

Profiling the *Anti-terrorism Act*: Dangerous and Discriminatory in the Fight Against Terrorism

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Introduction

On September 11, 2001, citizens of the United States suffered the worst terrorist attack on domestic soil in their nation's history. The U.S. authorities identified the perpetrators as members of a terrorist organization of Arab/Muslims. The threat of terrorism being brought, quite literally, so close to home called for the Canadian government to respond at both the administrative and legislative levels. What has resulted is a unique situation in the law: the practice of "profiling" by race or religion and the new federal *Anti-terrorism Act*¹ interact in a way that poses a threat to the equality rights of Arab/Muslim Canadians.²

There is significant speculation that the need for heightened national security has resulted in the employment of a policy of profiling³ to help the authorities identify and investigate possible terrorist threats. The targeting of Arab/Muslims for investigation, based on their race or religion, is cause for an array of concerns. Profiling not only poses a risk to the civil liberties of the targeted individual, it stigmatizes the Arab/Muslim community as a whole.

The *Anti-terrorism Act* has the effect of broadening both the substantive definition of

criminal activity and the state's investigative power, while significantly reducing levels of accountability. In doing so, this legislation risks breaching a variety of protected rights as defined by the *Canadian Charter of Rights and Freedoms* ("Charter").⁴ Of particular concern in this paper is the potential for the violation of section (s.) 15 equality rights concerning the potential discrimination against Arab/Muslims.

Specific concerns with the *Anti-terrorism Act* are that it uses an overly broad definition of terrorism, provides for the reduction or elimination of rights under the *Access to Information Act*,⁵ and reduces government accountability by limiting judicial review. These concerns create an unacceptably high risk of alienating and stereotyping Arab/Muslim Canadians by race and/or religion.

Despite the possibility that this legislation may infringe civil liberties guaranteed under the *Charter*, the government is confident that the legislation would be considered by a court to be demonstrably justified in a free and democratic society, and would therefore be saved under s. 1. It is arguable that any infringement on the rights of Arab/Muslims

¹ *Anti-terrorism Act*, S.C. 2001, c.41.

² There is some difficulty in discerning the specific characterization for those people who are likely susceptible to human rights abuse following September 11, 2001. Distinctions made on race, religion or nationality may facilitate stereotyping. For the purposes of this paper, I will refer to Arab/Muslims as those affected, although in reality, the scope may be broader.

³ Law enforcement may use profiling in a number of ways to focus investigation. For the purposes of this paper, the profiling referred to is that employed based on race or religion.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. [*Charter*].

⁵ *Access to Information Act*, R.S.C. 1985, c.A-1 [*Access to Information Act*].

in Canada would be so justified given the security risk of terrorism arising from the Middle East. However, that a law may be saved under s. 1 of the *Charter* does not mean that justice is being reached in the best possible manner. Profiling, within a context of extensive state power exercised with limited accountability, may lead us unknowingly to accept grave abuses to fundamental human rights. While discretion may be a necessary component of the anti-terrorism legislation, the importance of legislation that provides the maximum amount of protection for rights cannot be overstated. Where infringement of civil liberties is necessary, it remains unacceptable without accountability.

The aim of this paper is, first, to gain a meaningful perspective on the state of the law with respect to profiling and the new anti-terrorism legislation. After the true potential for harm from the interaction of these aspects is identified, a constitutional analysis will be used to establish whether a legal justification for the condition of the law exists. Finally, the paper will take a deeper look at some of the surrounding policy issues to help discern what better options may be available.

The State of the Law After September 11

Profiling's Renewed Prominence

There is some difficulty in assigning an exact meaning to the concept of "profiling". For the purposes of this analysis, it will be adequate to define profiling as "allowing the use of race or ethnicity to play a decisive role in the decision of whether to subject an

individual to further investigation."⁶ It has been alleged for some time that domestic police have employed this practice in targeting minority groups on a smaller scale through local police enforcement.⁷ Profiling has traditionally elicited criticism from academics, public interest groups, and concerned citizens for its unfair treatment and the resulting over-representation of profiled minority groups within the penal system.⁸

Despite the known risk, in the aftermath of the September 11 attacks, a number of media sources report an emerging demand for the use of racial profiling, in the interest of national security. It has been observed that profiling has enjoyed a "renewed prominence" following the attacks.⁹ Indeed, the headlines for one *National Post* article on October 5, 2001 was "Ontario denies anti-terror policy is racist: Retired General says checking Arabs 'common sense'." This article specifically refers to the suggestion of retired Major-General Lewis MacKenzie, then security advisor to former Ontario Premier Mike Harris, that profiling would be an acceptable law enforcement strategy to fight terror.¹⁰ An editorial in that same newspaper two weeks earlier stated the opinion that "it would be criminally negligent if Air Canada did not engage in profiling."¹¹ These opinions reflect the actual directives given to port-of-entry immigration and customs officials at the same time. As reported in *The Globe and Mail*, those officials were directed to target men with technical training and links to certain "conflict" countries.¹² We can only speculate on how and where profiling is currently

⁶ Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*," in *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, ed. R. Daniels, P. Macklem and K. Roach. (Toronto: University of Toronto Press, 2001) at 367.

⁷ *Ibid.* at 369.

