



A REVIEW OF CANADA'S ANTI-TERRORISM ACT

Presentation to

**The House of Commons Subcommittee on Public Safety and
National Security of the Standing Committee on Justice,
Human Rights, Public Safety and Emergency Preparedness**

and to

**The Senate of Canada Special Committee
on the Anti-Terrorism Act**

September 2005



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Preface

B'nai Brith Canada has been active in Canada since 1875 as the community's senior advocacy and volunteer organization. Through its agencies, the Institute for International Affairs and League for Human Rights, its mandate is to protest the abuse of human rights and advocate on behalf of communities in distress both at home and abroad.

Before the tragic events of 9/11, the most serious terrorist act anywhere in the world, the one with the largest number of deaths, was planned, organized and executed right here in Canada – the Air India disaster. There has never been a commission of inquiry into that disaster. We simply have not digested the lessons to be learned. A mass terrorist attack could, and if experts are correct, will again be organized in Canada.

Yet, Canada is woefully unprepared for this inevitability despite the many warning signs. Incitement to terrorism proliferates without hindrance in Canada. Terrorists are being recruited in this country for action abroad. For instance, Canadian Mohamed Jabarah is in an American jail on allegations of plotting to attack the US embassy in Singapore. Canadian born Mohammad Momin Khawaja, arrested in March, 2004 in Ottawa, is facing charges of participating in a plot to bomb London, England. Plots for terrorist acts in Canada have also been uncovered. Ahmed Ressam, an illegal Canadian resident convicted for attempting to blow up the Los Angeles International Airport, confessed to targeting “a neighbourhood in Canada where there was an Israeli interest”. He also told investigators from his jail cell of a plot to blow up a fuel truck in a Jewish area of Montreal. The Canadian Security Intelligence Service (CSIS) revealed that a plot by a South American

terrorist cell linked to Osama bin Laden to strike Jewish targets in Ottawa and several other Canadian cities was foiled. There is also evidence that synagogues and Jewish schools have been under surveillance by those with suspected terrorist links.

The Jewish community and its institutions are prime targets for such incitement and terrorist schemes. The Jewish community has had to provide additional security for its schools, houses of worship and community buildings across the country as a direct result of bomb threats against its institutions, including B'nai Brith Canada offices. This is surely an unconscionable violation of our community's *Charter* right to safety and security. Minimizing security concerns will, therefore, in no way enhance our civil liberties, but only put us at risk while increasing our level of anxiety and feelings of endangerment.

Since 9/11, there has been increasing awareness of the pressing need to protect Canadians against the looming threat of global terror. The architects of the anti-terrorism legislation were therefore mandated with the task of balancing security imperatives with the protection of traditional civil liberties. This legislation was also necessary to bring Canada in line with its international obligations. *The Anti-Terrorism Act* was indeed a step forward, but in our view, far too timid a step.

We have thoroughly reviewed the legislation and are cognizant of the difficulties the drafters faced in balancing security concerns with traditional liberties. Nevertheless, we believe that this is a vital piece of legislation and that, with due consideration wherever possible to maintaining civil liberties, it should be strengthened to meet the painful challenges of the post

9/11, and indeed the post July 7, 2005 environment. In fact, we argue in this brief that there are aspects of the legislation that do not go far enough. Anti-terrorism legislation, both in its form and operation, must respect human rights punctiliously. However, terrorism is itself a grave violation of human rights. When the state does too little to defend against terrorism, the state is indeed violating the human rights of its citizens.

The threat of terrorism is real and immediate, not just to our community, but indeed to Canadians of all religious and ethnic backgrounds, and the response has to be commensurate with the clear and growing danger of terrorism on Canadian soil.

We offer specific recommendations as discussed in the following sections.

Recommendations

1. Sunset Clause

The *Anti-Terrorism Act*, as passed in 2001, set a five-year sunset clause regarding preventative arrest and investigative hearing powers (s. 83.32), with a three-year review period for the Act as a whole. B'nai Brith Canada recommended at the time that a limited sunset clause be inserted (regarding arrest without charge, the right to silence and ousting the jurisdiction of the Access to Information Commissioner and the Privacy Commissioner) in response to concerns that such provisions could have a negative impact on civil liberties. However, hoped-for improvements in national and global circumstances which might

justify the lifting of such measures have not materialized. Indeed the threat of a terrorist attack at home and abroad has only increased after such events as 7/7 in Great Britain.

