

**Brad Verhulst,  
University of Calgary**

Brad Verhulst is currently in his fourth year of studies for a Bachelor of Arts degree in Political Science with Honours and a Bachelor of Arts degree in Psychology at the University of Calgary. He is intrigued with the examination of issues using the lenses of the two distinct disciplines. He is especially interested in Canadian International Relations, particularly Canada's response to terrorism, Canadian foreign policy and trade relations between Canada and other western industrialized nations. Political Psychology and regional variability in Canadian voting behaviour also interests him because of the emphasis that is placed on the individual as a unit of analysis. Brad planning to go on to do graduate studies in Political Science focusing on Canadian foreign policy. In preparation for graduate studies Brad will write his honours thesis on the development of Canadian foreign policy since the end of the cold war.

**Abstract**

Protection against terrorism has been one of the fundamental security concerns for western liberal democratic governments since the atrocities of September 11th, 2001. The steps taken to protect the general public in most western countries have brought the debate between preventing possible future terrorist attacks from occurring and protecting the civil liberties that form the fundamental basis of democratic society to the forefront. In Canada, policy makers strive to protect Canadians against possible terrorist attacks, but there is definitely a tendency to overstep the boundaries of protection and begin encroaching upon the civil liberties that the government is designed to protect. It would be impractical to live in a society where civil liberties were protected at all costs. At the same time, there is no point having civil liberties if the government is able to pick and choose which rights that they are going to respect on a per case basis. There is a fine balance between protecting individual civil liberties and establishing a safe and secure environment for the general public. In this paper I will argue that it is possible to balance the precautions required to protect against future terrorist attacks with the civil liberties that allow democracy to flourish. I will evaluate the capability of the Canadian government to react to terrorist attacks as compared to the reactions of previous Canadian governments and to the American government in the events following the September 11 attacks.

**Striking a Balance between Civil Liberties and Terrorist Protection:  
Comparing Canadian, American and Historical Responses to Terrorist  
Attacks**

Brad Verhulst

University of Calgary

Protection against terrorism has been one of the fundamental security concerns for western liberal democratic governments since the atrocities of September 11th, 2001. In this regard, Canada is no different from any other western democracy. The steps taken to protect the general public in Canada and most western countries has brought to the forefront the debate between preventing possible future terrorist attacks from occurring and protecting the civil liberties that form the fundamental basis of a democratic society. In Canada, policy makers strive to protect Canadians against possible terrorist attacks, but there is an undeniable tendency for the government to overstep the boundaries of protection and begin encroaching upon the civil liberties that they must dutifully protect. It would be impractical to live in a society where those civil liberties were protected at all costs. At the same time, there is no point having civil liberties if the government is able to pick and choose which rights they are going to respect on a per case basis. There is a delicate balance between protecting individual civil liberties and establishing a safe and secure environment for the general public. This paper will argue that due to the inconsistent application of an anti-terrorist policy, the Canadian government is ill-equipped to effectively respond to future terrorist threats. In order to establish an anti-terrorism policy it is necessary to balance the civil liberties that allow democracy to flourish with the precautions required to protect society against future terrorist attacks. This type of analysis requires an evaluation of the capability of the Canadian government to react to terrorist attacks in comparison with the historical reactions of previous Canadian governments and the American government in the events following the September 11th attacks.

Civil liberties are the basic building blocks that governments must cultivate in order to have an effective relationship with the general population. The extent that the protection of these rights are guaranteed signifies the democratic strength of a country. Civil liberties are crucial to the well being of any truly democratic society. These civil liberties include, but are not limited to legal rights, equality rights and fundamental freedoms. It has been argued that “men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law<sup>[1]</sup>.” According to this assumption the basis for any anti-terrorism policy must be grounded in a deep respect and consideration of civil liberties. In both Canada and the United States these rights are enshrined in their respective constitutions, which suggests that the basis for an anti-terrorism policy that respects the civil rights of citizens has been at the root North American society since the implementation of both of the documents.

An effective way in which to develop an anti-terrorism policy would be to examine the historical responses to previous terrorist attacks in an attempt to repeat the successful strategies and discard the unsuccessful ones. During the 1970 October Crisis, civil liberties were taken into consideration by the legislators, but the legislators

ultimately decided that the risk to security outweighed the consequences of the harm incurred to liberty. Although this occurred prior to the repatriation of the constitution in 1982, the groundwork, specifically the Bill of Rights, had already been established. In contrast to the blatant disregard for civil liberties during the October Crisis, the Air India bombing caused very few demands to be placed on the government from the general population. Because of this lack of genuine popular concern, civil liberties were not affected at all and the debate remained a non-issue. The message that the Canadian government desires to send to terrorist groups must be more consistent than these two situations illustrate. It is necessary to have a harsh, yet fair procedure for dealing with terrorist attacks on Canada, and terrorist activity within Canadian borders. This cannot be the dissolution of civil rights, as was the case with the FLQ, but it also cannot be a method of denying the factors that indicate the risk of terrorist attacks.

