alluded to that might support that fact.[64] There is some mention of a possible drug connection, and it appears relevant that Aramesh was Muslim with Pakistani family connections.[65] In a Vancouver Sun article, a friend is quoted as saying, "He had a airplane ticket leaving for Pakistan. He was supposed to go today [a few days after his death]. He was excited about going to see his newborn son for the first time. He said he was going to bring his family here, his wife, his daughter, his mother and father."[66] Aramesh's friend, Rob Arbab, goes on to discuss the Balouch tribal group in another article, "There are a few of us in Canada and many from around the world. Mohamad was always talking to friends on the internet. That night, he sent an email around 1:30 in the morning."[67] Arbab has known Aramesh for over 10 years. He suggests that Aramesh was just trying to find out if there was anyone to talk to online. Arbab mentioned he talked with Aramesh but only briefly "to exchange a few pleasantries," while Aramesh seemed eager to continue chatting. No evidence is ever suggested in the news reports available to the public of any terrorist connections, though there is a brief mention of a suspicion that Aramesh was selling drugs to raise money for Al Qaeda.[68]

The lead investigators were members of INSET. RCMP Corporal Pierre Lemaitre is quoted in the Vancouver Sun after Aramesh had fallen to his death, saying, "We're trying to determine right now and confirm if this person was linked to a group or groups. We don't

[63] Asian Pacific News Service, p1.
[64] Fong, p1.
[65] Asian Pacific News Service, p2.
[66] Fong, p2.
[67] Fong and Skelton p2.
[68] Fong, p.1.

know. [In regards to INSET involvement] They focus on the criminal activity of individuals or groups linked to terrorism. This file belongs to INSET and by their true nature of doing national security investigations, they don't discuss ongoing investigations."[69] A coroner's investigation was reported would to take place but no results are mentioned in any media reports.[70]

The *Asian Pacific Post* suggests that Aramesh's death was direction caused by the INSET investigation, stating, "It was one of these INSET probes that led to the death of Mohammad Aramesh in Vancouver's West End."[71] The article also suggests that "those who knew Aramesh suspect he may have been dabbling in drugs and attempted to escape because he did not know who was busting down his door."[72] The article criticizes the RCMP "and others entrusted to uphold the law" and insists that it those organizations must stop the "every Muslim is a suspect' approach before they alienate the entire community."[73]

The necessity for INSET involvement in this case is not clearly evident. While Aramesh belongs to a distinct ethnic community, the Balouch tribal group, the link between tribal membership and suspicion of terrorism appears far-fetched. In a climate of overwhelming suspicion of Pakistani, Arab, Afghani and Iranian people in Canada and the West it is essential that all investigations by national security organizations such as INSET be based on fact, and not prone to over-zealous policing practices, spurious evidentiary connections, and racial/religious profiling. Particularly when a person dies during the execution of a warrant, it is vital that the public be provided with reassurances and information with regards to reasons

[69] Fong, p1.
[70] Fong, p2.
[71] Asian Pacific News Service p2.
[72] Asian Pacific News Service p1.
[73] Asian Pacific News Service p2.

for that person's death. More than usual, in cases of accidental death while in police custody, an examination of the use of INSET teams is essential to maintaining the public trust in the administration of justice. If there was a genuine concern relating to terrorism, it would be appropriate for INSET to obtain a warrant on that basis, not hide behind accusations of garden variety criminal matters like drug warrant searches normally reserved for ordinary forces. Was it really necessary to involve the INSET?[74]

David Barbarash: Case Example

David Barbarash is a spokesperson for the activist group Animal Liberation Front (ALF) based in Courtenay, BC.[75] He is no longer a member of the activist wing of the group and acts as a spokesperson, receiving and publicizing anonymous reports of the group's activities. In July 2002, during the post 9/11 hysteria period, the Integrated National Security Enforcement Team (INSET) conducted a home raid and seized files, books, videos and two computers. In obtaining the warrant pursuant to s.12(1) of the *Mutual Legal Assistance in Criminal Matters Act*, the RCMP and INSET relied on minimal evidence provided by US authorities. The only evidence used to obtain the warrant was a 3-year-old photocopy of a newspaper article from the State of Maine in which Barbarash is quoted as a spokesperson for the ALF. The article describes minor criminal acts (property damage – approximate total value $8700) committed by the Maine ALF in 1999. Barbarash had spoken to the Maine media in support of the actions. Barbarash was neither charged nor under investigation for any offence in either Canada or the US.