⁸ *Ibid.* at 367.

⁹ *Ibid.* at 367.

¹⁰ Sarah Schmidt "Ontario denies anti-terror policy is racist: Retired General says checking Arabs 'common sense'" *National Post* (5 October 2001) A5.

¹¹ "Profiles in Prudence," Editorial, *National Post* (20 September 2001) A17.

¹² Estanislao Oziewicz "The Brink of War: Border alert targets pilots, Canadian guards told to watch for men with technical training and links to 16 'conflict' countries" *The Globe and Mail* (19 September 2001) A1.

being employed by government officials, but the available evidence and common sense seem to indicate that profiling is occurring to some degree.

This analysis is not meant specifically as an argument on the merits of profiling as a policy, or on its effectiveness. It simply acknowledges its existence. There is an argument that profiling, even if imperfect, is a logical response to a threat perceived to be from a group identifiable by race. Particularly given the ensuing military response to the terrorist attacks and the proclamation of the "War on Terror," it is logical to conclude that feelings of hostility toward North Americans may be exacerbated. That being the case, it is also logical to conclude that at least some special attention will be given to those citizens and non-citizens with ties to nations that we ourselves have chosen to identify as the "enemy."

Legislating a Response to Terrorism – The Anti-terrorism Act

The *Anti-terrorism Act* has the effect of broadening the net under which abuses of discretion may take place, while at the same time reducing the state's level of accountability. The *Anti-terrorism Act*, through an amendment to the *Criminal Code of Canada*,¹³ is the first legislation to define "terrorist activity." Section 83.01 of the *Criminal Code* outlines an expansive and broad definition for "terrorism." Particularly notable is subclause (b)(11)(e), which encompasses as criminal any action that: causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).
Clauses A to C read:

- A) causes death or serious bodily harm to a person by the use of violence,
- B) endangers a person's life,
- C) causes a serious risk to the health or safety of the public or any segment of the public.

Critics of the *Act* state that under this definition, many acts of civil disobedience which are unlawful but certainly not terrorist in nature could, if the *Criminal Code* were interpreted broadly enough, be captured as criminal and render individuals susceptible to the broad investigatory powers of the *Act* as the legislature never intended. Former Minister of Justice Anne McLellan acknowledged the existence of an overbreadth problem prior to the last amendment, stating that, while it is not the intent of the legislature, the *Act* as it is worded does not take into account that some "unlawful activities ... do not amount to terrorism."¹⁴ Despite the most recent amendments, critics maintain that this overbreadth problem persists. The problem has two levels. First, as noted, the legislation may be interpreted and misused to capture activity not intended by the legislature, particularly due to the ambiguity in what constitutes "serious disruption," and the application of this standard to the idea of "any segment of the public." On a deeper level, this overbreadth problem serves to widen the net under which profiling may operate unfairly against Arab/Muslims individually and contribute to the stigmatization of that community in general.

The overbreadth problem may be a result of simple drafting failures on the part of the government, or a necessary evil that is inherent in legislation of this type. Either way, the *Anti-terrorism Act* makes very clear the government's priority of effectively policing terrorism and its willingness to sacrifice civil liberties to attain that effectiveness.

¹³ *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code*].

¹⁴ Alexandra Dorstal, "Casting the Net too Broadly: The Definition of 'Terrorist Activity' in Bill C-36" (2002) 60 (1) U.T. Fac. L. Rev. 69 at para. 4.

Another critique of the *Act* is its allowance for the total restriction of access to information. Through an amendment to the *Access to Information Act*, the *Anti-terrorism Act* provides that, in situations where the Attorney General issues a prohibition certificate in accordance with s. 38.13 of the *Canada Evidence Act*,¹⁵ the *Access to Information Act* will not apply, or will cease to apply with respect to any applications for information being requested.¹⁶ This provision alienates the public from the benefits usually provided by access to information legislation (i.e., accountability and fairness in administrative decision-making). Additionally, and possibly of greater concern is the possibility that this amendment may hide the fact that information is being protected altogether.¹⁷

Beyond restricting access to information, other provisions of the *Anti-terrorism Act*, regarding the power to investigate and prosecute, reveal diminished accountability in these processes. An example of this may be seen in the provisions allowing for the creation of a "list of terrorists". This power is specifically conferred by amendment in s. 83.05 of the *Criminal Code*, which states [emphasis added]:

83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are *reasonable grounds to believe* that

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity;

or
(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

(1.1) The Solicitor General may make a recommendation referred to in subsection (1) only if the Solicitor General has reasonable grounds to believe that the entity to which the recommendation relates is an entity referred to in paragraph (1)(a) or (b).

Subsection 6 provides that judicial review of entities¹⁸ assigned to this list may occur in private with limited participation of the party assigned to the list, or their counsel, and without opportunity to test the evidence of the Crown. It reads [emphasis added]:

(6) When an application is made under subsection (5), the judge shall, without delay

(a) *examine, in private, any security or criminal intelligence reports considered in listing the applicant and hear any other evidence or information that may be presented by or on behalf of the Solicitor General and may, at the request of the Solicitor General, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;*

(b) provide the applicant with a statement summarizing the informa-

¹⁵ **Canada Evidence Act*, R.S.C. 1985, c.C-5. This paper was last updated in March of 2002. It does not reflect developments in the law since that time.