By virtue of the fact that Canada is geographically located next to the United States, makes Canada a likely target for terrorism. Even if Canada is not at a high risk of being a target of terrorist attacks, the sheer devastation of a potential attack makes it necessary to possess an effective strategy to combat terrorism, should the need arise. Based on these facts, and in the light of the events of September 11, Canadians must become more aware of the anti-western, albeit primarily anti-American sentiment that exists throughout a good portion of the non-western world. Walden Bello argues that:

There is simply too much distrust, dislike, or just plain hatred of a country that has become so callous in its pursuit of economic power and arrogant in its political and military relations with the rest of the world and so brazen in declaring its cultural superiority over the rest of us.[\[2\]](#)

Bello is referring to the United States specifically, but the general theme of his argument could easily be applied to any other advanced industrial nation. This is especially true for Canada, existing next door to the United States. Prime Minister Jean Chrétien expands on Bello's argument, conceding "the western world is getting too rich in relations to the poor world... we're looked upon as being arrogant, self-satisfied, greedy and with no limits... you cannot exercise your powers to the point of humiliation of others."[\[3\]](#)" Mr. Chrétien is not only chastising the United States, but the whole western world including Canada, suggesting that the relationship that the west has with underdeveloped nations need to improve. This will function as a preventive measure to aid in the war against terrorism.

### **Terrorism Defined**

There is no generally accepted definition of terrorism. As with many terms used in political science, the absence of a concrete definition allows individuals to manipulate definitions in such a way that they are able to illustrate their point. The term 'terrorism' is no different. It is absolutely necessary to develop a working definition of terrorism in order to evaluate past responses and to suggest potential future responses. It is necessary to ensure that terrorism is not defined too broadly as to allow every criminal action to also be called terrorism. At the same time, an incredibly specific definition would allow for

technicalities to interfere with acts of terrorism actually being called acts of terrorism. It is also important to recognize the inevitable ethnocentric bias that exists in western society towards terrorism. The western world tends to be incredibly good at placing their immediate interests above the general interests of the international community, as both Walden Bello and Prime Minister Jean Chrétien have indicated, and subsequently wonder why they are being attacked. Some would argue that Western society must understand that what it deems a terrorist others call a freedom fighter.[4] Since this examination analyzes Canada, and partially the United States, the analysis of terrorism must be viewed through the lens of western society. Accordingly, the common western belief must not be, as Irwin Cotler points out, that a terrorist and a freedom fighter are simply determined by perspective, but rather, that “one democracy’s terrorist is another democracy’s terrorist.”[5]

As Laura Donohue points out, terrorism has been attempted to be defined on numerous occasions in the past.[6] Section 140 of the 1987 American State Department Authorization Act suggests that terrorism has a strong political motivation that tends to be aimed at non-combatant targets.[7] The State Department Authorization Act also places a heavy emphasis on the international aspect of terrorist activity. Section 411 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, more commonly known as the USA PATRIOT Act, defines “engaging in terrorist activities” in a much broader sense. The USA Patriot Act suggests that terrorist activities are intentions or actions that cause serious injury or death. The definition includes preparing or planning for, gathering information about or soliciting funds that would aid in terrorist actions.[8] The updated definition in the USA Patriot Act allows for a wider range of interpretations than the State Department Authorization Act. It appears that the architects of the USA Patriot Act were more willing to encroach on the civil liberties of Americans in the aftermath of September 11th, based on the more accommodating definition, than were the architects of the State Department Authorization Act.

Canadian Legislators defined terrorism similarly, but with a few noteworthy differences. The Public Order Regulations of 1970 use a definition of terrorism that focuses on individuals who advocate, promote or engage in “the use of force or the commission of criminal offences as a means of accomplishing a governmental change within Canada.”[9] The Anti-Terrorism Act, or Bill C-36, which is the most current piece of Canadian terrorism prevention legislation, emphasises the idea that terrorism is an act committed for a “political, religious or ideological” purposes that attempt to force the government, an individual or an organization to act, or refrain from acting, through the threat of force that may injure or harm the object.[10] These four definitions illustrate the differences in which the government of the time felt threatened by acts of terrorism and serve as a starting point for the government to restrict civil liberties within anti-terrorism legislation. The Public Order Regulations, the USA Patriot Act and the Anti-Terrorism Act all incorporate some form of responsibility incurred upon the individuals behind the scenes who facilitate, but do not actually perpetrate the attacks.[11]

Lawrence Freedman suggests that a definition of terrorism should also include aspects that demonstrate the fact that terrorism is used by the marginalized or weaker actors as a way of fighting against the more powerful actors, both internationally and domestically. Freedman suggests that terrorism is used as a “coercive means of obtaining political effects by using threats of violence against civil society.[12]” Bruce Hoffman adds that terrorism is “planned, purposeful and premeditated,” with a distinct psychological component.[13] Although terrorism does have these broad qualities, the psychological component is the only quality that distinguishes terrorism from other heinous crimes like murder and robbery. Terrorism’s primary objective is to “create unbridled fear, dark insecurity and reverberating panic.[14]” In attempt to combat terrorism by restricting civil rights, governments further exasperate the society’s feelings of anxiety. Civil liberties are the most vulnerable democratic ideals and are the most susceptible to limitation during a terrorist attack. If terrorism is defined as a “perennial ceaseless struggle[15]” the only recourse that democracies have in fighting against it is to completely annihilate every terrorist. To achieve this it would be necessary to completely abandon the fundamental democratic ideas in favour of state sanctioned genocide. This portion of Hoffman’s definition must be rejected not because it is false, but rather on the basis that would be undemocratic and paradoxical to protect a democratic state by abandoning democracy for authoritarianism. If this were to happen, the terrorists would have destroyed democracy before the war had begun.