In March 2003, the BC Supreme Court quashed the warrant and returned Mr. Barbarash's property. The Barbarash case raises concerns that the INSET teams are being used under the guise of investigating terrorism to provide a pipeline into Canadian criminal jurisdiction for US law enforcement. This expansion of authority creates a slow leak towards greater infringement of Canadian sovereignty. In addition, there are issues relating to the reliability of basing a warrant on a newspaper clipping, i.e. double hearsay. The actions of INSET teams in relation to Mr. Barbarash amount to police harassment.[76]

West Coast Warrior Society: Case Example

"The word warrior has been criminalized, but groups like the warrior society have always been a part of indigenous nations. What you see with warrior societies are men that are dedicated to the idea of standing up for their rights, protecting the land, protecting their nation and their people. There is no criminal aspect to that."

- James Ward, West Coast Warrior Society[77]

On June 27, 2005 in Vancouver BC, David Dennis and James Sakej Ward, both members of the aboriginal activist group The West Coast Warrior Society (WCWS), and a driver were taken into custody by officers of the Vancouver Police Department (VPD) and RCMP Integrated National Security Enforcement Team (INSET).[78] Mid-afternoon, the officers blocked off the Burrard Street Bridge at both ends and surrounded the men using sub-machine guns and assault rifles.[79] The men were taken into custody but later released with no charges laid "as all necessary documents were in order for the possession of outdoor equipment and hunting rifles."[80] The men had recently purchased rifles and ammunition for

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[77] Miller, and Badelt June 29, 2005.
78 Joseph, "Press Release: RCMP Interference" p1.
79 Miller and Badelt p1.
80 Joseph, "Press Conference Backgrounder: RCMP Interference" p1-3.

the purposes of an Outdoor Indigenous Traditional Training program for the Tsawataineuk First Nation led by Chief Eric Joseph.[81]

The INSET seized 14 Norinco M305 rifles and 10,400 rounds of ammunition from the men.[82] RCMP spokesperson Sgt. John Ward is quoted in the *Vancouver Sun* saying, "What we've said is that INSET has an ongoing investigation. They've conducted an arrest of three individuals, and they've released those individuals after talking to them. We've seized a number of high-powered weapons and ammunition, and we will carry on with our investigation."[83] The guns and ammunition were legally purchased from Lever Arms Service Ltd. on Burrard Street.[84] In a press conference on Wednesday, June 29th, 2005, Dennis showed press a receipt for the guns and ammunition as well as the related legal transfer of ownership documentation from the Canada Firearms Centre dated June 27th, 2005.[85] In addition, Dennis also holds a valid Firearms Acquisition Certificate (FAC).[86] Materials seized total over $23,000 in value and also include a laptop, cell phones, a briefcase and other outdoor equipment.

The bridge takedown involved at least 15 officers from the Vancouver Police Department, however, arrests were directed by two members of the INSET.[87] The manner in which the dramatic daytime arrests took place – in broad daylight, downtown on a major arterial bridge – and the use of INSET teams in executing the 'high-risk takedown' of three aboriginal men raises serious issues about appropriate policing methods. The involvement of INSET in

81 Joseph, Eric "Press Release: RCMP Interference" p1.
82 Read and Hansen p1-2.
83 Read and Hansen p2.
84 Ibid.
85 Ibid.
86 Ibid.
87 Armstrong, Jane p1.

non-terrorism related matters is highly inappropriate and problematic from a civil liberties perspective. Investigation of domestic criminal activity (such as illegal possession of firearms) has long been the proud work of regular RCMP and VPD forces. The involvement of secret policing teams such as INSET is unnecessary and deceptive. By participating in, and possibly also escalating the scale of, arrests such as those of the three West Coast Warriors on the Burrard Street Bridge, INSET steps out of its mandated role as an anti-terrorism force and becomes more akin to a secret international police. There is a disturbing trend of INSET actions in BC against activists or political groups such as the West Coast Warriors since 2001.[88]

Joseph Thul: Case Example

Over 1000 pounds of stolen explosives were seized between June 10 and 13, 2003 by RCMP and INSET investigators from private residences, a motel suite and a storage facility in the Lower Mainland and Squamish areas.[89] Joseph Thul of Coquitlam was charged with Possession of Explosives, Possession of a Restricted Weapon and Possession over $5000.[90] The materials were reported stolen from a company in Squamish on May 31st, 2003.[91] The investigation included INSET when the Squamish RCMP "uncovered the possibility that the explosives could be illegally smuggled to the United States."[92] The explosives were mining related, and included: blasting caps, dynamite, detonator cord, and AMEX (a high nitrate product with diesel used in mining exploration.)[93]

[88] Wall, p1.
[89] RCMP "*Media advisory"* June 16, 2003.
[90] Ibid.
[91] Ibid.
[92] Ibid.