A sunset for terrorism is not on the horizon. Ending preventative arrest and investigative hearing powers on December 31, 2006, as now provided under the legislation, simply would not reflect the very real dangers from terrorism. It is our view that those powers should be made a permanent part of the legislation. If and when the danger from terrorism recedes, they can be repealed under ongoing review provisions.

B'nai Brith Canada also reiterates its 2001 recommendation that amendments to the *Criminal Code* and the *Canadian Human Rights Act*, which strengthen anti-hate provisions (as found in sections 10, 12 and 13(2) under the *Anti-Terrorism Act*), should be made permanent and excluded from any ongoing review process. Such provisions should be part of our legislative structure no matter what level of terrorist threat exists.

2. Non-Discrimination Clause

Canada must make it clear that this country does not buy into any misplaced notion that terror against certain states is wrong while terror against particular states, for example Israel, India or Sri Lanka, is acceptable. Clearly, Canada's anti-terrorism policy cannot be administered so as to discriminate, in a manner inconsistent with the *Canadian Charter of Rights and Freedoms, 1982*. Furthermore, as a signatory to United Nations anti-terrorism conventions, including Article 6 of the *International Convention for the Suppression of Financing of Terrorism*, Canada is obliged to adopt such "measures to ensure that criminal

acts are not justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature”. B’nai Brith Canada therefore continues to call for the insertion of a general clause that recognizes that the anti-terrorism policy will not be administered in a manner inconsistent with the *Canadian Charter*, as well as a non-discrimination clause specific to the listing of terrorist entities under section 83.05 of the *Criminal Code*.

3. Definition of Terrorist Activity

In 2001, we recommended that the scope of the definition of “terrorist activity” be limited so to fall in line with Article 2(1)(b) of the *International Convention for the Suppression of Financing of Terrorism* which defines terrorism as any:

“act intended to cause serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

While many of our recommendations to limit the breadth of the definition of terrorist activity under *Bill C-36* were followed, we remain concerned that the definition of terrorism, as now found in the *Anti-Terrorism Act*, requires proof of the motives of the perpetrator – i.e., proof that the act or omission is committed “in whole or in part for a political, religious or ideological purposes, objective or cause” (s. 83.01(1)(b)(i)(B)). This provision, which goes beyond the definition in the United Nations *Convention on the*

Suppression of Financing of Terrorism as set out above, is overly restrictive and may place Canada in violation of the *Convention* if it should fail to prosecute or extradite as it is obliged to do. Motivation of the perpetrator is clearly a difficult element of proof that may never be really known. However, if the perpetrator is a listed entity, there should be no need to establish its purpose in facilitating or carrying out individual terrorist activities.

4. Retrospectivity Clause

The anti-terrorism provisions are limited by their prospectivity given that many people accused of terrorism now in Canada are implicated in acts committed before the Canadian law came into force. In its 2001 submission, B'nai Brith recommended that a provision be added ensuring liability to prosecution for offences created under the *Anti-Terrorism Act*, even if the wrongdoing was committed prior to its enactment -- so long as the wrongdoing was an offence at international law or under general principles of law recognized by the community of nations at the time it was carried out. The latter proviso would ensure that the retrospective application of the *Act* would fall within the exception set out in section 11(g) of the *Canadian Charter of Rights and Freedoms, 1982*. Our recommendation, though not followed in the legislation enacted, is even more relevant today. Furthermore, any time limits for the laying of charges for terrorist-related activities should be removed from the legislation.

5. Hate Crime Provisions: Mischief to Property

The link between acts of hate and acts of terrorism makes it essential that criminal provisions such as the mischief to religious property (s. 430 (4.1) *Canadian Criminal Code* -- s. 12 of the *Anti-Terrorism Act*) be worded as broadly as possible. Section 430(4.1) of the *Code*, as enacted, is limited to a building, structure or part primarily used for religious worship. Our past recommendations to include all religious institutions, including religious-based schools, cemeteries and organizational offices, must be revisited in light of current realities.