There is a definite distinction that is often made between domestic and international terrorism. Domestic terrorism tends to be viewed as the responsibility of the police, not constituting a significantly different category from other heinous crimes. International terrorism is treated differently, potentially because of the benefits that are associated with being a victim of international terrorism on the international stage. Painting one’s self as a victim allows a state a wider degree of policy alternatives in response to the attacks. It is true that “if terrorism is a global phenomenon, it requires a global response,[16]” but that does not absolve any individual government from taking steps, in the form of legislation, to enhance national security and protect its citizens from danger. In this article the differentiation between domestic and international terrorism is moot because of the emphasis on the way in which terrorist activities serve as a catalyst to prompt governments to restrict civil liberties.

It is also important to incorporate the individuals who operate behind the scenes into the web of responsibility. Although the people who fund the terrorist activities do not actually detonate the explosives, they are every bit as responsible as those who do. The grey area comes from the idea that those who fund the terrorist organizations may not know exactly what they are funding. Therefore, to distinguish between these two types of people it is necessary to include that individuals are only criminally responsible for their behaviour if they “knowingly facilitated or financed terrorism.[17]” It should also be included that “threats of terrorism and participation in the activities of a terrorist group[18]” also constitute terrorist activity. By taking this type of clause into account the anti-terrorism policy the government would not violate civil liberties any more than it was justified in doing.

For the purposes of this paper, terrorism will be characterized by five central themes. Firstly, as is emphasized in the Public Order Regulations of 1970, terrorism attacks the established order in an illegitimate attempt to destabilize the status quo or challenge the authority of the government.<sup>[19]</sup> Secondly, in contrast to the State Department Authorization Act, terrorism targets civilian and military personnel indiscriminately, although the casualties are most distressing when victims are civilian. Thirdly, as Hoffman suggests, based on its psychological component<sup>[20]</sup> terrorism is qualitatively different from other forms of criminal behaviour as well as traditional warfare, although it does share some tactical similarities with guerrilla warfare. Fourthly, the differences that exist between domestic and international terrorism suggest separate categorizations of the same phenomena. Finally, as is expressed in the Public Order Regulations, the USA Patriot Act and the Anti-Terrorism Act the responsibility for terrorist activities extends beyond the actions of the individuals who actually carry out the crime, to the individuals that work behind the scenes facilitating the attacks.

### **Historical Canadian Cases: The FLQ and the Air India Bombing**

The historical responses to terrorism provide a starting point for the analysis of the potential direction that the Canadian government should follow. By contrasting the vastly different responses to the October Crisis and the Air India bombing it is possible to develop a contingency plan that should be followed if Canada becomes the victim of a terrorist attack in the future.

Although the Canadian government is often applauded for their extremely rapid and effective response to the FLQ during the October Crisis, the major casualty of this time period was undoubtedly the civil rights of Canadians and more specifically the rights of the Quebecois population. When the Trudeau government invoked the War Measures Act they conceded defeat in a very unique way. The terrorists, although officially defeated, had managed to shake the very foundations of the Canadian state. In the closing days of the October Crisis, many of the Quebecois felt that there was more of a threat to their personal security emanating from powers that were seized by the Canadian government in response to the FLQ than from the FLQ itself.<sup>[21]</sup> This illustrates the importance that Canadians place on the protection of their individual rights, even if the terrorists are brought to justice.

Although the suspension of civil rights occurred in Canada before the height of IRA activity in Britain, an applicable justification for the Canadian government's response came from Roy Jenkins, the British Home Secretary when comparable events broke out in Britain. Jenkins argued that legislation that was "unprecedented in peacetime," was "fully justified to meet the clear present danger."<sup>[22]</sup> The Minister for Northern Ireland added to Jenkins' statement by proclaiming that "the whole system of justice is under sustained attack by terrorists and their aim is to destroy they whole system."<sup>[23]</sup> These arguments run counter to the basic elements of democratic thought. When dealing with terrorist attacks it may only be plausible to react to the events as they occur, but government actions must be held to a higher moral standard than the terrorists when responding to the threats. The government must strive to redefine the rules of the game

in order to maintain the upper hand, yet not infringe on the liberty of the general population. The idea that if you are innocent you have nothing to fear is not an acceptable defence of intrusive policies. After analyzing the track record of the Canadian government, the proportion of arrests well exceeded the number of people who could have possibly been criminally involved in the FLQ's role in the October Crisis, as was indicated by the ratio of successful convictions to the number of arrests. Also, the implementation of the War Measures Act at 4:00 in the morning, while the nation slept, allowed law enforcement to capture 30 percent of the almost 500 individuals arrested in connection with the FLQ on the first day of the legislation's implementation[24]. In essence, the invocation of the War Measures Act allowed the government to arrest anyone, regardless of how tenuous the link was to the FLQ.

The October Crisis was handled very quickly, compared with other incidences of terrorism. "The relative ease, speed and success associated with security operations during the October Crisis had the effect of lessening the perception of terrorism as a threat to Canada and to Canadians.[25]" The years that followed the October Crisis were free of terrorist attacks which led the Canadian government to become overconfident with its ability to deal with terrorism.[26] When the next wave of terrorism hit, Canada was completely unprepared to respond which in turn led to a policy of non-response.

The Air India case is one of the most devastating acts of terrorism ever enacted, aside from the September 11th attacks. This case is extremely important to the study of terrorism in Canada because of what did not happen. The government did not think that the bombing reflected an attack on Canada. Nevertheless, the Air India bombing is undoubtedly a case of Canadian terrorism, based on the number of Canadians who were killed and on the fact that the flight left from Toronto's Pearson international airport. The lack of any official government response in the form of legislation to protect the security of Canadians is a denial of the responsibility which the government has in terms of protecting its citizens. The absence of a unilateral plea to bring the responsible individuals to justice suggests that the Canadian government is only nominally committed to fighting terrorism. Judging from the response of the Canadian government following the events of September 11th, there was a greater threat to Canadian security on September 11th, when in absolute terms, there were more Canadian casualties in the Air India bombings.

