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The *Anti-Terrorism Act* and the Arar Findings: Democracy Protected or Democracy Eroded?

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1. INTRODUCTION

On September 18, 2006, the Honourable Dennis R. O'Connor, Associate Chief Justice of Ontario ("Justice O'Connor") released his Report of the Events Relating to Maher Arar (the "Report"). In the Report, Justice O'Connor details the deficiencies in the Royal Canadian Mounted Police (RCMP) investigation of Maher Arar. In particular, Commissioner O'Connor found that the RCMP failed to follow their own policies on sharing intelligence information with outside agencies. Justice O'Connor found that it was very likely that, in making the decisions to detain and remove Mr. Arar, American authorities relied on information provided by the RCMP.¹

Justice O'Connor found that post-9/11 the RCMP's primary focus was on preventing future terrorist activity. Indeed, the mandate of the RCMP project primarily responsible for the investigation of Maher Arar,

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1 "Analysis and Recommendations Report of the Events Relating to Maher Arar", Minister of Public Works and Government Services, 2006 at 14.

Project A-O Canada, was established with a mandate to prevent terrorist activity. The secondary and tertiary goals of the project were intelligence gathering and criminal prosecution, respectively. Prior to 9/11, preventative investigations or national security investigations were handled by the Canadian Security Intelligence Service (CSIS) and in narrow circumstances by a small group of RCMP officers specially trained in national security.

The new post-9/11 mandate represented a significant departure from the RCMP's traditional role in national security investigations – i.e. criminal prosecution. The shift in mandate and priorities was a result of the climate of fear that clouded western democracies after the tragic events of September 11, 2001. Post-9/11, intelligence and police agencies were convinced that another wave of attacks was not only possible, but imminent. It was this “imminent threat” that the reorganized mandate of Project A-O Canada was meant to address. The climate of fear that spawned the reordering of priorities was formally and legislatively authorized and indeed re-enforced by the passing of Bill-C 36 – the *Anti-Terrorism Act* (“Act”).

While the focus of Project A-O Canada was preventative, Project A-O members were mostly experienced criminal investigators that were inadequately trained in national security investigations. Without national security investigation training, many of the Project A-O members and senior officers were not well versed in the established RCMP policy of intelligence sharing with outside agencies. As such, the well-formulated intelligence sharing policies were ignored in favour of a “caveats down” approach necessitated by the post-9/11 “imminent threat” environment.

The post-9/11 climate of fear changed the priorities of the RCMP. The responsibilities of preventative investigations and their qualitative likeness to national security investigations were placed into the hands of an organization that was ill-suited and under trained to handle such investigations. As such, the authors posit that the tragedy that befell Maher Arar was a natural consequence of the RCMP's changed mandate and the legislation that legitimized that change in mandate – two factors that were borne out of the climate of fear.

In the aftermath of 9/11, the government's stated position, as detailed below, was that Bill C-36 would protect democracy by arming police forces with the power to prevent future terrorist activities. Indeed, guarding against terrorist activity protected the core values of our constitu-

tional democracy – the right to life, liberty and the security of the person.² Our democracy was being threatened by terrorist forces. The government had to protect our constitutional democracy from future terrorist threats.

Despite the government's lofty intentions, Justice O'Connor's Report detailed several disturbing actions taken by government officials. In light of Justice O'Connor's finding one is left questioning whether the government's response to the post-9/11 tragedy has protected our constitutional democracy. To the contrary, it would appear, based on the alarming facts detailed in the Report, that our government's response to 9/11 has further eroded our democracy.

Relying on Justice O'Connor's findings, this paper will discuss the government's response to 9/11 and examine how the passing of Bill C-36, a consequence of the post-9/11 climate of fear, affected the manner in which the RCMP conducted national security investigations. In particular, this paper will address, in talking point format, the following topics:

- (1) The Post-9/11 climate of fear;
- (2) The RCMP's inability to staff and properly conduct a large scale national security investigation;
- (3) Bill C-36 legitimizes a shift in focus to preventative investigation;
- (4) The definition of terrorist activity and its implications on racial profiling;
- (5) Racial profiling in the Maher Arar case;
- (6) The civil rights ramifications of Bill C-36 Investigative Hearings; and
- (7) Future unresolved issues: Protecting government officials.