As presently worded, the legislation is too narrow to combat the harm it was designed to prevent. Member of Parliament, the Honourable Sarmite Bulte, explained the aim of the provision during the House of Commons debate on the legislation in October, 2001:

“The harm done by a mischief against a religious property goes far beyond the physical damage to the property. The greatest harm comes from the message of hatred that is conveyed by the mischief. Such mischief would create fear among worshippers of a specific religion and divert them from the practice of their religion.”

The United Talmud Torah elementary school firebombing in Montreal in April 2004 illustrates our concern. The prosecution proceeded as a case of arson only, even though it was also clearly a terrorist act. The description of the offence simply failed to fit the dimensions of the crime. The prosecutor seemed to be of the view that the school did not fit within the description of a building that was primarily used for religious worship under

section 430(4.1) of the *Criminal Code*. The legislation needs to be changed so that there can be no question that an attack such as the school firebombing falls squarely within the anti-terrorism legislation.

Furthermore, the reference in the same section to “bias, prejudice or hate based on religion, race, colour or national or ethnic origin” should be expanded to include “gender and sexual orientation”. As noted in our 2001 brief, the law must recognize the grim reality that religious bias, prejudice and hate all too often involves hate and violence against women and those with differing sexual orientations.

6. Hate Crime Enforcement

There have been a number of recent pronouncements by federal and provincial ministers regarding increased funding to hate crime units. Nonetheless, the essential establishment of fully functioning hate crime units across the country, dedicated to that task and ready and able to enforce applicable provisions, has not yet been fully implemented. Yet such a need is ever more pressing given the link between acts of hate and acts of terrorism as discussed above.

7. Criminalizing Incitement to Terrorism

The *Anti-Terrorism Act* presently focuses on measures to thwart the financing of terrorism. However, those who promote the virtues of terrorism must be sanctioned as well. Incitement is the oxygen which fuels terrorism.

The recognized and growing phenomenon of “homegrown terrorism” in Canada demands such provisions. Government agencies such as the Canadian Security Intelligence Service (CSIS) have reported on this growing threat as well. Indeed, one CSIS study (“Sunni Islamic Extremism and the Threat to Canadian Maritime Security”, March 2004) states that “The presence of young, committed *jihadis* in Canada is a significant threat to national security . . .” Another recent CSIS study (“Sons of the Father: The Next Generation of Islamic Extremists in Canada”, 2004) notes that “Canada is home to a number of young men who are the sons of known Islamic extremists and have adopted a jihadist mentality.”

Canada is certainly not immune from the danger of “home-grown terrorism”, which has already had a direct impact in other countries, such as Great Britain. Indeed, there are documented cases of Canadian youth being drawn into a life of terror abroad, and of religious and community leaders inciting hatred and encouraging *jihadism*. (See for example, *The Martyr’s Oath* by Stewart Bell, Wiley 2005). Consider for instance Sheik Younus Kathrada who is under investigation since 2004 regarding a series of lectures laced with antisemitic slurs and exhortations of *jihad*.

Penalizing incitement clearly falls under Canada’s international obligations. Article 20 of the *International Covenant on Civil and Political Rights*, which Canada has signed and ratified, obligates states to prohibit both war propaganda and hate propaganda. Incitement to terrorism is a combination of both. The *United Nations Declaration on Measures to Eliminate International Terrorism* (United Nations General Assembly Resolution A/Res/49/60, 9 December 1994) calls on all states to refrain from instigating, encouraging,

or acquiescing in terrorism, or tolerating terrorist activity. States are supposed to ensure that their territories are not used for terrorist training camps. Incitement to terrorism is, in itself, a terrorist activity. It is part and parcel of terrorism training. Acquiescence to incitement to terrorism is acquiescence to terrorism. Most recently, on September 14, 2005, the United Nations Security Council passed a resolution calling on all states to prohibit by law the incitement of terrorist acts, prevent such conduct and deny safe haven to anyone guilty of such conduct. A preambular paragraph to that resolution states that the Security Council is deeply concerned that incitement of terrorist acts poses a serious and growing danger to the enjoyment of human rights.