¹⁶ *Anti-terrorism Act*, s. 87

¹⁷ Lorne Sossin, "The Intersection of Administrative Law with the Anti-terrorism Bill" in Daniels, Macklem & Roach, *supra* note 6, 419 at 426.

¹⁸ Entities are defined in s. 83.01(1) of the *Criminal Code* as including a "person, group, trust, partnership or fund or an unincorporated association or organization."

tion available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;

(c) provide the applicant with a reasonable opportunity to be heard; and

(d) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

Profiling and the Anti-terrorism Act Amendments: A Dangerous Interaction

Although subsections (b) to (d) provide for some due process, it is evident that, to a large extent, discretion may be exercised beyond the reach of the party affected. Discretionary decisions in these and other sections of the statute appear to rely on the official having a "reasonable grounds to believe" before he or she takes action. (See author's emphasis in s. 83.05(1), earlier.) This term of art has been examined by the Federal Court in the context of language to the same effect arising in the *Immigration Act*.¹⁹ In *Re Ikhlef*,²⁰ the court considered a certificate issued by the Solicitor General of Canada and the Minister of Citizenship and Immigration for the removal of Mr. Ikhlef in accordance with the *Immigration Act*. In examining the "reasonable grounds for belief" standard, the court followed the recent decision in *Qu v. Canada (Minister of Citizenship and Immigration)*²¹ and *Chiau v. Canada*,²² stating that, "'reasonable grounds' is a standard of proof that, while falling short of a balance of probabilities, nonetheless

connotes a bona fide belief in a serious possibility based on credible evidence."

Judicial review under this standard is greatly hindered through the lack of opportunity to test evidence. It has been observed that "because [judicial] involvement may take place in secret, behind closed doors, and without an opportunity for further review or appeal, the judicial capacity to provide accountability for government decision making is limited."²³ There may be little review of any actual merit. Effectively, it is not the acts of the party being reviewed. Rather, the scope of review is limited to the adequacy of the data-collection of the administrative body.²⁴ As indicated by the language in the case law, it is the bona fides of the belief in the evidence that gets tested, not necessarily the evidence itself. In this context, it may be seen that the "reasonable grounds" standard prescribed by the *Criminal Code* may be closer to one of patent unreasonableness. The resulting danger is the potential for extensive investigation and the exercising of administrative discretion to significantly affect the economic and civil liberties of individuals without any thorough assessment of merit.

Profiling and the *Anti-terrorism Act* amendments need to be examined as a functional whole to fully grasp the potential for abuses to civil liberties. This combination increases the propensity for abuses of rights in two ways. First, broadening the definition of "terrorist activity" greatly increases the net within which unwarranted investigation, accusation and charges may take place. Second, the broad investigative powers and lack of procedural safeguards to those investigative processes provide a cloak through which the low standard for these actions can be met. Indeed, the processes available to a party in challenging the

¹⁹ *Immigration Act*, R.S. 1985, c.I-2, s. 19. [*Immigration Act*].

²⁰ *Re Ikhlef*, [2002] F.C.J. No. 352.

²¹ *Qu v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1945 (C.A.).

²² *Chiau v. Canada*, [2001] 2 F.C. 297 (C.A.).

²³ Sossin, *supra* note 17 at 429.

²⁴ Sossin, *supra* note 17 at 424.

findings of a state official may be made unavailable at the government's discretion. As noted, applications for access to information may be denied categorically. Likewise, judicial review is subject to being limited in scope through the application of s. 83.05(6)(a) (quoted earlier). This section provides that, at the request of the Solicitor General, where the judge is of the opinion that disclosure may harm the interests of national security, the judge may "hear all or part of that information in the absence of the applicant and any counsel representing the applicant." Despite the remainder of the provisions in the same section providing for a summary of the information available and a "reasonable opportunity to be heard,"²⁵ absence from the hearing presents serious obstacles to any effective testing of evidence. The issue of denial of full participation in proceedings also arose in *Re Ikhlef*.²⁶ Despite objections from counsel for the accused, the court held that "evidence that was heard by and presented to the Court in the absence of the person concerned and his counsel cannot be disclosed to them since that would be injurious to national security and to the safety of persons."

Unfortunately, the reality is that these laws will likely be applied primarily to Arab/Muslims through profiling. Certainly, even in the early days of this legislation, it has been shown that a likely consequence will be the assignment to the noted "list of terrorists."²⁷ The consequences for those assigned to this list are far-reaching, as is evident from the case of Mr. Liban Hussein, a Canadian citizen from Somalia.²⁸ Mr. Hussein was designated a "terrorist entity" in the fall of 2001. He was immediately jailed and his assets were frozen. Further, it was illegal for anyone to have financial dealings with him.

He was cleared of all allegations and removed from the list in June 2002, but in spite of that he lost his business, income, and future prospects. Mr. Hussein's story not only illuminates the *Act's* enormous potential for intrusion on human rights, but demonstrates how the designation of "terrorist" can stigmatize an individual long after the 'official' label is removed.