2. THE POST-9/11 CLIMATE OF FEAR

There is little doubt that the tragic events of September 11, 2001, changed the legal and social environment of most western democracies. In the wake of 9/11, the federal government, in the hopes of protecting

2 Irwin Cotler, "Thinking Outside of the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Ron Daniels et al., eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 112.

Canadians, feverishly drafted and passed Bill C-36³ with the hopes of providing law enforcement officials with the tools necessary to prevent future terrorist acts and to criminalize a broad range of activities loosely defined as “terrorist activities”. The two purposes of the *Act* were recognized by then Justice Minister Anne McLellan:

Without being alarmist or dramatic, it is fair to say that September 11 was a turning point for all free and democratic nations. As with every other democratic nation, we were forced to re-examine the measures in place to protect our national security and, by extension, the security of each and every Canadian. We have recognized the critical importance of strengthening, in as directed a manner as possible, our legislative and law enforcement tools.

Honourable senators, the way I describe this, which I believe is readily understandable by most Canadians, is that we must have laws, intelligence gathering and investigative tools that stop terrorists from getting on planes. If terrorists get on the planes, it is too late. We have failed.

Therefore, the approach we have taken in this bill is directed at cutting off the terrorists from their financing and property, with a view to seriously impeding them from carrying out their intended acts. The approach we have taken in the bill is a preventive one because punishing terrorists for crimes after they occur is simply not enough.⁴

Minister McLellan’s fears were echoed by RCMP Commissioner Zaccardelli. In his comments to the House Committee on Justice and Human Rights, Commissioner Zaccardelli painted a picture of outdated policing techniques ineffective for dealing with the new dangers posed by terrorism.⁵ Commissioner Zaccardelli described terrorist activity as, “indiscriminate, global in scope, and destabilizing in effect.” He concluded his remarks by suggesting that terrorist activity, “poses an extraordinary threat to society” and that the “fight against terrorist activities calls for extraordinary action.”⁶ Bill C-36 was this extraordinary action.

The post-9/11 climate of fear was repeatedly noted by Justice O’Connor. The RCMP relied upon the post-9/11 climate as an explanation for many of their practices. In addition to finding that the RCMP

3 First Reading of Bill C-36 occurred on October 12, 2001. Bill C-36 received Royal Assent on December 18, 2001.

4 Canada, House of Commons, Special Senate Committee on the Subject Matter of Bill C-36, *Evidence*, (October 22, 2001) 09:07.

5 David Schneiderman, “Terrorism and the Risk Society” in Ron Daniels et al., eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 63.

6 Canada, House of Commons, Standing Committee on Justice and Human Rights, *Evidence* (October 23, 2001) 09:32-09:35.

provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and overstated his importance in the RCMP investigation, Justice O'Connor found that the RCMP provided American authorities with information in ways that did not comply with RCMP policies requiring screening for relevance, reliability and attaching caveats to the use of said information.⁷ As always, the rationale for failing to adhere to their internal policies was the fear that another terrorist attack was imminent:

Despite this need, some RCMP officers testified that, because of the imminent threat of another terrorist attack following 9/11, it had no longer been practical or desirable at the time to adhere to policies on screening information and using caveats for information shared with the United States. As some expressed it, "caveats were down."⁸

Justice O'Connor went on to hold that there was no reason, post-9/11, to abandon the established policies on intelligence sharing:

I am satisfied that, in the period after 9/11, there was no need to depart from established policies with respect to screening and the use of caveats. The urgency of investigations and the workload of investigators did not justify such departure. Attaching caveats to documents being provided to American agencies is a very simple, straightforward exercise and is not time-consuming. Similarly, reviewing documents obtained during the course of the RCMP's investigation for relevance, reliability and personal information would not generally be a complicated matter. Because these documents were a product of an RCMP investigation, one would expect that they had already been reviewed and analyzed as part of the investigation. The additional screening before sharing information with another agency is extremely important and, in most cases, should not create an undue burden on investigators.⁹

The post-9/11 climate of fear even affected the RCMP's investigation techniques. At the Arar Inquiry, members of the RCMP testified that the environment of fear that followed 9/11 justified their unusual surveillance of and intelligence gathering on Mr. Arar:

Project A-O Canada conducted a background search on Mr. Arar, obtaining open-source biographical data, and carried out limited surveillance on him in November 2001. Although officers indicated that it was unusual for surveillance to be conducted on someone who was merely a person of interest, Project A-O Canada officials reasoned that it had been warranted, given the seriousness of a possible imminent terrorist threat in the fall of 2001.¹⁰

7 Analysis and Recommendations Report of the Events Relating to Maher Arar, Minister of Public Works and Government Services, 2006 at 14.