While the use of INSET capacity may have been excessive or inappropriate, but perhaps within the allowable range for operational procedure while still respecting civil liberties. The RCMP media release explained the need for INSET as arising from the potential for illegal export of stolen goods to the US, not as relating to a potential threat of terrorism. Still, it is necessary to ask a few careful questions every time the INSET is used. It is a special force, not meant for the regular investigation and enforcement of garden variety crime such as theft or assault, however serious those crimes may indeed be. What was the basis for determining the possibility the materials would cross the border. Was it really necessary to involve the INSET?

On May 31, 2003 the Squamish RCMP found out that over 1000 pounds of explosives valued at over $50,000 had been stolen from a local mining company.[94] Due to an initial worry by Squamish RCMP that the materials might cross the US border, the INSET was called in to support the investigation.[95] A joint task force was then created.[96] No information was available in the public record regarding what possible evidence might have led police to the conclusion that materials would be headed across the border.[97] The investigation went on to also include additional resources and members from the Explosive Disposal Unit (EDU), Police Dog Services (PDS), the Coquitlam Emergency Response Team (ERT), and officers from the West Vancouver Police, New Westminster Police, Coquitlam RCMP, and Surrey RCMP.[98] One media article says that even following Joseph Thul's arrest an RCMP "E" Division INSET spokesperson, Sgt. Grant Learned, told reporters that investigators had

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[93] Ibid.
[94] French, John "*Explosives bust leads to 9 local arrests: All released, more charges likely, say police*" Whistler Question, July 19, 2003. Online at http://www.whistlerquestion.com July 4, 2005.
[95] French, p1.
[96] Ibid.
[97] Ibid.
[98] RCMP "*Media advisory"* June 16, 2003.

"yet to determine" whether there was any link between the thefts and possible illegal smuggling to the US.[99]

Tre Arrow: Case Example

Tre Arrow is an environmental activist from Oregon. He was arrested in Canada in 2004 for shoplifting from a Canadian Tire Store in Victoria, BC. Following Arrow's arrest, the US began the extradition process based on charges he faces in relation to a June 1st, 2001 logging truck arson incident in Oregon state. Three conspirators from the logging truck arsons have named Arrow as the mastermind who recruited their assistance.

Extradition hearings began in Vancouver on June 27th, 2005. Arrow is represented by Russell who argues that in Canada, Arrow would face up to 5 years for a first offense of arson if convicted while in if extradited to the US he faces life imprisonment. It is anticipated that a committal order will be issued declaring sufficient evidence to convict Arrow of eco-terrorism in the US.

Arrow has not been charged with terrorism for the logging truck incident, though the words "terrorist" and "eco-terrorist" have consistently been used in the news media to describe him. In 2002, there was an Oregon court order that the word "terrorism" was not to be used in reference to Arrow or his case, however use by the FBI and news media continues. The Oregon activist group Cascadia Forest Alliance views the government's use of the word "eco-terrorism" as a propaganda-driven attempt to associate non-violent civil disobedience with vandalism, and vandalism with terrorism.

[99] Gillies, p1-2.

It is uncertain whether INSET has become involved with Mr. Arrow's case or launched an active investigation. In a society where civil liberties and the human rights of citizens are of paramount importance, the extradition of Tre Arrow is a clear example of an occasion where the Anti-Terrorism provisions are being over-used and over-extended. By applying the mechanisms of anti-terrorism to domestic criminal activity by activists the US and Canadian governments undermine fundamental freedoms essential to the effective and secure operation of a democratic society. This example of the application of the Anti-terrorism Act or INSET on non-terrorist activity is not appropriate and unacceptably infringes on both national sovereignty over criminal matters and creates a destructive climate of fear and repression within the scope of legitimate exercise of civil liberties.