Recent incidents, in Canada and elsewhere, indicate clearly that support for terrorist activity, including advocating for terrorist activity or expressing support for terrorism, must be added as a recognized offence. Other nations have taken such steps. Dutch Justice Minister Piet Hein Donner announced in July, 2005 that his government would introduce legislation into the Dutch Parliament to make it possible to prosecute individuals who glorify, extenuate, trivialise or deny war crimes, genocide or terrorist attacks. In August 2005, the Prime Minister of the United Kingdom Tony Blair announced that his government would introduce legislation which would include the offence of condoning or glorifying terrorism. Under the measures announced by the British Prime Minister, “fomenting, justifying or glorifying of terrorist violence” in furtherance of political beliefs, or seeking to provoke others to terrorist acts by any means or medium including the use of positions of leadership, would be met by decisive action.

Similar measures are crucial here as well, if Canada is to confront the dangers it faces. Preachers of hate who play a role in radicalizing Canadian youth must know that their actions will be met with the full force of the law. In addition to shutting down organizations which indoctrinate Canadian youth to terrorism, those in a position of authority, for example religious leaders and even parents who use their position of trust to encourage those under their influence to hate and to carry out acts of terrorism, must be deterred.

8. Listing of Terrorist Entities

We identify a number of problems with the listing of terrorist entities. Certainly the existence of three separate lists, one under the *United Nations Suppression of Terrorism Regulations*, the second under the *Criminal Code* and a third more recently enacted under the *Charities Registration (Security Information) Act*, each administered by a different Ministry and each having different listings, raises concerns that have largely gone unanswered to date.

Furthermore, the *Anti-Terrorism Act* has too low a threshold for delisting a terrorist entity once listed. No entity has so far engaged in the delisting process. However, unless the legislation is changed, delisting is going to be hard to prevent. Section 83.05(2) of the *Criminal Code* states:

“On application in writing by a listed entity, the Solicitor General shall decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity.”

The decision of the Solicitor General (now the Minister of Public Safety and Emergency Preparedness) is subject to judicial review. The way the legislation reads, the Minister must recommend in favour of delisting as long as there are any reasonable grounds to conclude that the entity should no longer be listed. In our view, the test should be the exact opposite. As long as there are still reasonable grounds to refuse the request for delisting, such a request should be refused.

9. Financing Terrorist Activities

Reports clearly identify Canada as a major base for terrorist fundraising activities. While the *Anti-Terrorism Act* itself operates as a deterrent to those who might have supported banned organizations and a number of suspect organizations have been identified, the lack of successful prosecutions under the *Act*, and the limited action on the part of Canadian officials to date, raises great concerns that suspect organizations continue to operate here, using such designations as charities as cover. There are serious grounds to believe that at least one banned organization in Canada continues to operate with a different name but at the same address.

Increased funding to government bodies such as the Revenue Canada - Charities branch is crucial if Canada is to effectively address this problem. In particular, it is our recommendation that a special investigative team be formed which would develop the expertise necessary to track suspect organizations.

Furthermore, the anti-terrorist provisions focus on registered charities (section 113, *Charities Registration Security Information Act*). However, not-for-profit organizations, which are not subject to reporting requirements, must be examined closely as well.

10. Suppression of Funding for Terrorism

Canada must prevent Canadian government funds from being diverted to terrorism. Government contributions to the Canadian International Development Agency (CIDA), which contributes some \$10 million a year to the United Nations Relief and Works Agency for Palestine Refugees (UNWRA), is one illustration of the problem. CIDA itself has expressed concern about funds it grants to humanitarian agencies being diverted to financing terrorist organizations, but it has nonetheless continued to fund such agencies. Despite reports of the smuggling of arms in Agency ambulances and the storage of ammunition in schools operated by UNWRA, government funds have been allowed to flow unchecked. By allowing such a flow of funds which could end up in the hands of terrorist groups such as Hamas and Hezbollah, Canada can be said to be complicit in terrorism. It must put into place stringent controls to ensure that government funds do not end up in the hands of terrorist entities.