8 *Ibid.* at 107-108.

9 *Ibid.* at 108.

10 *Ibid.* at 79.

The fear generated by the 9/11 attacks shifted the focus of the RCMP. Rather than focusing on criminal prosecutions, the normal bailiwick of the RCMP, the RCMP's mandate concentrated on prevention and intelligence gathering. Despite the shift in focus, RCMP's Project A-O team was largely staffed by criminal investigators untrained in national security investigation.

3. THE RCMP'S INABILITY TO STAFF AND PROPERLY CONDUCT A LARGE SCALE NATIONAL SECURITY INVESTIGATION

(a) The CSIS Handoff

After September 11, 2001, the RCMP established Project Shock. Project Shock was coordinated by the National Security Intelligence Branch (NSIB) at RCMP Headquarters. Project Shock was to coordinate all of the tips received concerning the terrorist attacks. The mandate of Project Shock was as follows:

In order of priority, the goals of the Task Force were to be prevention, intelligence and prosecution. This marked the first time that IPOC officers [which became the Task Force] had been directed to conduct their investigations with prevention, rather than prosecution, as the primary goal.

At the same meeting, participants agreed that these three goals would also apply to Project Shock. The Assistant Criminal Operations (CROPS) Officer for "A" Division, Inspector Garry Clement, testified it was clear to him that these instructions had the approval of RCMP Headquarters, up to and including Commissioner Giuliano Zaccardelli.¹¹

For some months prior to September 11, 2001, the CSIS office in Toronto had been investigating the activities of a group of targets that they believed were connected to al-Qaeda. Justice O'Connor found that post-9/11 the focus of all intelligence agencies became identifying the "next wave" of potential attacks.¹² On September 22, 2001, CSIS officials met with officials from the RCMP, the Ontario Provincial Police (OPP), the Toronto Police Service and the Peel Regional Police. CSIS briefed them on the investigation of certain individuals identified as potential threats to Canadian security.

11 Report of the Events, Relating to Maher Arar, Factual Background, Volume I, Minister of Public Works and Government Services, 2006 at 17-18.

12 *Ibid.* at 19.

As the meeting progressed, the police representatives believed that CSIS might have enough information to support criminal conspiracy charges. At that point, the police representatives began to consider whether the case would be better managed as a criminal investigation. As a result of this meeting, CSIS transferred the primary investigation of various Toronto suspects to the RCMP. The RCMP then created a coordinated investigation project, based at their "O" Division in Toronto. The project was dubbed Project O-Canada. Project O-Canada's primary goal was prevention, with intelligence and prosecution as its secondary and tertiary goals, respectively.¹³

In addition to the Toronto suspects, CSIS then requested that the RCMP take over the primary investigation of another suspect – Abdullah Almalki. As a result of the new suspect, Project O-Canada requested the help of the RCMP "A" division in Ottawa which in turn created Project A-O Canada. Soon after their formation, Project A-O members were conducting their own investigations, including the investigation of Maher Arar.

(b) A Shift in Focus

As with Project Shock and Project O-Canada, Project A-O Canada's mandate was prevention, intelligence and prosecution (in that order of priority).¹⁴ Justice O'Connor noted that, following 9/11, priorities for enforcement investigations had significantly shifted away from prosecutions towards preventative intelligence gathering functions:

Prevention was the first priority for any investigation after 9/11, whether carried out by an intelligence agency or, as in the case of Project A-O Canada, by a law enforcement agency. At the time, Canadian authorities believed that the 9/11 attacks were only the first wave and that further attacks might be directed against other countries, including Canada. According to Inspector Michel Cabana, who became the Officer in Charge of Project A-O Canada, the RCMP's role was "to make sure that nothing nefarious occurred anywhere."