In a documentary film project pitch entitled "Safe haven: The Extradition of Tre Arrow," produced by Garfield Lindsay Miller of the May Street Group in Victoria, Murray Mollard as Executive Director of the BCCLA is quoted in an interview regarding non-terrorist applications of Canada's anti-terrorism apparatus. It is the intent of the producers to conduct an on camera interview with Mr. Mollard on this topic during the production stage of this documentary. Here is an excerpt from the pitch proposal:

> "At the B.C. Civil Liberties Association in Vancouver, B.C., we interview Executive Director Murray Mollard. Mollard is concerned that in Canada, out own anti-terrorism force, the Integrated National Security Enforcement Team (INSET), has helped the FBI look into Arrow's activities and contacts here. That involvement raises questions about what INSET is doing, how it works with its counterparts in the United States, and, what is considered "terrorism."
>
> "That the Canadian anti-terrorist forces would be pulled in to work on such a case and look into Arrow's activities and contacts here is disturbing. We're

> dealing essentially with a garden-variety criminal who has some political motivation behind what he's done. It doesn't strike me you need INSET to deal with any threats from this kind of individual. Mollard continues. "While the civil liberties group doesn't defend the crimes, property damage where nobody is harmed is not even close to being in the league of what most people would consider terrorism."

INSET ACTIVITY IN CANADA

Based on the case research outlined above, there is a serious problem of overzealous enforcement and exceeding the organizational mandate within the INSET Division "E" – that's the team based in Vancouver. A thorough survey of all INSET-related media and public information available for the period up to July 2005 yielded almost no mention of the INSET units located in Toronto, Ottawa or Montreal. Meanwhile, the INSET unit based in Vancouver has had a consistent, reported trend of inappropriate and potentially criminal police action against citizens and activists. While it isn't an impossibility that excessive use of force or anti-terrorism forces being used for garden variety criminal matters in the case of other divisions across the country, there simply isn't any media or other public record material evidence to indicate that is the case. However, "E" Division has been busy enough infringing on the rights and liberties of British Columbians to make up for the apparent temperance of the remaining divisions of the INSET force.

Sovereignty and INSET

In the INSET cases, Barbarash and Tre Arrow have a direct connection to US law enforcement seeking to enter Canadian sovereign jurisdiction. In Barbarash, they succeeded initially in having Canadian partners exercise a warrant based on international bilateral

treaties with regards to cooperation in policing. It was one of the earlier cases soon after INSET was created and has not been so obviously repeated since. Or, if it has, the involvement of US law enforcement has not been evident in media or public reports.

Most people don't know that the INSET even exists. If they do, there is a general climate of acceptance of increased law enforcement in response to fears of terrorism and other threats to collective public safety (i.e. national security). Our first challenge is to overcome the fear response, and choose whether to redirect that response to add a fear of overzealous policing and removal of civil rights to an already frothy cocktail of paranoia.

LISTING PROVISIONS

There are two main 'terrorist lists' maintained by the Government of Canada. One is established under the *Criminal Code of Canada*. Entities and individuals are added to this list by the Minister of Public Safety and Emergency Preparedness, currently the Hon. Anne McLellan. The other list was established under the *United Nations Suppression of Terrorism Regulations*, it is maintained by the Minister of Foreign Affairs. This paper will give an overview of both lists, provide insight into the political and legislative climate surrounding terrorist "listing" in Canada.

The Criminal Code List

The Government of Canada maintains a list of 'terrorist' organizations and individuals pursuant to s.83.05 of the Criminal Code of Canada as modified by the *Anti-terrorism Act*

2001. Any person or group listed may have its assets seized and forfeited. There are severe penalties, including up to ten years imprisonment, for persons and organizations that deal with the property or finances of any listed entity.[100] Also, it is a crime to knowingly participate in, or contribute to, or facilitate the activities of a listed entity.[101]

The UN Suppression of Terrorism Regulations List

There is also a separate process for listing entities pursuant to the *United Nations Suppression of Terrorism Regulations* ("*UNSTR*") under the responsibility of the Minister of Foreign Affairs. These regulations enable Canada to comply with *UN Security Council Resolutions 1267* and *1373*, which call on states to freeze terrorist assets without delay as well as create other obligations on states. Entities are added to the *UNSTR* list on reasonable grounds to believe the entity is associated with terrorist activity.

Both the *Criminal Code* listing provisions and the *UNSTR* listing provisions require all Canadian financial institutions to freeze the assets of a listed entity and place a prohibition on fundraising activities. Regardless of whether an entity is listed on either list, any individual participating in terrorist activities can be investigated and prosecuted under the *Criminal Code* for criminal terrorist activities.[102]

[100] Canada Newswire Group May 25, 2005.
[101] Ibid.