In profiling Arab/Muslims for investigation or for designation as a "terrorist" under the *Anti-terrorism Act*, the government may act without providing access to any of the background information, and with judicial review conducted in private and away from public scrutiny. Any evidence obtained under these broad powers is available to the Crown, the immigration department, or the Canadian Security Intelligence Service ("CSIS"). This process specifically targets a group of people based on race and, through an overly broad definition, may label them as "terrorists." One of the frightening aspects of this situation is that the unreasonable denial of rights of Arab/Muslims may occur while government officials act in good faith. The legislation simply does not supply the real checks and balances required to provide the best guarantee for fair decisions.

The government has very recently shown the great lengths of discretionary power it is prepared to employ to combat terrorism. On August 1, 2002, media reports revealed that CSIS had recently "facilitated the transfer" of Canadian citizen Mansour Jabareh to the U.S. for questioning.²⁹ The transfer became public after a leak to NBC News in the U.S. For several days, little was known about the circumstances surrounding the transfer, the crimes of the accused, or the condition of the accused in American

²⁵ *Criminal Code*, s. 83.05(6)(c).

²⁶ *Supra* note 20.

²⁷ Updated versions of this list may be viewed online:

<<www.osfi-bsif.gc.ca/eng/publications/advisories/index_supervisory.asp?#Supter>>.

²⁸ Alan Borovoy, "Civil Liberties: Security's Serpentine Coils: Ottawa has broad powers to detain suspected terrorists, but those who prove innocent are still pariahs," *The Globe and Mail* (1 August 2002) A21.

²⁹ Wesley Wark, "What's going on here?" *The Globe and Mail* (5 August 2002) A11.

custody. In the aftermath, it was revealed that Mr. Jabareh was captured first in Oman on suspicion of involvement with terrorist organizations in the Middle East. However, what is still unknown is why Canadian authorities did not complete the questioning of the suspect in Canada and then disseminate the information to interested governments accordingly. The title of the article reporting on that issue – “What’s Going on Here?” – is representative of a major criticism concerning the *Anti-terrorism Act*. As will be addressed later, accountability for actions taken in this “War on Terrorism” is a key to ensuring that security and fairness prevail. Canadians, especially Arab/Muslim Canadians, should not be subjected to the speculation surrounding the discretionary actions of government agencies carried out under this new statutory scheme. Not least, it is disturbing to note that without a leak to the media, this incident may likely have been kept from public attention altogether. It may be more prudent for the legislature to find ways to minimize the risk of this occurring instead of creating allowances for it.

Beyond the impact the *Anti-terrorism Act* may have on an individual citizen, it could have an enormous potential impact on Arab/Muslim Canadians as a community, both citizens and non-citizens alike. The importance of that impact cannot be overstated. As will be discussed in the legal analysis, this process not only threatens to bring about unwarranted stigmatization of individuals, it threatens to stigmatize the Arab/Muslim population as a whole.

Constitutional Analysis

Observing the current state of the law and the potential for the abuse of civil liberties obviously gives cause for concern. If profiling by race or religion is being employed in conjunction with the *Anti-*

terrorism Act amendments, it is very likely that a court would find a breach of s. 15 rights to equality.

The government has noted the possibility for *Charter* breaches in a number of areas of the *Anti-terrorism Act*, conceding that it is relying on a deferential court to find that the “balance between individual and collective security [has] shifted,”³⁰ and, accordingly, that the *Act* is demonstrably justified in a free and democratic society, and therefore constitutional within the scope of s. 1.

Section 15: Right to Equality

The difficulty with any legal analysis of profiling is that profiling is not an officially recorded policy. Despite the evidence that it is occurring, there are no regulations or any legislation prescribing its usage. Profiling is carried out at an operational level through the discretionary powers of various administrators. It may be evident only in verbal instructions to subordinates, and possibly in internal memoranda. Its existence is problematic to prove, and therefore difficult to challenge. However, whether this policy could effectively be challenged or not, a *Charter* analysis of profiling is essential in examining its interaction with the legal system, *Charter* values, and, consequently, Canadian society.

The test for establishing a breach of s. 15 right to equality has recently been described by the Supreme Court of Canada in *Law v. Canada* (“*Law*”).³¹ In assessing whether there has been a s. 15(1) breach, the court will take a purposive and contextual approach in examining three central issues:

- whether a law imposes differential treatment between the claimant and others, in purpose or effect,
- whether one or more enumerated or analogous grounds of discrimination are the

³⁰ Lorraine Weinrib, “Terrorism’s Challenge to the Constitutional Order,” in *The Security of Freedom: Essays on Canada’s Anti-terrorism Bill*, ed. R. Daniels, P. Macklem and K. Roach. (Toronto: University of Toronto Press, 2001) at 94.

³¹ *Law v. Canada*, [1999] 1 S.C.R. 497.

basis for the differential treatment, and

- whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.³²

It is apparent that the first two steps of this test are fulfilled. As noted, profiling is by definition the differential treatment – in this case, the targeting for identification and investigation – of an individual based on their belonging to a certain group. The policy of profiling Arab/Muslims satisfies the second branch of the test, since both race and religion are enumerated grounds. As with most s. 15 challenges, the crux of the breach issue would fall on the third branch, and whether this distinction is discriminatory.