Intelligence was the RCMP's second priority, as CSIS had indicated there were terrorist cells in Canada about which there was minimal information. As such, it was considered vitally important to collect as much information as possible about threatened terrorist activities.

Normally the primary focus of RCMP investigations, prosecution now became the third priority.¹⁵

13 *Ibid.* at 15.

14 *Ibid.* at 16.

15 *Ibid.* at 17.

(c) Inadequately Trained Officers

Despite this new emphasis on prevention and intelligence gathering, Project A-O Canada was comprised mostly of conventional criminal investigators (albeit serious crime investigators). Oddly enough, there were only two members of Division A's NSIB and National Security Investigation Section (NSIS) staff on the Project. It was felt that the NSIB and NSIS members were not criminal investigators and thus not well-suited for the Project. With few exceptions, none of the regular members of Project A-O Canada had previous experience in national security investigations or in RCMP policies relating to national security and information sharing.¹⁶ With a mandate of prevention, Project A-O Canada was forced to investigate national security issues without staff that was adequately trained on the intricacies of national security investigations.

(d) The Effects of Inadequate Training

The effect of their inadequate training would be felt by Mr. Arar in the most profound way possible – in late October 2001, a member of Project A-O Canada wrote to U.S. Customs (as well as Canadian officials) asking that Maher Arar and Dr. Monia Mazigh be entered as lookouts in American databases as members of a **“group of Islamic Extremist individuals suspected of being linked to the al-Qaeda terrorist movement”**.¹⁷ No justification could be found or advanced at the Inquiry for this label. Justice O'Connor found that inexperience in national security training likely lead to such an enormous blunder:

I note that this is one instance where team members' lack of training and experience with respect to national security investigations and the lack of oversight by senior officers in the RCMP likely combined to create a situation that was grossly unfair to Mr. Arar. The offensive language in the lookout request led to serious and unacceptable risks for Mr. Arar in the United States. Officers properly trained in national security investigations would have been aware of the risks in describing individuals—especially Muslim or Arab

16 *Ibid.* at 19.

17 Report of the Events Relating to Maher Arar, Factual Background, Volume I, Minister of Public Works and Government Services, 2006, pg. 59 (hereinafter “O'Connor Report, Volume I”) – N.B. references to Volume 1 and 2 are intended to refer to the factual volumes whereas the *Analysis and Recommendations* volume is referred to by name separately.

men—in this way and of the dangers in making such an assertion, particularly to American agencies in the period following 9/11.¹⁸ [emphasis added]

When it came to how members of Project A-O Canada dealt with outside agencies (in particular, American authorities), Justice O'Connor found that the RCMP provided U.S. authorities with information (including information with respect to Mr. Arar), in ways that did not comply with RCMP policies requiring screening for relevance, reliability and attaching caveats to the use of said information.¹⁹ The rationale for failing to adhere to their internal policies was the fear that another terrorist attack was imminent:

Despite this need, some RCMP officers testified that, because of the imminent threat of another terrorist attack following 9/11, it had no longer been practical or desirable at the time to adhere to policies on screening information and using caveats for information shared with the United States. As some expressed it, "caveats were down."²⁰

Justice O'Connor went on to hold that there was no reason, post-9/11, to abandon the established policies on intelligence sharing:

I am satisfied that, in the period after 9/11, there was no need to depart from established policies with respect to screening and the use of caveats. The urgency of investigations and the workload of investigators did not justify such departure. Attaching caveats to documents being provided to American agencies is a very simple, straightforward exercise and is not time-consuming. Similarly, reviewing documents obtained during the course of the RCMP's investigation for relevance, reliability and personal information would not generally be a complicated matter. Because these documents were a product of an RCMP investigation, one would expect that they had already been reviewed and analyzed as part of the investigation. The additional screening before sharing information with another agency is extremely important and, in most cases, should not create an undue burden on investigators.²¹

The O'Connor Report details evidence of various examples in which Canadian authorities breached their own rules concerning vetting information for accuracy and reliability before providing it to American authorities. Furthermore, members of the RCMP failed miserably in creating any restrictions on the use that could be put to any information that they provided to American authorities. Ultimately in the post-9/11 era, an approach had been adopted by Project A-O officers (to the knowledge of many at RCMP headquarters) that the rules that governed

18 *Ibid.* at 118.