Who is on the list?

As of July 22, 2005, there are 38 listed entities on the Canadian terrorist list maintained by the Ministry of Public Safety and Emergency Preparedness (the "Criminal Code List").[103] The groups listed include a wide range of political and religious organizations from around the world. Many are not widely known to the Canadian public, though others are notorious, such as Al-Qaeda.

The most recent three groups were added in May 2005 – Mujahedin-e-Khalq (MEK) an Iranian organization based in Iraq dedicated to overthrowing the current Iranian regime and establishing a democratic, socialist Islamic state – has been one of the most controversial. While the Ministry of Public Safety and Emergency Preparedness emphasizes that the MEK support the use of physical force and armed struggle if necessary, critics highlight similarities between MEK and other legitimate citizens' revolutionary groups established to overthrow oppressive regimes, pointing out that the ultimate goal of MEK is to create a democratic Iran.[104] The other groups added in May 2005 include Kahane Chai (Kach) a Jewish group whose overall aim is to restore the biblical state of Israel. Kach "aims to intimidate and threaten Palestinian families and mount sustained political pressure on the Israeli government."[105] Also, Gulbuddin Hekmatyar and his group Hezb-e Islami Gulbuddin (HIG) is a group whose objective is to overthrow the administration of Afghan president

[102] British Columbia Securities Commission October 22, 2001.

[104] Canada Newswire Group May 25, 2005.

[105] Ibid.

Hamid Karzai to create a fundamentalist Islamic state.[106] HIG has reportedly established joint training camps with Al-Qaeda and the Taliban in Afghanistan and Pakistan.[107]

There have been heavy criticisms of earlier listing choices by the Ministry of Public Safety and Emergency Preparedness. In August 2002, following a US move to declare the Filipino political organization Communist Party of the Philippines and the New People's Army ("CPP-NPA") a 'foreign terrorist organization,' Canada also added the CPP-NPA to its list of terrorist organizations using the *United Nations Suppression of Terrorism Regulations*.[108] This move was highly criticized by Filipino human rights, concerned overseas Filipinos and Canadians of Filipino descent as pandering to US fear-mongering and intensifying an "atmosphere of trepidation and panic."[109] The Philippine Women Centre of B.C. suggests that groups that are part of a legitimate national liberation movement are being unfairly included in terrorist lists.[110] Luninging Alcuitas of the B.C. Committee for Human Rights in the Philippines cautions that "Canada's action dangerously undermines the peace process in the Philippines and heightens the prospect for more human rights violations and militarization. Canada champions itself as a leader in the international arena in the promotion of human rights and peace-building, but this action goes against these principles by blindly following the dictates of the U.S. and inciting a worldwide political witch hunt."[111]

There have also been calls for well-known terrorist groups to be added to the list, and criticisms of the Liberal government that include accusations of pandering to ethnic constituencies and avoiding controversy in key ridings where listing would have significant

[106] Ibid.
[107] Ibid.
[108] Philippine Women Centre of B.C. September 5, 2002.
[109] Ibid.
[110] Ibid.

community impact. The overwhelming evidence that groups such as the Tamil Tigers are actively operating within Canada and fundraising through oppressive violence and even criminal extortion amongst vulnerable immigrant communities does not appear to have persuaded the Ministers of the need to list this group. Meanwhile, an Jewish radical group, Kach, not known to have any active members in Canada was listed in May 2005, much to the confusion of Jewish leaders who, while supporting the government's opposition to Kach remained unaware of any Kach activities within their communities.[112]

How do you get on the list?

Under the *Criminal Code*, the Governor in Council may list an entity on the recommendation of the Minister of Public Safety and Emergency Preparedness. Recommendations made by the Minister of Public Safety and Emergency Preparedness are based on a rigorous evaluation of the facts and the Governor-in-Council must approve the listing. Once approved, the decision is published in the *Canada Gazette*.

Listing Provisions in Other States[113]

The United States government is by far the world's most prolific 'potential terrorist' list-keeper. The *US Lookout Index* or No-fly list is a master list of over five million people worldwide "thought to be potential terrorists or criminals.[114] Anyone whose name is on this list may be either barred entry or questioned upon entering US territory. In addition however, there are several other lists kept by different state agencies in the US as well as

[111] Ibid.
[112] Lungen, July 14, 2005.

international non-governmental organizations (INGOs) and the national governments of various states. Some such examples are described below.