The two separate instances of that are combined here and called the Air India bombings took place on June 23, 1985: one at Tokyo's Narita airport, killing two baggage handlers, and the other on Air India flight 182, killing 329 people, mostly Canadians of Indian heritage. The absence of any legislative action in the 18 years since the "deadliest crime in Canadian history,[27]" illustrates the Canadian government's lack of a policy for dealing with terrorism. The lack of any attempt to expedite the extradition based on the rhetoric of national security or to make Canada free from terrorism is extremely distressing. Although 329 people were killed when Air India flight 182 crashed into the ocean off the coast of Ireland, the Canadian government resisted amending legislation in order to deter further terrorist activity. The families of the victims of the horrific crash

are still awaiting justice, but 18 years between the incident and the trial make it hard for them to believe that the government will effectively provide any comfort for them in legal terms.[\[28\]](#)

The most comparable event to the Air India bombing are the events of September 11th. The circumstances surrounding the two events are separated by a single detail. The majority of the casualties of the former are Canadians and the majority of the latter are Americans. The Canadian government did not, as the Americans did, declare a war on terrorism. They did not pass legislation that would aid in the capture of the guilty parties, and subsequently did not have to worry about violating anyone's civil rights. Instead the Canadian government did nothing, which is worse. They left the victims to themselves, and turned their backs.

A memo was discovered by the press acknowledging that the Canadian Security and Intelligence Service (CSIS) agents followed Talwinder Singh Parmar and Inderjit Singh Reyat, on suspicion of other crimes prior to the Air India bombing, to a forest on Vancouver Island, where they heard a loud explosion that was later concluded to be a trial run for the Air India bombing.[\[29\]](#) One unnamed official stated, "Certainly we can, with the benefit of hindsight, say that if we had immediately interviewed Parmar and Reyat after the incident, we might have deterred the subsequent presumed bombing of Flight 182.[\[30\]](#)" The federal government even rejected calling and inquiry addressing the way that the case was handled prior to the bombing, although it was requested to do so by the opposition, but did not hesitate in declaring a publication ban on all documents relating to the case.[\[31\]](#) In essence the government made a crucial error by allowing itself to be viewed as more concerned with protecting the civil rights of the terrorists than the civil rights of Canadians at large.

When the publication ban was eventually lifted, on February 25, 2003[\[32\]](#), the information was inconsistent with gaping holes in the information that was released. There were suggestions by the RCMP, during the interrogation of other suspects, that there was a CSIS mole that had penetrated the internal structure of the terrorist circle. Surjan Singh Gill, the alleged mole, ended up leaving the group prior to the actual event, consistent with how a government agent would be expected to act. After denying the existence of Mr. Gill, CSIS claimed that it "was not in a position to predict that the Air-India flight was to be the target of a terrorist attack.[\[33\]](#)" In addition to these facts, most of the tapes that recorded the wire tapped phone conversations were erased, although the government contends that "it is unlikely that the prevailing practices resulted in the loss of important information.[\[34\]](#)" With all of these obvious mistakes surrounding the government's involvement in the Air India investigation, it is surprising, to say the least, that more public outrage has not been aroused by the apparent attempts to keep the public from finding out what really happened during the worst case of terrorism in Canadian history.

### **The American Case: September 11th**

The American Case after September 11th is different from either of the Canadian

cases, but these differences did not result in radically different legislation being proposed, which allows for comparisons to be made between the different cases. To a large extent, the sheer distance across the oceans on either side of the North American continent provides a mistaken sense of security to both Americans and Canadians. Terrorist activities that have occurred on the North American continent can be categorized into two main subsections: home grown and international. Domestic terrorism, like attacks by the FLQ in Canada, and instances like the Oklahoma City bombing in the US are perpetrated by nationals from within the country. Bringing these individuals to justice is clearly more achievable than in instances of international terrorism. As was previously indicated, the Air India bombing was planned and to a large extent executed by individuals who considered themselves to be foreign nationals. This is very similar in principal to the attacks on the World Trade Center. Even with minor differences between the examples, these differences did not result in radically different legislative responses that would justify distinct legislation to deal with international or domestic terrorism.

The American response to the terrorist attacks on September 11 followed two main streams simultaneously. The first was the almost immediate declaration of a 'war on terrorism' that involved dispossessing the Taliban of Afghanistan. The other response was the creation of the USA PATRIOT Act. The Bush Administration took a 'for or against us' stance, both domestically and internationally, leaving little room for dissenting opinions within the international community and labelling those who criticized the legislation at home as 'un-American' [35]. This defiles the democratic ideal of plurality that weaves through the heart of western political thought. Without the plurality that underscores democratic choice, there is no hope for a continuation of democracy.

The United States is unable to be militarily challenged in the international arena. Americans are amazingly successful at fighting battles in conventional battlefields. By steering clear of wars of choice [36] (wars that increase the probability of securing an interest in a foreign country) and engaging only in wars of necessity (those that are defensive or deemed vital to American national security) the US has been very successful. When it was possible to partially achieve a traditional type of engagement, the US had to fight against an enemy that was still embedded in the civilian population. [37] Due to the fact that al-Qaida forces were embedded in the civilian population, the United States faced an increased risk of civilian casualties. The United States had to be acutely aware if they wished to continue to be viewed as the victims of an international tragedy, which provided the legitimizing factor for the war on terrorism. Excessive civilian casualties would have significantly diminished the support for the war at home making it unpopular and seemingly illegitimate.