In assessing whether a distinction amounts to discrimination, the court would employ an objective/subjective standard in inquiring whether a reasonable person in circumstances similar to the complainant would suffer harm to their sense of human dignity. The non-exhaustive definition of “human dignity” from *Law* states:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?³³

The court has identified a number of contextual factors to be balanced in examining the effects of a limitation of rights on human dignity.³⁴ The court will consider the pre-existing disadvantage, vulnerability or stereotyping of a group, the relationship between the grounds for distinction and the claimant’s characterization of the circumstances (i.e., whether the distinction takes into account the needs of the complainant), any ameliorative purpose or effect of the legislation, and the nature of the interests affected. It is important to note that, in the application of these factors, the court will not consider them exhaustive, nor any of them singly determinative.

Applying the above factors to profiling reveals ample arguments for the position that profiling is indeed a breach of s. 15(1) right to equality. Of most significance is the propensity for stereotyping. It has been noted that the practice of profiling fits neatly into the legal concept of stereotyping which effects harm to “human dignity” as examined above:

[Stereotyping] is an over-generalization – that is, an assumption that all members of a group possess certain undesirable traits that some members of those groups possess, when in fact some, or many, do not. The

³² *Ibid.* at para. 88.

³³ *Ibid.* at para. 53.

³⁴ *Ibid.* at para. 62.

harm to human dignity – what transforms the use of stereotypes into discrimination – is that doing so has the effect of stigmatizing all members of that group, by promoting the view that they are somehow less worthy of respect and consideration, because they all possess the undesirable trait in question.³⁵

Profiling does not merely have the effect of stereotyping, it actually employs stereotyping as its basis for utility. An assessment of the other factors reveals little reason to believe that the deleterious effect of stereotyping would be counterbalanced to save this practice as non-discriminatory. Profiling in the sense it is being used does not take into account the needs of the distinguished group. In fact, it willingly sacrifices them. Nor is there any ameliorative purpose to the practice. In assessment of the final factor (i.e., the nature of the interest affected), profiling and the accompanying stigmatization of Arab/Muslim Canadians denies full membership in Canadian society. The court has held this interest as critical and important to protect.³⁶

Section 1 Analysis

If, as predicted, profiling through the *Anti-terrorism Act* provides for a breach of s. 15, a s. 1 analysis becomes crucial. The specific concerns about the overly broad definition of terrorism may be challenged for vagueness, and therefore not “prescribed by law.” The framework for the remainder of the s. 1 analysis is derived from *R. v. Oakes* (“*Oakes*”)³⁷. The *Oakes* test places the onus on the government to establish that a sufficiently

important purpose justifies violating *Charter* rights.³⁸ The government must establish (a) that the objective of the limitation is pressing and substantial, and (b) that those rights are limited by means that are reasonable and proportional to the importance of the objective. This proportionality test is examined in three branches by evaluating (i) the rational connection of the practice with the objective, (ii) whether the limiting practice or law is of minimal impairment, and (iii) the balance between the deleterious effects of the legislation with its objective and/or any salutary effects of the legislation.

It should be noted that to aid in the *Oakes* analysis, the court will first characterize the objective of the legislation. Additionally, the court may apply the *Oakes* factors with more or less rigour, depending on the circumstances.

(a) Overbreadth Concerns

The concern that the definition of terrorism prescribed by the *Criminal Code* is overly broad may support an argument that this portion of the *Act* is not “prescribed by law.” In *R. v. Therens*,⁴⁰ the Supreme Court of Canada described the essence of this portion of s. 1 as requiring that distinctions imposed by law not be arbitrary. The court held that guidelines which are overly vague are of no force or effect. In *Osborne v. Canada (Treasury Board)*,⁴¹ the court elaborated on this concept, stating that vagueness was possible in two ways. First, in cases where such a degree of uncertainty exists that the law has no actual function, and second, where such overbreadth exists that it would be impossible to establish a reasonable limit vital to the rest of the s. 1 analysis. Taken at face value, this overbreadth critique may

³⁵ *Supra* note 6 at 371.

³⁶ *Supra* note 31 at para. 74.

³⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103.

³⁸ *Supra* note 37.

³⁹ This branch of the proportionality test was modified by *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

⁴⁰ *R. v. Therens*, [1985] 1 S.C.R. 613.

⁴¹ *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

seem to be the anti-terrorism legislation's *Charter* Achilles heel. Arguments against the overly broad definition of terrorist activity contained within s. 83.01 of the *Criminal Code* are based on the exact sort of parade of horrors with which courts are concerned in the overbreadth analysis. The broad discretion granted to administrators of the *Act* makes it hard to discern exactly where violations of civil liberties might start and end. Identifying these starting and ending points is made even more difficult by the 'cone of silence' built into the investigation and trial proceedings through the provisions of the *Act* which lower government accountability.

Despite overbreadth concerns, it should be noted that the court has shown a willingness to go soft on the overbreadth analysis of legislation, stating that absolute precision is not required where there is some evidence that the legislation requires allowances for discretionary elements.⁴² Given the concerns for security following September 11, it is almost certain that the judiciary would consider legislation combating terrorism as warranting this broad discretionary power.