The US Department of the Treasury has been involved in sanction programs since the War of 18212. Currently, the Office of Foreign Assets Control ("OFAC") "administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction."[115] The main OFAC listing program is the Specially Designated Nationals and Blocked Persons list which lists groups, individuals and entities without requiring any association with a specific foreign sovereign state.[116] Americans and American companies are prohibited from dealing with listed entities in the Specially Designated Nationals list.[117] Lists kept elsewhere within the US government system also include: OFAC Sanctioned Countries list[118], Department of State Trade Control (DTC) Debarred Parties[119], US Bureau of Industry & Security Unverified Entities list[120], Denied Entities list[121], Denied Persons list[122], Federal Bureau of Investigation Top Ten Most Wanted list[123], as well as the FBI Most Wanted Terrorists and Seeking Information.[124]

In Europe, lists are maintained by the European Union as well as by certain EU countries. The European Union Consolidated list is maintained by the EU as well as the European

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[114] Godfrey, January 20, 2004.
[115] ESR Check Employment Screening Resources, p1-5.
[116] US Treasury, p.4.
[117] ESR Check Employment Screening Resources p1-5.
[118] US Treasury, p10.
[119] Online at http://www.pmdtc.org/debar059.htm July 15, 2005.
[120] Online at http://www.bxa.doc.gov/Enforcement/Unverifiedlist/unverified_parties.html July 15, 2005.
[121] Online at http://www.bxa.doc.gov/Entities/Default.htm
[122] Online at http://www.bis.doc.gov/dpl/Default.shtm
[123] FBI, p1.

Union Terrorism List[125]. The Bank of England Sanctions List is maintained in the UK.[126] Also, the UK maintains a separate designated Terrorist List.

Internationally, there is the INTERPOL Most Wanted list[127], the United Nations Consolidated Sanctions list[128], the Politically Exposed Persons list[129], the World Bank Ineligible Firms list[130], and the OECD Non-Cooperative Countries and Territories list.[131]

Within Canada, the most thorough and up-to-date list combining both the *Criminal Code* and *UNSTR* lists is the one maintained by the Office of the Superintendent of Financial Institutions.[132]

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[124] FBI, p2.
[125] Online at http://www.statewatch.org/news/2004/jun/01terrlists.htm July 15, 2005.
[126] Bank of England, p.1.
[127] INTERPOL, p1.
[128] United Nations Committee List, p1.
[129] Online at http://www.complinet.com/kyccheck/kyccheck/pep/html July 15, 2005.
[130] World Bank, p1.
[131] OECD, p1.
[132] Online at http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?DetailID=525 July 15, 2005.

SECURITY OF INFORMATION ACT

Part 2 of Bill C-36 *The Anti-terrorism Act*, amends the *Official Secrets Act*, which becomes the *Security of Information Act*. The new Act addresses national security concerns such as threats of espionage by foreign powers and terrorist groups as well as economic espionage. It deals with coercive activities against émigré communities within Canada. In addition, it creates new offences to counter intelligence-gathering activities by foreign powers and terrorist groups. It also creates other offences such as unauthorized communication of special operational information.

Whistlebowers – The Public Interest Defence

The *Security of Information Act* contains a prohibition against communication or confirmation of "special operational information" by anyone "permanently bound to secrecy." This means that up to 6, 000 former and current civil servants and others within CSIS, the CSE, certain special RCMP sections, and many others are bound permanently (for the rest of their lives one would imagine) to secrecy. This "special operational information" includes information about the lawful activities that would be ordinarily conducted within the Communications Security Establishment, for example.[133] It is however possible for a person who is permanently bound to secrecy to disclose special operational information or classified information on the grounds that it is in the public interest to do so. This is set out in the "public interest defence" section of the *Security of Information Act*. The following quick

[133] Office of the Communications Security Establishment Commissioner, p-1-6.

description of the public interest defence is found on the website of the Office of the Communications Security Establishment Commissioner:

"An individual would not be found guilty of an offence under this part of the Act if that person could establish that he or she acted in the public interest when communicating or confirming special operational information. The Act states that a person acts in the public interest if the person's purpose is to disclose "an offence under an Act of Parliament that he or she reasonably believes has been, in being or is about to be committed by another person in the purported performance of that person's duties and functions for, or on behalf of, the Government of Canada." The public interest in disclosure of information must outweigh the public interest in non-disclosure."[134]

There are a few hitches with this defence however. A judge can only consider the defence if the person claiming it has complied with a series of preliminary steps which must be conducted prior to communicating or confirming the operational information.