19 *Ibid.* at 13.

20 *Ibid.* at 108.

21 *Ibid.* at 109.

transmittal of information no longer applied (i.e. it was now a case of "open book/caveats down").²²

In the case of Maher Arar and Dr. Monia Mazigh this approach had devastating consequences. By virtue of one meeting for lunch with Mr. Almalki, Maher Arar and his wife were propelled into being al-Qaeda terrorist suspects. It bears important note that this misinformation was compounded by the failure of enforcement authorities to acknowledge early on (i.e. 2002) that there had been false information fed to the American authorities. This is particularly troubling in light of RCMP Commissioner Zaccardelli's recent revelations before the House of Commons Committee that he knew of this false information as far back as 2003. Indeed, it was only through Justice O'Connor's findings that it was firmly established that the RCMP had fed false information to American authorities. All of the above led Justice O'Connor to find as follows:

It is very likely that, in making the decisions to detain and remove Mr. Arar to Syria, the U.S. authorities relied on the information about Mr. Arar provided by the RCMP. Although I cannot be certain without evidence of the American authorities, the evidence strongly supports this conclusion.²³

Commissioner O'Connor also found that both before and after Mr. Arar's detention in the U.S., the RCMP provided the American authorities with information about Mr. Arar which was inaccurate, betrayed him in an unfair fashion and overstated his importance to the investigation. Some of this inaccurate information had the potential to create serious consequences for Mr. Arar in light of the American attitudes and practices at the time.²⁴

4. BILL C-36 LEGITIMIZES A SHIFT IN FOCUS TO PREVENTATIVE INVESTIGATION

(a) The Preventative Nature of Bill C-36

For the RCMP, the passing of Bill C-36 legitimized their preventative role in national security investigations. As mentioned above, one of the stated purposes of the *Act* was the prevention of terrorist activity. The Supreme Court of Canada reaffirmed this in holding that the purpose

22 See Annex 1 to O'Connor Report re Categories of Information provided by Project A-O to the F.B.I.

23 *Ibid.* at 13.

24 O'Connor Report, Analysis and Recommendations, at 13-14.

of the *Act* as a whole is the prosecution and prevention of terrorism offences.²⁵ The preventative nature of the *Act* is demonstrated in three ways: (1) criminalizing, facilitating and instructing terrorist activity; (2) the investigatory hearing; and (3) recognizance with conditions. Without a doubt, the *Act* is formulated with prevention in mind.

Former Justice Minister Anne McLellan further espoused the preventative nature and purpose of the *Act*:

Perhaps the greatest gap in the current laws is created by the necessity of preventing terrorist acts. Our laws must reflect fully our intention to prevent terrorist activity and currently, they do not. Under our current laws, we can convict terrorists who actually engage in acts of violence if we are able to identify and apprehend them after their acts have been committed . . . The Criminal Code offences in C-36 will allow us to convict those who facilitate, participate in and direct terrorist activity and these must include preventive measures which are applicable whether or not the ultimate terrorist acts are carried out.²⁶

As stated above, the mandate of Project A-O Canada was prevention, intelligence, and prosecution. The authors submit that Bill C-36, with its focus on prevention, legitimized and expanded the Project's preventative mandate and further blurred the line between the RCMP's traditional role in national security investigations and criminal investigations.

(b) The Effect of Bill C-36 on the RCMP's Role in National Security

In the Report, Justice O'Connor detailed the traditional role of the RCMP in national security and addressed the effects of Bill C-36 on that role:

Clearly, the mandates of CSIS and the RCMP are different. However, those mandates contemplate a continuum in the collection of information concerning national security threats. CSIS collects information at an earlier phase and on a broader basis than does the RCMP. It collects information and/or intelligence under section 12 of the *CSIS Act* in respect of activities "that may on reasonable grounds be suspected of constituting threats to the security of Canada" and advises government of perceived threats to the security of Canada. However,

25 *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379, [2004] 2 S.C.R. 248 (S.C.C.) at para. 40.