Oakes Test

(a) Rigour Considerations

As previously noted, the court may apply the *Oakes* factors with more or less rigour, depending on the circumstances:

[T]he test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they

are deprived, and the importance of the state interest.⁴³

It has been further suggested that "[t]his flexibility may mean that variations will emerge to influence the intensity of the review for infringements to equality rights."⁴⁴

In this situation, it may be expected that the court would relax its scrutiny in an effort to show deference to the government and its efforts for the protection of national security. The political climate, even the collective psychology of the nation, has been shocked into guardedness by the threat of terrorism. The "importance of the state interest," being in this case one of national security, cannot be underestimated. However, the argument that a threat to national security should relax the rigour with which *Oakes* is applied can also be turned on its head. The fact that such a charged environment (with respect to terrorism) exists at the present time is also a compelling factor in heightening the risk and effect of discrimination against Arab/Muslims. This argument may help support the proposition that *Oakes* be applied more intensely.

(b) Characterization of the Issue

Prior to the actual application of the *Oakes* formula, the court will also characterize the objective of the legislation. It has been noted specifically in equality cases, that the "characterization of the government's purpose or objective ... plays a key role in both determining if there is a discriminatory distinction and in assessing whether the government can demonstrate a pressing and substantial interest and proportional means."⁴⁵

The court allows itself a great deal of flexibility in determining this characterization. However, in any circumstance involving the

⁴² *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

⁴³ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 198.

⁴⁴ Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 *Can. Bar Rev.* 299 at 338.

⁴⁵ *Ibid.*

Anti-terrorism Act, it can be predicted with some confidence that the characterization of the objective of the legislation will embody the need for national security. This characterization would likely reflect the Preamble to the *Act*, which specifically notes that the purpose of the *Act* is to combat terrorism and ensure the safety of Canadians through enhancing the country's ability to "suppress, investigate and incapacitate terrorist activity," including the "financing, preparation, facilitation and commission of acts of terrorism."⁴⁶

(c) *Oakes Formula: (i) Pressing and Substantial*

In *Oakes*, the court held that, to justify any breach of constitutional rights, the law in question must "relate to concerns which are pressing and substantial."⁴⁷ This stage of the test has played a limited role in determining litigation, since courts are usually prepared to show deference to the legislature's ability to pursue policies of its choosing. It has been observed that "[e]ven when in issue the Court rarely weighs the wisdom or propriety of a proffered legislative purpose."⁴⁸ Given the sociopolitical climate following the terrorist attacks, even in the face of evidence of profiling, legislation characterized as having the objective of protecting national security would be virtually guaranteed to be found pressing and substantial.

(d) *Oakes Formula: (ii) Proportionality Test*

(i) Rational Connection

The rational connection test examines whether the means employed are rationally connected to the desired objective of the legislation. This stage of the *Oakes* test is also used relatively sparingly. Examples of decisions rejecting legislation at this stage include *Andrews v. Law Society of British*

*Columbia ("Andrews")*⁴⁹ and *Miron v. Trudel ("Miron")*⁵⁰. In *Andrews*, the court found no rational connection between citizenship and the competency to practice law. In *Miron*, it was held that no rational connection existed between marital status and motor vehicle benefits.

Opponents of profiling may argue that this policy, due to its ineffectiveness as a policing tool, is actually not rationally connected to the objective of national security. Critics of the practice maintain that profiling by race or religion may well be of little use in identifying potential threats to national security, as these threats tend to move under the profiling radar, whether as part of Middle Eastern terrorist organizations or Texas Militia. If that opinion about the actual ineffectiveness of profiling is valid, this practice only serves to increase scrutiny of non-terrorist Arab/Muslims. That noted, a contrary line of reasoning exists: that profiling by race or religion in the context of this particular conflict can practically aid authorities in focusing their resources, since the "enemy," to some degree, is identifiable on those grounds.

The fulfillment of this branch of the test may largely depend on the specific evidence available on the actual means and effectiveness with which profiling is being employed. If it is employed in the broad context of the *Anti-terrorism Act*, it is likely the government would link profiling and the *Act* together and argue that a rational connection to national security does indeed exist.

(ii) Minimal Impairment

This stage of the *Oakes* test requires that any law breaching a *Charter* protected right do so in a manner so as to infringe that right as little as possible. It is on this ground

⁴⁶ Preamble, *Anti-terrorism Act*.

⁴⁷ *Supra* note 37 at para. 69.

⁴⁸ *Supra* note 44 at 341.

⁴⁹ *Supra* note at 43.

⁵⁰ *Miron v. Trudel*, [1995] 2 S.C.R. 418.

that the majority of s. 1 litigation is determined, and it would seem that any challenge with reference to the *Anti-terrorism Act* would be no exception.

While on its face the minimal impairment test calls for as little infringement as possible, case law has determined that in actuality, a range of discretion exists which allows for legislation to survive so long as it impairs as little as reasonably possible.⁵¹ A weak point of this statutory scheme lies in the unreasonable denial of procedural rights. As discussed, sections of the *Act* allow for the absolute denial of access to information, and minimal judicial review. Addressing concerns about national security is a critical objective of this legislation, but there are better options available that could achieve the same end without limiting accountability. For example, an alternative to completely barring a party's attendance from a hearing would be to provide for a form of *voir dire*, requiring the party's absence only on certain issues. While this still may not provide standard procedural protection, it would enhance the protection of rights by allowing for the direct hearing of a greater portion of the evidence, therefore increasing the opportunity to effectively respond or test that evidence.