First, concerns must be brought to the attention of the Deputy Attorney General of Canada or the deputy head of whatever institution the information relates to, for example, the Deputy Minister of Defence. If no response is received by either the Deputy AG or the deputy head of the organization/institution within a reasonable amount of time, then the person must bring their concerns to the attention of the Communications and Security Establishment Commissioner and allow a reasonable period for response. If both avenues do not yield an adequate response, then the person may choose to rely on the public interest

[134] Ibid.

defence. If the person fails to complete these steps they are precluded from claiming that disclosure was made in the public interest.

Civil liberties concerns in relation to this section revolve around the need in an accountable, democratic society to protect and encourage whistleblowers within public agencies who are willing to step forward and speak openly about misconduct, error, misappropriation of funds, criminal activity, corruption and other blights on responsible governance. Whistleblowers traditionally must risk and often sacrifice career, personal and financial security and reputation in order to blow open the doors on internal misconduct by their institutions, be they public or private sector employees. It is essential to ease the necessary disclosure of misconduct within government, particularly areas of government that hold the power to lawfully infringe on core liberties such as liberty and privacy.

The *Security of Information Act*, enacted in 2001, is a component of the *Anti-terrorism Act* security regime in Canada. It replaces the old *Official Secrets Act* of 1939. Several key areas have been modified in the new act with direct impact on civil liberties for Canadians and those traveling in Canadian jurisdiction.

The 1939 *Official Secrets Act* was originally passed in 1890 and remained unchanged until it was replaced by the 1939 version prior to WWII and the Cold War Era. Originally, the purpose of this genre of legislation in Canada has been to protect the nation's national security and national interest from unlawful theft and communication of information. In 1939, the *Official Secrets Act* had two main provisions of note: s.3 created a criminal offence of espionage and s.4 created an offence of 'leakage' or wrongful communication of information. There have been over 20 prosecutions under the *Official Secrets Act* 1939 since

its inception, most of which have come under the category of espionage and espionage-related offences.

The *Official Secrets Act* 1939 has been criticized as both ineffective and overbroad. The ambiguous and overly broad nature of the Act has repeatedly been pointed out in government committee hearings as a major failing of the Act. It also opens the door to the degradation of public access to government information as well as raising issues of Charter violation. In 1969, a *Royal Commission on Security* discussed this issue at length and called for a complete review of the Act. Again the call for change was heard and criticisms raised in 1979 at a House of Commons Standing Committee hearing on issues of freedom of information and protection of privacy and again in 1979 at a *Commission of Inquiry concerning Certain Activities of the Royal Canadian Mounted Police*. Criticisms raised in these committees all led to changes in legislation in order to improve public access to information.

The ineffectiveness of the *Official Secrets Act* 1939 has also been a sore point for civil liberties advocates and enforcement divisions alike. It is only reasonable that legislation drafted for the security and technological climate of pre-WWII would prove ineffective in the context of a constantly changing human security and world geopolitical environment. The introduction of the *Charter of Rights and Freedoms* as well as emerging technologies have all had an impact on the national security issues addressed by the *Official Secrets Act*.

Immediately following Sept 2001, Canada and indeed much of the world sought to improve and modernize security regimes. It is not surprising that the *Official Secrets Act* was one of the areas for reform. Increased effectiveness and streamlined power for government, intelligence and policing communities has been the result, often to too great an extent at the expense of

Canadians' civil liberties and human rights. It is recognized that change was inevitable, and an effective means of protecting national intelligence interests and other government information, including private information regarding citizens, is necessary. However, the new *Security of Information Act* may simply be too big a hammer when investigating and prosecuting terrorist activity.

The *Security of Information Act* 2001 replaced the old *Official Secrets Act* with vigor in the eager lawmaking period immediately following the attacks in New York in 2001. This political and social climate led to a reluctance by governments and other forces in civil society to appear to be 'doing nothing' or not enough to counter the perceived threat of widespread terrorist attacks. The new Act's purpose is to provide the government with more effective means to address national security concerns. These concerns remain overbroad, and include espionage by foreign powers and terrorist groups as well as intimidation or coercion of Canadian ethnocultural groups.