The American media's portrayal of the war in Afghanistan had a significantly different focus regarding the material that it chose to report relative to the foreign media coverage of the war. While the American media tended to focus on the collapse of the Taliban regime, the reporters from other parts of the world, especially the Middle East, focused on the intensity of the bombing raids and the deficit of accurate intelligence. [38] The

combination of these two factors stressed by foreign medias is coincidentally associated with the amount of support that the sustained war garnered in Europe and the Middle East, although sympathy related to the terrorist attacks on September 11th remained high. The war on terrorism, reflected in the war in Afghanistan will “ultimately ensure further action against the United States, as well as aiding the development of a more defined line of fracture between the west and the Islamic world.[39]” The decrease in the international support for American aggression in Afghanistan can be directly linked to a decline in the perception of American moral legitimacy.

It is also important to keep in mind that most of the senior Taliban officials and approximately half of the senior al-Qaida members survived the attacks on Afghanistan, eluded capture by the American forces and moved across the border to Pakistan.[40] With the potential for further terrorist attacks diminished by an estimated 30 percent[41] and the fact that Osama bin Laden remained at large, the American people were left with the fear that the nightmare of September 11th could recur. The American government was forced to come up with another way in which to protect the American homeland, and give their people a sense of closure. This led to the formulation of the USA PATRIOT Act.

The USA Patriot Act raises concerns about the invasion upon civil liberties, similar to the Public Order Regulations, although the main difference is the extensive powers that it grants to the intelligence gathering community. As Jon Gould points out, the increased leniency that is afforded by the USA Patriot Act allows the government to violate civil rights in covert ways.[42] First, by relaxing the definition of the standards for wiretapping, it is easier for law enforcement to justify invading the privacy of individuals. In fact, the government allows intelligence agencies to place wiretaps in residences of people who simply house activists, who have no connection to terrorist activity. This clearly goes beyond the intended mandate of the bill. Furthermore, wiretaps are permitted to be used without judicial supervision, as long as they can be justified ex post facto on concerns related to foreign intelligence or international terrorism. Law enforcement agencies are also allowed unconditional access to an individual’s internet communications with no need for judicial review of the case. Second, the information gathered in such an invasion of privacy is able to be shared between agencies without notification of the public or the judicial system. Last, non-residents of the United States are not granted the same fundamental rights that the American constitution provides for citizens, allowing the government to detain non-nationals prior to their deportation for an unlimited amount of time.

In defence of these harsh measures, Chief Justice William Rehnquist argues that, “national emergencies shift the balance between freedom and order toward order.[43]” The idea that government is able to sustain order in times of crisis must not come at the expense of civil liberty. The maintenance of order is an extremely beneficial by-product of democracy, but order cannot be the ultimate goal, or authoritarianism emerges. Therefore, the maintenance of order above all else is contrary to democratic ideals. Lisa Nelson acknowledges the argument that “the rhetoric of public policy weighs the shared loss of individual privacy against the shared cost of terrorism in the statutory language of

the USA PATRIOT Act,[\[44\]](#)” but goes on to conclude that privacy and toleration must be protected at all costs because they form the basic features that underpin the liberal democratic state. Without the guarantee of the democratic freedoms, democratic ideals are meaningless.

### **Directions for Canada**

It is an undeniable fact that desperate times call for desperate measures. Even so, the government must be frugal when attempting to restrict civil liberties. The above examples illustrate the need for effective terrorist protection within the limitations of retaining the basic qualities of democratic existence. In times of direct terrorist attacks, governments tend to try and capitalize on public uncertainty, in order to increase their “anti-terrorist and security capabilities... equating critics of the legislation with supporters of terrorism.[\[45\]](#)” This polarization attempts to eliminate any opposition to the legislation, but as Lisa Austin argues, legislation must be a tool that significantly enhances the capability of law enforcement for the reason that restrictions on civil liberty is not a price that “the government should ask us to pay needlessly. [\[46\]](#)” In the wake of September 11th, the International Federation of Human Rights ranked Canada’s anti-terrorism laws as the third most invasive and hazardous to civil liberties behind only the United States, who ranked first, and Great Britain, who ranked second.[\[47\]](#) This ranking exposes the reality that the Canadian government has exceeded the minimal limit necessary to protect the civil liberties of Canadians.

There is an expectation that the government will not over extend its power simply because it can. This assumption is fundamental to the well being of democracy. As J. N. Lyon argues, “it is in times of crisis when judicial checks on excesses and abuses of power become most important, for the temptations to excess and abuse are greatly increased among officials who are pressed by an anxious public to deal with the crisis.[\[48\]](#)” The theory of judicial review implies that the justice system has the ability to ensure that government does not over step its mandate. This theory is flawed in times of dire emergency because it fails to take into account the extreme time constraints that the government must work within during periods of extreme crisis. Unfortunately the judicial system reacts much too slowly to allow for it to be an effective check on the power of parliament in pressing situations. The Anti-Terrorism Act, the most recent weapon in the government’s anti-terrorism arsenal only came into effect as of December 2001, which means that any possible challenge to the bill based on the charter is still in the distant future.[\[49\]](#) When the situation calls for immediate action the government must have the capacity to act efficiently, but it must also act as its own check, thus ensuring that the proverbial line in the sand is not crossed. The government must examine proposed legislation and be capable of balancing the protection against immediate danger and basic civil liberties. The legislation must also be powerful enough to deter future terrorist actions taken against the state. The impact that September 11th had on Canada prompted the Canadian government to propose the Anti-Terrorism Bill, and usher it through parliament as fast as possible. In response to Bill C-36, there was an entourage of Canadian human and civil rights activists who were able to mobilize quickly enough to influence the modification of the legislation prior to its

implementation. Roach suggests that without the rapid mobilization of this ad hoc opposition, “the government’s argument that new laws would both prevent terrorism and respect human rights would have gone unchallenged.<sup>[50]</sup>” In this case, the civil rights activists were able to assume the role of balancing civil rights against the need to protect society from terrorism when the judicial system was unable to respond quickly enough. Although the activists were successful in this specific situation, this type of check cannot be relied upon to act as a permanent balancer of parliamentary power.