Some critics of the new legislation have gone so far as to say that it is unnecessary in its entirety, because all activity contributing to terrorism was already illegal in Canada. It is arguable that what is required is not new legislation allowing for processes that infringe civil liberties, but simply more resources allocated to the law enforcement process already employed, including those checks and balances existing within this system.

Case law indicates that where the law calls for the total exclusion of rights, such law is in jeopardy with reference to the minimal impairment standard.⁵² While the

amendments in the *Anti-terrorism Act* do not totally exclude basic procedural rights, they may represent an unsatisfactory level of infringement where a process with increased protections could achieve the same ends.

Unfortunately for those caught within this process, the law does not demand perfection respecting minimal impairment, only reasonableness. Much has been made during this analysis of the dual effect of profiling through the *Anti-terrorism Act* being not only confined to the individual, but also serving to stigmatize the community sharing those profiled traits more generally. The courts have helped construct an understanding of the seriousness of this implication through extensive discussions on human dignity and stereotyping, such as those found in *Law*. Procedural safeguards must not only be assessed in the protection they afford an individual, but also in the protection they afford a race or religion. The court must take up this challenge.

Despite the need for national security, the court should demand more of the government in protecting citizens from racism: it should find that due to the lessening of procedural safeguards and government accountability, this legislation fails the *Oakes* test on the minimal impairment ground.

(iii) Deleterious Effects Versus Objective/Salutary Effects

It has been noted that this stage of the *Oakes* test is rarely determinative. Factors considered here generally reflect the rationale employed in the previous steps.⁵³ If a court were to pass the legislation through the minimal impairment stage by finding that the procedural safeguards and level of government accountability were adequate, it is likely that the court would find the potential for discrimination arising from these problems in the *Act* not to be of such a

⁵¹ *Supra* note 44 at 347.

⁵² *Supra* note 44 at 346, citing *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

⁵³ *Supra* note 44 at 347.

deleterious nature as to outweigh the benefits for national security.

Improvements in Policy for Improvements in Law

An examination of the state of the law does not simply end with a constitutional analysis. The potential for abuse of rights may be assessed beyond strict legality and the *Oakes* framework by looking into the underlying premises and assumptions surrounding the government's actions. Examining the policy behind the state of the law may help reveal better alternatives.

On the enactment of the *Anti-terrorism Act*, the government defended the *Act* on four grounds.⁵⁴ First, the government claimed that the new *Act* meets *Charter* muster. Second, it claimed that this legislation is necessary to fulfill international obligations. Third, the government noted that many allied countries had enacted similar legislation. And finally, it claimed that the new legislation provides greater protection than the *War Measures Act*.⁵⁵

While it may be argued that there is some logic behind these defences, in total they are unsatisfactory in addressing concerns with this *Act*. Granting for a moment that the *Anti-terrorism Act* is constitutional, simply because a piece of legislation passes *Charter* muster – with a judiciary bent to deference – does not mean that the government has found the best alternative. “Adequate” is not “optimal,” and whether the law demands it or not, “optimal” is exactly the standard for which the government should strive, especially when opening the doors to abuses of fundamental freedoms.

In reference to fulfilling international obligations, it is valid that Canada share in the responsibility to minimize the threat of terrorism for its international allies. However, international obligations must

coincide with national interests. There is nothing inherent in fulfilling international obligations that excludes accountability. Fulfilling international obligations while concurrently doing the utmost to protect fundamental rights is a realistic expectation and should be a sought-after goal.

The government's proposition that justification for the *Anti-terrorism Act* be found in the fact that other governments have enacted similar legislation is illogical in two ways. First, it begs for opponents of the *Act* to ask what the government would do if all of the other governments jumped off a bridge. Second, criticism of the *Act* is not necessarily aimed at its existence, or even its type, but its subtleties, processes, and even exclusions relative to our *Charter* and distinct societal values, which are *not* common to those of other nations.

The government also alluded to the quality of this legislation in protecting rights by comparing it to the *War Measures Act*, referring to the legislation employed during World War II, under which Japanese-Canadians were stripped of their property and relocated from their homes to internment camps. This was among the most embarrassing and extreme incursions of human rights propagated by Canada in its history. While it is applauded that the current government seeks to afford greater protections than were afforded under the application of the *War Measures Act*, this is such a low standard, given the history of its use, as to constitute no standard at all.

What the government has thus far failed to address is that there exists a very realistic expectation that national security may be protected in an accountable manner. In fact, accountability is especially important given the risks associated with the stigmatization of non-terrorist Arab/Muslims. If this is the case, then the question must be asked: why is the

⁵⁴ *Supra* note 30 at 94.

⁵⁵ Weinrib makes special note that only the *War Measures Act* is alluded to and that there is no mention of the *Emergencies Act*, which replaced it in 1988.

government choosing to adopt legislation that provides for the lessening of accountability within its processes?