The new Act protects certain classes of information. These are "safeguarded information," which means information that governments have "taken measures to safeguard." This may mean information designated as classified or where explicit notice was given not to disclose the information, but it also has the potential for an overbroad interpretation. This section may also include any information which the government has implied notice not to disclose, for example, information kept in a closed or locked cabinet or a secure internet site where employees must sign in with a password in order to view. This definition would effectively make any and all government communications subject to the Act.

Secondly, the other class of information protected by the Act is information with the potential to be harmful to Canadian interests. This includes information, which if disclosed, released, or stolen, could be shown to cause harm to Canadian interests. Some examples of this type of information include critical infrastructure plans, information that could impair Canadian military capability or threaten the capabilities of the Government of Canada in relation to security or intelligence, or additionally it might include information with the potential to impair or threaten Canadian capability to conduct diplomatic relations or international negotiations.

The Act creates several classes of offences. Some of these offences include: espionage, leakage, and harbouring or concealing. Espionage is an offence where persons "knowingly or recklessly communicate information that will result in harm to Canadian interests to foreign entities or terrorist groups. Leakage is an offence pertaining to disclosure, without authorization, of safeguarded information. Harbouring or concealing consists of knowingly harbouring or concealing a person whom the person committing the offence knows to be a person who has committed or is likely to commit an offence under the *Security of Information Act*, such as espionage or leakage.

CONCLUSION

This paper has shown that a critical human security nexus exists between changes in to law and policy, the actions of police and intelligence forces, and the health of citizen liberties and freedoms in Canada. The powers we afford our governments and police forces come to them by us, the citizens of a democratic state – a fact that has become lost in the race to restrict citizens in the name of "terrorism safety measures" or "national security." Euphemisms such as these have become commonplace in our daily lexicon to the point that the words themselves have taken on new meaning, and new power. No less has been the change in law, and legal terminology. The definition of "terrorism" itself is a politically charged legal norm in Canada, mandating police forces to investigate political and religious motivations in a broad range of crimes in order to properly determine if they come under the prosecutorial rubric of "terrorism." Racial and ethnic profiling abound, and are quasi-authorized by this choice of definition.

In law, the rights of the accused have taken a severe beating and it is being kept under wraps by the bullies. Dramatic and far-reaching changes have been wrought to several primary statutes that define the relationship of citizen to state in Canada, such as the *Canada Evidence Act*, the *Criminal Code of Canada*, the *Official Secrets Act* now the *Security of Information Act*, and others all in the name of protecting us in the age of Anti-Terrorism. But do these measures go to far? This essay suggests that yes, indeed they do, and dangerously so. Infringing on the rights of accused Canadians as well as non-Canadians entering our country is a risky practice that ultimately undermines rather than strengthens the society that chooses this path. We are currently seeing in the case of our southern neighbour the initial stages of social decay, corruption, conflict and suffering which are the inevitable consequences of this strategy

towards citizen social control. To lead with a carrot is always easier than to lead with a stick, and both governments and concerned citizens forget this at their peril.

Human security, truly, is built slowly and quietly, day by day and brick by brick at the hands of mothers, fathers, doctors, shopkeepers, artists, government clerks, farmers, lawyers, garbage collectors, writers, judges, athletes… all measure of ordinary citizens conducting their daily lives in peace and prosperity. One thing all these people have in common is that they are all citizens, and all protected by the same rights and responsibilities that accompany that title. Our response to the threat of terrorism has been wrong, it has undermined those rights too far and created a trend towards fascist policy as a government response to threat. In fact, this is a simplistic, insecure and immature response to threat, both internal (social) and external (political). A state confident in its citizens and healthy in its respect for rights and persons would address the root causes of terrorism, spend increasing energy and time of conflict resolution both at home and abroad, establish reasonable safeguards while concentrating on intelligence and civilized policing, not secret witch-hunts and attacks on activists. Building long-term security requires trust and confidence. It requires planning and intelligence. It is not too late to reverse the draconian measures implemented in recent years and to return to a state where the public trust is held, for all to see, in the public eye.

Appendix A

Preamble Anti-Terrorism Act 2001

An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism

Preamble

WHEREAS Canadians and people everywhere are entitled to live their lives in peace, freedom and security;

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;[135]

[135] Anti-Terrorism Act, preamble.

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