The goal of the government, as Trotter points out, must not be to “usurp as much individual freedom as possible<sup>[51]</sup>” without violating the provisions of the charter. The Charter should be viewed by the government as the absolute maximum intrusion on the civil liberties of an individual in a democratic society. Responsible legislators should legislate with the intent of incurring the least amount of violation to liberty possible, using the Charter after the fact, to ensure that the legislation under question falls significantly short of any potential Charter violation. This is an extension of the idea of “Charter-proofing<sup>[52]</sup>” legislation put forward by Kent Roach. In both the USA Patriot Act and the Anti-terrorism Act the legislators were overly concerned with aspects of national security, and unconcerned with the detrimental effects that the legislation would have on civil liberties. The government’s claim that “criminal laws advance the human rights of crime victims and potential crime victims<sup>[53]</sup>” is a rationalization by the legislators in attempt to promote the legislation to the public, disregarding the fact that the bills blatantly exceed acceptable limits on civil rights. A statement such as this suggests that it is possible to protect potential victims before they even become victims. Though the attempt is honourable, in actuality it is impossible. The only way that it would be possible to protect the potential victims of a crime or terrorist attack would be pre-emptively to arrest potential criminals or terrorist, people who have not yet committed a crime, and are not yet guilty. During the arresting spree following the implementation of the War Measures Act, the government illustrated its tendency to opt for a solution that attempted to solve the problem by merely arresting people who were tenuously connected to the FLQ. The very fact that they had not yet committed a crime absolved them of the immediate guilt. This does not mean that they will not commit the crime, only that they are not guilty of committing the crime until after the fact. Therefore, even in this sense, the debate must stay centred on the civil liberties of society as a whole. Although there is a need in any democratic country to ensure that the civil rights of suspects are respected, it is important to place the “civil liberties of terrorists<sup>[54]</sup>” above the civil liberties of society as a whole. The government must not shy away from investigating and prosecuting terrorists over concerns that they may be offended, but they must not disregard their civil rights either. This fear of offending the terrorists is what appears to have happened in the Air India investigation. Any pre-emptive invasion of privacy that is not justified by sound evidence would intolerably violate the civil rights of an innocent person.

The maintenance of civil liberties in times of terrorist attacks requires a clear delineation of the rights of the individual in reference to the rights of authority figures. In the *Hunter v. Southam* case, Chief Justice Dickinson, proposed a balance between the rights of law enforcement to invade an individual’s privacy versus an individual’s right to be

free of unwarranted searches by saying, the police have the right to search an individual when “credibly based probability replaces suspicion.[55]” The question that remains is what exactly is meant by credibly based probability. The term probability concedes a large degree of uncertainty. The definition of credibility to a police officer is most certainly a more liberal definition than that of a wrongfully accused citizen. The best way of ensuring that the government does not encroach on the civil rights of individuals is to clearly define both the offences and the rights of the accused with as little ambiguity as possible. Legal terms, like terrorism, elude easy definition, but nevertheless, the more specific the definition the less room for argument and misinterpretation.

In any discussion of civil liberties in Canada the topic of the Charter of Rights and Freedoms must be addressed. Citizens must be wary of putting too much faith in the Charter for two major reasons. Firstly, the Charter itself allows the government to override some of the most essential aspects of the document. By invoking the notwithstanding clause, governments can legally violate many fundamental civil liberties, as long as they renew the statement of intended violation every five years. The fact that these powers exist indicate the degree of caution that the government must exhibit when dealing with civil liberties. The question that is begging to be asked is ‘are civil liberties really being protected in democracies if they can be abandoned during times of crisis?’ In order for the answer to this question to be yes, the Canadian government must abolish the notwithstanding clause, which would force them to respect civil liberties on a more consistent basis.

Secondly, the Charter is able to be used by both those who wish to violate civil rights and those that wish to protect them simultaneously.[56] The intended balancing factor that pits the protection of civil rights against the safety of the public in Canada is Section 1 of the Charter, commonly referred to as the reasonable limits clause. This clause suggests that limits can be placed on the civil liberties as long as they “can be demonstrably justified in a free and democratic society.[57]” This idea enables the law enforcers to accommodate for events that were unforeseen by the law makers. This is not to argue that there are not acceptable limits to be placed on the civil rights of individuals. No one would argue that it is unreasonable to restrict a person’s right to incite violence or to espouse hatred or racism. As the Supreme Court points out, “The holocaust did not begin in the gas chambers. It began with words.[58]” Society does not have to be given unlimited freedom in exercising their civil liberties, but as long as an individual’s actions do not immediately and directly pose a threat to another person, the government should be wary of negating that right.