26 A. McLellan, *Notes for the Minister of Justice's Appearance before the House of Commons Standing Committee on Justice and Human Rights* (20 November 2001), online: Canada, Department of Justice <http://canada.justice.gc.ca/en/news/sp/2001/doc_27900.html> (date accessed: 1 November 2002).

CSIS is not a law enforcement agency, and once it makes a determination that sufficient indicators of criminality are present to warrant a criminal investigation, the RCMP may become involved.

Law enforcement agencies such as the **RCMP become involved in investigations relating to national security when the investigations are directed at apprehending criminals or preserving the peace and preventing crime.** Unlike CSIS, the RCMP conducts investigations that require the exercise of powers and practices associated with law enforcement and criminal investigations.

After the McDonald Commission, the RCMP continued to assume responsibility for conducting national security investigations from a law enforcement perspective. Thus, it was quite properly involved in any investigation with national security implications directed towards prosecuting offences under the *Criminal Code*. Moreover, the *Security Offences Act* enacted in 1984 conferred on the RCMP specific authority to conduct investigations of national security offences, being those that relate to conduct constituting a threat to the security of Canada.

In addition to conducting criminal investigations for purposes of prosecution, the RCMP has a preventative mandate under section 18 of the *Royal Canadian Mounted Police Act (RCMP Act)*, which gives it authority to conduct investigations aimed at taking steps to preserve the peace and prevent crimes.

Although some have suggested that 9/11 inappropriately thrust the RCMP back into the national security business contrary to the direction of the McDonald Commission, that is not the case. The RCMP has conducted investigations with national security implications in the years since the McDonald Commission. **In furtherance of this responsibility, the Force has, over time, developed specific operational and Headquarters units devoted to these types of investigations and implemented policies focused on them. What has changed since 9/11 is the number and intensity of the RCMP's national security investigations and the enactment of Bill C-36 which, among other things, created new criminal offences relating to national security, as well as certain new investigative powers.** In the months and years since 9/11, the RCMP has devoted a significantly larger proportion of its resources to these types of investigations, and it would seem that this higher level of activity will continue to be required for the foreseeable future.²⁷ [emphasis added]

Bill C-36, in its focus on prevention, provided the RCMP with an expanded preventative mandate.

Justice O'Connor noted the effect that Bill C-36 had on the RCMP. In the Report, Justice O'Connor found that members of Project A-O viewed themselves as engaged in a criminal investigation as it related to Mr. Almalki. Justice O'Connor found this perception to be substan-

27 Analysis and Recommendations Report of the Events Relating to Maher Arar, Minister of Public Works and Government Services, 2006 at 67-68.

tiated by the fact that Bill C-36 created new crimes like the facilitation of terrorist activities.

As discussed, Project A-O Canada officers regarded their investigation into Mr. Almalki's activities as a criminal investigation, rather than a national security investigation. This interpretation of their work was confirmed by the passage of Bill C-36, which specifically established the facilitation of terrorist activities as a criminal offence.²⁸

(c) The Investigation into Maher Arar

The investigation into Maher Arar, however, was not a criminal investigation. Justice O'Connor found that the investigation into Maher Arar was focused on prevention as opposed to a criminal investigation. Justice O'Connor went on to find that the investigation into Maher Arar may have crossed the line of a proper RCMP criminal investigation into national security:

Given that prevention, rather than prosecution, was the primary goal of the investigation that in time involved Mr. Arar, questions arise as to whether, at some point, the investigation ceased to have a focus that could properly be investigated by the RCMP as a law enforcement agency and should therefore have been discontinued, or whether it could have been more properly handled by CSIS as a security intelligence probe. While the line between the two types of investigations may be blurred in some cases, it is nonetheless important that the distinction between what is appropriately the subject matter for an investigation by the RCMP on the one hand, and what should be handled by CSIS on the other, be respected and maintained. The fact that a particular investigation is being conducted by the RCMP does not mean that it must necessarily remain a law enforcement investigation indefinitely.²⁹ [emphasis added]

The threat of an imminent attack shifted the priorities of the RCMP. No longer was criminal prosecution their main involvement in national security. Under the guise of preventative investigations, the criminal investigators that comprised Project A-O Canada were being thrust into an intelligence gathering. Bill C-36 only served to legitimize the post-9/11 environment of fear and further substantiate the RCMP's mandate of prevention and blurring the line between their role as a law enforcement agency and their role in intelligence gathering. Unfortunately, the

28 Report of the Events, Relating to Maher Arar, Factual Background, Volume I, Minister of Public Works and Government Services, 2006 at 51-52.