With respect specifically to profiling, the simplest reason for not openly acknowledging its usage is likely the very fact that profiling by race or religion is regarded by so many with such disdain. From a political standpoint, the government likely would rather avoid this sensitive debate altogether. Instead, the government has opted to enact legislation that allows profiling to occur in the shadows, beyond control, and in the realm of "discretion," allowing government and citizens alike to either ignore or outright deny its existence. This option is dangerous because the impact of profiling will not be monitored, and, worst of all, will go unmitigated.

With reference to the *Anti-terrorism Act*, a possible reason why the legislative response to terrorism is wrought with vagueness and non-accountability is because the foreign policy leading to its creation may also be characterized this way. We as Canadians are experiencing a new terrorist threat. Through our American neighbours, the impact of problematic foreign relations has been brought close to home. Whatever arguments exist on the value of American foreign policy, and whatever opinions may circle concerning what should be done about the conflict in Afghanistan and the Middle East generally, at least this much should be conceded: we are allied with the Americans and other members of the "coalition" insofar as this conflict goes. We are allied geographically and economically, and we share a democratic ideology with mutual goals for protection. Even on a moral level, there is a clear and acceptable duty that Canada protect citizens of any country in the world from terrorism, in so much as we ensure that we detect dangerous activities within our borders and do not allow terrorism to harbour and prepare while we remain willfully oblivious. This is an international obligation worth fulfilling.

Realistically though, it is important to admit that the practical meaning of this international obligation, given Canada's geographical location and the recent terrorist attacks, is an obligation to the U.S. This being the case, acknowledging an international obligation to the U.S. is significantly different than simply adopting the American view toward the conflict. The President of the U.S., George W. Bush, has made strong declarations about his country's purposes, and more pointedly, about the extent to which the U.S. is willing to retaliate for the terrorist attacks on its people. The Americans have chosen a military response to this problem. Whether this response is a solution or exacerbation of this conflict remains to be seen. The Preamble of the *Anti-terrorism Act* correctly reflects a need for international cooperation in fighting terrorism. There can be no doubt that this is the case. However, Canada should be wary in simply taking on the Americans' fight. In the international "War on Terrorism," Canada needs to very clearly define its role for itself.

Until the Canadian government identifies the manner and extent to which it wishes to participate in the American crusade, there will be fundamental difficulties in drafting legislation which is anything but vague. Important questions remain as to Canada's exact role in this conflict. Is the goal of Canada only to ensure that terrorism does not have a nest within its borders? If so, do we require troops in combat? Are we at war? Are we at war with another nation? Answering these questions definitively can be the beginning of specific policies and accountable legislation. Although the Preamble to the *Anti-terrorism Act* provides some guidance about its purpose, the government must make a more proactive and precise statement about its goals with respect to the overall conflict.

If the reality of the situation dictates that authorities need to focus investigation through profiling by race or religion, such an unfortunate necessity should be openly

acknowledged. The law currently allows for profiling to go on away from detection and beyond monitoring for abuse. There is an underlying message sent by legislation that allows for the potential of undetected abuse of human rights: that such abuse is somehow acceptable.

A very damaging aspect of profiling is the stigmatization of those people belonging to the group being profiled. The effects of any further stigmatization of Arab/Muslims will be especially acute, given the social climate under the terrorist threat and the propensity for the fear elicited by these attacks to foster racism. The courts have acknowledged that the primary harm of discrimination comes from the loss of human dignity on the part of those people through the exacerbation of a stereotype. Public acknowledgement of these issues will allow for public information. Stigmatization of a group of people, and racism in general for that matter, flows from the public to the stigmatized group. The government could greatly help mitigate ill effects of not just profiling, but the ill effects felt as a result of this entire conflict by openly addressing the new dynamic between the investigation of Arab/Muslims in Canada and the protection of their rights. This is one way to help counter stigmatization at its source to protect Arab/Muslims from discrimination. An equally important means of protection is a simple apology, and a promise that no infringements on their rights will be perpetrated any further or longer than is necessary to meet set and specific goals for the security and safety of all Canadians.

Counteracting the deleterious effects of profiling in this way cannot occur effectively if the process is hidden. Its existence should be acknowledged and its employment specifically and openly discussed in scope and form. This discussion should include detailed explanations of the policy to Arab/Muslim Canadians and include input from groups such as the Canadian Arab Federation, the National

Council on Canadian Arab Relations, and the National Council on Canadian Arab Relations. Through an acknowledgement of profiling, the government could work toward ensuring that, if it was carried out, profiling would be done only when and where necessary, and in a professional manner of utmost respect and minimal incursion on human dignity.

Conclusion

Generally, there is widespread acceptance of prioritizing national security. However, there is a valid concern that the *Anti-terrorism Act* unnecessarily infringes upon fundamental rights. While sacrificing civil liberties in the interest of security may be justified, sacrificing civil liberties in a manner that exposes them to more harm when less would suffice, is not. Unnecessary abuse of rights must be protected with procedural and substantive law to protect against the ultimate irony of circumventing the same rights that we seek to protect. If we require profiling by race, religion or nationality, even if only for a limited time, the processes facilitating investigation of this nature must be open and accountable to minimize the potential for harm through discrimination.

Author's note:

This paper was last updated in March of 2002. It does not reflect developments in the law since that time.