The protection of the privacy of innocent people must not be balanced against the government’s ability to detect guilty individuals. Innocent people benefit profoundly by the government accurately detecting guilty parties, but the innocent are not benefited by the government forcing them to prove their innocence. The Canadian government must not make the mistakes that the American government made in the USA Patriot Act, by allowing the intelligence agencies free reign over the violation of privacy that is acceptable in terms of phone taps and electronic monitoring. If there is any doubt that a

terrorist's civil rights have been violated "the court will probably hold that any limit on the presumption of innocence is a reasonable and justified in the anti-terrorist context.<sup>[59]</sup>" This is not comforting to people who are at risk of wrongly being labelled a terrorist. To protect these people the government must ensure that they have a solid case before they even attempt to encroach on civil liberties of suspected terrorists. In times of crisis, the Supreme Court of Canada tends to side with the legislators, citing that there are tangible benefits that exists based on the fact that the government's mandate comes directly from the general public.<sup>[60]</sup> This is based on the idea that the rights of the majority outweigh the rights of the minority, but by protecting the rights of a few, the government is also protecting the rights of many.

In the wake of September 11th, 58 percent of Canadians believed that the threat outweighed the restriction on civil liberties, while only 38 percent of Canadians believed that the Charter should be respected.<sup>[61]</sup> It could be argued that democracy is working well when the government is implementing legislation that 58 percent of the general public supports. The apparent support for the legislation is confounded by a separate problem. The motivation for the support is innately undemocratic. People, in general, are willing to accept incredible limitations on civil rights when they feel they are not likely to encounter the violation of these rights first hand.<sup>[62]</sup> As Dennis Chong suggests, when people think about the violation of the civil rights of a specific 'other,' they are more accepting of the violations than when they think about the same violations of their rights. As long as an individual's rights are not directly violated, they are not overly concerned with the violation of another person's rights.<sup>[63]</sup> This is especially true if, as in the case of September 11th, the out-group can be clearly portrayed in an individual's mind. It is also suggested that "respondents balance their attachment to civil liberties against the risk of –or their animosity toward- an 'out group.'<sup>[64]</sup>" In a more concrete example, the respondents were completely willing to allow the 'frisking' of individuals who look 'suspicious,' but disapproved of allowing the government the right to search an individual's residence without a warrant.<sup>[65]</sup> Basically, people are willing to give up the rights that they do not intend on exercising as long as they believe that they will not be affected by the consequences.

The fear of using a person or a group as a scapegoat to reach a quick resolution to the crisis is very real. The government must be mindful about minorities who may haphazardly be connected to the terrorist groups by religion, skin colour or other ethnic factors. It became painfully obvious during the October Crisis that only the Quebecois ought to fear the substantial powers absorbed by the federal government since English speaking Canadians were virtually unaffected by the intrusive nature of the War Measures Act. A significant spike in hate crimes occurred against visible minorities in the United States following the September 11th attack that can be directly attributed to the fact that the terrorists were visible minorities.<sup>[66]</sup> As Roach points out racial profiling is not only degrading but it is also discriminatory and inefficient. In essence, racial profiling is simply calling institutionalized racism equality.

There is also a degree of legitimacy that is achieved on the international scene by consistently taking the moral high road. "We should make it crystal clear that Canada

will never send even the worst terrorists to face torture and that violations of privacy, equality and fair trial rights will not be easily justified even in the context of national security.[67]” The policies that the Canadian government develops must not simply protect the civil rights of Canadians, but they must enhance civil rights and extend them to others. The government must create a degree of moral justice in their anti-terrorism legislation which promotes the development of civil liberties abroad as well. The American led war on terrorism, although it is not a realistic policy that the Canadian government could employ, is a policy that the Canadian government should strain itself to avoid. Although the Taliban government was successfully undermined, the Americans lost immeasurable amounts of international support because of the indiscretion that they used in bombing raids.

It is not always necessary to make new laws to prosecute terrorists under. The governments must be willing to accept the conviction of terrorists through the use of traditional criminal convictions when those convictions are assured. The prosecution of terrorists in a more aggressive manner, using new anti-terrorism legislation could more completely capture the extremely heinous nature of their crimes, while providing enormous political benefit. Some argue that political agendas must be taken into consideration to truly bring the terrorist to justice.[68] In response to this line of argument, one must remember that the prisons that these people are sent to are the same maximum security prisons that other criminals are sent to for other atrocious crimes. These revisions do not necessarily obtain harsher consequences when convictions using new methods do not appear to be readily forthcoming.

It is also important to focus on the administrative methods that could potentially restrict the ability of terrorists to achieve their objectives without infringing on the civil liberties of individuals at large. Kent Roach suggests two administrative measures that would aid the government in fighting terrorism without violating civil liberties.[69] In Canada it is not considered a fundamental civil liberty to own a gun. Restrictions on gun ownership would allow the government to reduce the potential weapons available to terrorists in the first place. This does not suggest that all guns should be removed from society, but rather, further restrictions on the weapons that are made available to the public would reduce the ease in which terrorist would be able to acquire the weapons that they need to launch an assault on society. The second administrative measure would be to increase the security at locations that are deemed high risk or vulnerable to easy attacks. This is not suggesting that military personnel should patrol shopping malls with rifles strapped to their backs, or that every public building should have metal detectors, but perhaps making the training for existing security guards more rigorous, so as to allow them to respond effectively to potential acts of terrorism.