11. Ending Immunity for States

The *State Immunity Act* provides as a general principle that “Except as provided by the legislation, a foreign state is immune from the jurisdiction of any court in Canada (s. 3(1)).

As that *Act* now reads, foreign states which sponsor terrorism cannot be sued civilly in Canadian courts by victims of terror for damages inflicted by the state's own terrorism. An end to financial immunity for terrorists must also mean an end to the financial immunity of states sponsoring terror.

The United States has lifted this restriction under its legislation (28 USCA s. 1605(a)(7)). It is our recommendation that the Canadian *State Immunity Act* be amended to provide an exception allowing victims of terror to sue designated foreign states in Canadian courts for state-sponsored terrorism. The Conservative Party of Canada has proposed such an exception in the Senate through Senator David Tkachuk. The Bloc Quebecois foreign affairs critic Francine Lalonde has expressed her intention to introduce a bill into the House of Commons which would provide an exception to state immunity for torture and crimes against humanity. These two initiatives should be melded and supported by the government.

To avoid any politicization of this course of redress, a list of recognized terror-sponsoring states against which lawsuits would be possible should be drawn up. This list should be updated as necessary by regulation.

12. Diplomatic Immunity

The Federal Government must act proactively against the continuing and growing threat of terrorism. As recommended as far back as 1987 by B'nai Brith Canada, the government should refuse the diplomatic status of any person who is a supporter of terrorism.

Similarly, anyone promoting hatred or committing hate crimes in Canada or abroad should not be allowed entry as a diplomat. Every person complicit in terrorism, no matter what official position that person might hold, should be barred entry to Canada.

Similarly, family members of diplomats should not be able to abuse such status. For example, a child of a diplomat should not be able to study on Canadian university campuses if he or she is involved in activities in support of terrorism.

Furthermore, the granting of blanket immunity to diplomats under the *Foreign Missions and International Organizations Act* from civil and criminal suits, including those who might be connected to terrorism, is also inconsistent with the stated priority in the fight against terrorism.

13. Security Certificates

Much concern has arisen concerning the issuing of security certificates. As noted by Aharon Barak, President of the Israeli Supreme Court, the proper balance between security and freedom is “the result of a clear position that recognizes both the need for security and the need for human rights” (*Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, Jerusalem, 2005, p. 17).

In particular, concern has arisen in Canada regarding the government’s non-disclosure of evidence considered to involve national security issues. The review process allows for non-disclosure to the person concerned where disclosure would be injurious to national

security or to the safety of any person, as well as examination of the information in private and a hearing in the absence of the person concerned (*Immigration and Refugee Protection Act*, section 78(a), (d) and (e)).

It is our view that much concern could be lifted in cases where there is such non-disclosure, if an *amicus curiae* could be appointed to whom confidential material could then be disclosed and who could represent the interests of the person concerned. The person subject to a security certificate procedure should also be allowed to submit specific questions to the Minister on the summary of information provided. If the Minister objects, the Federal Court could rule on the objection. This procedure was followed in *re Harkat*, 2003 FC 918 (par 17) by Madam Justice Dawson, for example, and should be formalized.

In addition, the provision in the legislation which gives the federal court the authority to uphold or overturn a security certificate (section 80(2) of the *Immigration and Refugee Protection Act*) should be amended to allow for an appeal with leave of the Federal Court of Appeal. Such an appeal would prevent a state of uncertainty where different judges of the Federal Court might reach different decisions.

Since the availability of the security certificate as a tool to fight terrorism remains of crucial importance to law enforcement personnel, such changes would enhance human rights protections without detracting from equally valid security concerns.

14. Amendments to Other Acts

Other statutes, including the *Immigration and Refugee Protection Act* (2002) and the *Citizenship Act*, must be reviewed to ensure that their provisions are consistent with the priority of fighting terrorism and the need to ensure that Canada does not become a safe haven for terrorists.