An argument can be made that there is “no fundamental right to conceal identity.[70]” This argument suggests that it is possible to protect the general public from potential terrorist attacks by forcing everyone to carry identification cards. This mandatory identification card could be far more all-encompassing than the current identification cards that most advanced industrial nations ask their citizens to carry. Identification cards could be outfitted with biometric devices that would enable law enforcement

personnel the ability to swipe the card through a computer while matching it with a biological cue, like a person's finger prints, and be able to discern if that person was involved in any type of criminal activity in another part of the country. This type of computer could be networked with similar computer systems from other countries. With a large enough network of countries willing to implement this type of mandatory biometric identification card, police all over the world would be able to determine if a person was involved in any form of criminal activity. The type of information that would potentially be able to be stored on the identification card and the retrieval of the information would be relatively unobtrusive and universal in the invasion of civil liberties. The implementation of such technology would promise the "safety and protection of the innocent in return for its penetration of our privacy."[\[71\]](#) Unfortunately, there is not way of guaranteeing that the minor invasion of privacy that the government is proposing would increase its ability to detect terrorist attacks any earlier, or protect against terrorism more efficiently. Especially not to the extent that would be necessary in order to make the encroachment on civil liberties worthwhile.

This sounds positive for the reduction of both criminal and terrorist activity but realistically this type of mandatory biometric identification card unintentionally violates a person's fundamental civil liberties through the implementation of such measures. It would be only a small step from requiring all citizens to carry this type of identification with them at all times, to periodic spot checks to ensure that the identification card is being carried. This type of spot check violates an individual's right to be free from any kind of unlawful search or seizure. Richard Clutterbuck argues that "there is no more fear from ID cards than from the mass of bank and credit cards, all linked to a computer, which almost every citizen now carries from choice."[\[72\]](#)" It is true that almost every citizen carries these bank or credit cards by choice, and even if there was some type of biometric type of encoding on these bank or credit cards, the challenge to civil liberties would be qualitatively different. Firstly, if a bank biometrically encoded their access cards they would be doing so for the protection of the individual customer; to ensure that there was no way that any other person had access to their personal bank account. Secondly, the bank does not control the ability to legislate, which would limit the amount of additional control that they would have over the card holder, which stands in direct contrast to the government. Thirdly, there would be an expectation of confidentiality, in which the bank would not share the information with a third party. This differs greatly from the proposal that law enforcement agencies will share the biometric information with other agencies. In addition to these drawbacks, even if the biometric cards were to make it past the 'Charter-proofing' round in the House of Commons, they would incur the maximum amount of restriction on civil liberties, not the minimum that should be expected of government. There is little doubt that the identification cards would increase the government's ability to track individuals, but it needs to be asked whether this extra tool would significantly add to law enforcement's ability to catch terrorists over and above the tools already at their disposal. The biometric identification card would potentially only allow the police the ability to track down and round up the usual suspects, hoping that they give them a lead to serve as a starting point for further investigation.

It does not need to be asked whether terrorism is a crime or whether terrorists should be punished to the fullest extent of the law, but whether the legislation tilts the playing field in such a way that it makes it easier to convict non-terrorists. There is definite political capital to be generated by the swift capture of a terrorist cell, especially one that is challenging the legitimacy of the government and its policy. Even with these threats to the government the protection of privacy and civil rights of innocent people must be balanced against the possible gains that any type of legislation might bring. Ultimately, governments must find away to respect civil liberties while also providing a security function to the public.

## **Conclusion**

The track record for supporting civil liberties in liberal democratic states has not been stellar. That said, by simply adhering to the basic principles of democracy these issues could be reconciled. In the past, Canada has erred on both extremes of the civil liberties issue. During the October Crisis, the implementation of the War Measures Act provided an extreme example of the violation of civil rights in a democratic country. On other side of the same coin, the lack of action during the period of time leading up to and directly following the Air India incident, the Canadian government did nothing to decrease the feelings of anxiety of the nation or soothe the suffering of the victim's families. The American response to September 11th is not much better. The near immediate declaration of war and the highly restrictive USA Patriot Act showed that the country that claims to be the model of democracy also has few reservations when invading the civil liberties of their citizens.

The future for Canada is still to be determined. Even if terrorism is considered to be the "ultimate existential assault on human rights,<sup>[73]</sup>" the government must not exceed its mandate from the people when attempting to justify the invasion of civil liberties in an attempt to protect national security. It is an extremely difficult task to attempt to balance between enough protection against the risk of terrorism and the fundamental concepts of civil rights that provide the basis for democracy. Be that as it may, the government must adequately address this issue in attempt to resolve this problem. The judicial process, although partially effective in some cases, does not have the capacity to react to legislation quick enough to act as an efficient balancer to the law makers in crisis situations. The Charter of Rights and Freedoms is only a tool that can be used to assess the laws that are made. It cannot be relied upon to ensure that laws consistently conform to its principles. The ambiguity within the document as it stands provides the ability for it to protect and the justification to restrict civil liberties. Through self restraint the Canadian government is the most effective force to protect the liberty of Canada. By abolishing the notwithstanding clause in the Charter, the importance of the fundamental civil rights is underscored. In addition, the reasonable limits clause provides more than enough leeway for law enforcement to effectively capture terrorist.

Currently Canada is ill-equipped to respond quickly and effectively to a direct terrorist attack. The inconsistent application of anti-terrorist policies in the past suggests that in effect there is no anti-terrorist policy. If Canada is attacked again, the response would

most likely not be a nice balance between the protection of national security and the defence of civil liberties, but either the extreme shock and inaction, as was done in the Air India disaster, or the complete collapse of civil liberties as was the case in the October Crisis. Since civil liberties provide the basis for social interaction in democratic societies, they must be protected. The cost of living in a society that civil liberties are not protected could not be justified by anything. The cost would be too high.

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[17] Kent Roach (2003) p. 95

[18] Ibid., 90

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