As recommended by B'nai Brith Canada in 2001, the possibility of stays of removal orders where a person is suspected of being a terrorist, in order to allow for possible prosecution for offences set out in the *Anti-Terrorism Act*, is crucial in the fight against terrorism. Deportation without criminal investigation fails to comply with Canada's international obligations. For example, Article 9 of the *International Convention of the Suppression of Financing of Terrorism* requires a State Party to take appropriate measures under its domestic law against an alleged offender present on its territory. Deportation relocates a terrorist, but does not act as a real deterrent.

We reaffirm our 2001 recommendation to include the definition of terrorism, as set out in the *Anti-Terrorism Act*, in the *Immigration and Refugee Protection Act*. No definition of terrorism can be found therein although it is a ground for inadmissibility. The absence of a definition makes the application of the law arbitrary.

Provision for the revocation of citizenship for participating in, facilitating, instructing or harbouring terrorist activity under the *Criminal Code* would be a useful addition to the

arsenal of anti-terrorism tools. This can be met by expanding section 10(1) of the *Citizenship Act*.

Summation - Impact of Terrorism in Canada

The continuing threat of terrorism in Canada and abroad has had a profound impact on the Canadian Jewish community. The financial costs of securing community sites, especially schools and synagogues, is an enormous burden. However, after attacks such as the Montreal school firebombing and the synagogue and cemetery desecrations in record numbers, as documented in our annual *Audit of Antisemitic Incidents*, the community has been put into the position where such additional security is essential.

Threats from Al-Qaeda, and other terrorist groups known to have a base in Canada, have been directed at Jews in particular, placing a huge emotional burden on Jews across Canada, wherever they live and wherever they travel. Terrorist attacks on Jewish institutions abroad, whether in Argentina, Turkey or Morocco, are a grim reminder that extremists consider Jews anywhere in the world as legitimate targets. Surely no parent should have to worry about the security of their children at play or in school, especially in Canada.

And yet, Jews are reminded of this constant threat when carrying out such everyday activities as going to daily prayer services, taking their children to school or attending family celebrations. Terrorism has indeed impacted on every aspect of our lives.

We therefore urge the Federal Government to fulfill its mandate to protect each of its citizens, so as to lessen the profound impact the threat of terrorism has, not just on vulnerable communities, but on all Canadians. We contend that strengthening the anti-terror legislation is a core responsibility of government and respectfully request that our recommendations be adopted.

Summary of Recommended Changes

1. The anti-hate amendments to the *Criminal Code and Canadian Human Right Code* should be made permanent with no further review period.
2. Non-discrimination clauses should be added to ensure all groups targeting civilians are included.
3. Motivation should be removed as a required element of proof from the definition of terrorism under the *Anti-Terrorism Act* so to fall in line with the *United Nations Convention on the Suppression of Financing of Terrorism*.
4. The *Anti-Terrorism Act* must be made retrospective in application so to cover those complicit in terrorist activities before the enactment of the legislation.
5. The hate crime provision regarding mischief to religious property should be amended to include protection from attacks on religious-based schools and institutions.
6. Hate crime units must be established in police forces across the country given that hate and terror are clearly linked.

7. Incitement to terror must be added as a criminal offence so that those who foment, glorify or condone terrorism are penalized.
8. The three listings of terrorist entities that currently exist should be consolidated into one central list.
9. Special investigative teams should be struck to effectively block the financing of terrorism through charities, not-for-profit organizations and corporations.
10. The Canadian government must put measures in place to ensure that its funds are not used to support terrorist activities.
11. The *State Immunity Act* should be amended to allow civil lawsuits by victims of terror against listed states sponsoring terrorism.
12. A strong front against the threat of terrorism must include measures to block the abuse of diplomatic status.
13. Provision for an *amicus curiae* should be added to the security certificate procedure to represent the interests of the suspect while still ensuring that vital security information is protected.
14. Other legislation, including the *Immigration and Refugee Protection Act* and the *Citizenship Act*, must be amended to make them consistent with the provisions of the *Anti-Terrorism Act*.

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