29 *Ibid.* at 68.

RCMP investigators tasked with the duties of prevention were not adequately trained for national security investigations.

5. THE DEFINITION OF TERRORIST ACTIVITY – THE CRIMINALIZATION OF MOTIVE AND RACIAL PROFILING IMPLICATIONS

When determining whether Bill C-36 assisted in protecting or eroding democracy, one must examine the effect it has had on the people most affected by investigations into terrorism – Muslims. It is without a doubt that since 9/11 Muslims in both Canada and the United States have been targeted by authorities. This problem is more pronounced in the United States. Post-9/11, hundreds of Muslims with no connection to criminal or terrorist activity were detained without charges for months until their release.³⁰

With these concerns in mind, legal scholars such as Professors Kent Roach and Sujit Choudhry presented briefs to the Senate Special Committee calling for an explicit ban on racial and religious profiling in the administration of Bill C-36 as well as for more robust reporting requirements that would ensure that relevant statistics are collected to determine whether such discriminatory profiling was occurring.³¹ Unfortunately, the government gave little or no weight to these pleas.³²

The concerns over racial and religious profiling are legitimate for two reasons. Firstly, racial profiling is not a new phenomenon and was a problem that plagued law enforcement prior to the enactment of Bill C-36.³³ There is no reason to believe that problems that plagued our criminal justice system prior to 9/11 would not plague our criminal justice system after 9/11.

30 Office of the Inspector General, United States Department of Justice, *The September 11 Detainees: A review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003) as cited in Maureen Webb, "Essential Liberty or a Little Temporary Safety? The Review of the Canadian Anti-Terrorism Act" (2005) 51 Crim L.Q. 53 at 70.

31 The Senate Committee heard from several professors, politicians and public interest advocacy groups including the Urban Alliance on Race Relations (submissions made by Julian Falconer on December 1, 2001). Statements of Julian Falconer before the Senate Committee (December 2001) from Hansard on the Anti-Terrorism Act 38475 0930-1.

32 Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 R.D. McGill 893 at 909.

33 *Ibid.* at 897.

Secondly, the *Act* itself makes politics, religion, and ideological motive the forefront of any criminal prosecution. In order to fit the definition of terrorist activity in the *Criminal Code* of Canada, the impugned act must be committed “in whole or in part for a political, religious or ideological purpose, objective or cause”³⁴. In essence, the provision criminalizes political, religious or ideological beliefs.³⁵ Stipulating religious beliefs as an element of the offence gives state agents wide discretion to profile individuals and groups based on who they are or what they believe rather than for what they have done. The creation of motive-based “terrorist” offences ensures that the politics and religions of suspects becomes the fundamental issue in every Canadian “terrorism” trial and in every “terrorism” police investigation. This will have divisive effects in a pluralistic society and could result in many innocent people being caught up in a net of crude profiling or inept stereotyping. The criminalization of motive will undoubtedly chill freedom of expression and association.³⁶ In the authors’ opinion, the criminalization of religious, political or ideological thought will invariably lead to racial or religious profiling. In a speech given to judges at a Canadian Bar Association meeting Justice O’Connor recognized the potential for abuse in stating that “national security investigations harbour the potential for improper profiling”³⁷.

By way of comparison, it should be noted that s. 1(1)(c) of the *United Kingdom’s Terrorism Act, 2000* also criminalizes motive by requiring that the terrorist act or threat be “made for the purpose of advancing a political, religious or ideological cause.” On the other hand, s. 808 of the *U.S.A. Patriot Act* does not require proof of political or religious motive. Under the *U.S.A. Patriot Act*, domestic terrorism is defined as any act dangerous to human life that appears to be intended to intimidate or coerce a civilian population, to influence the policy of a Government by intimidation or coercion, or affect the conduct of a Government by mass destruction, assassination or kidnapping.

34 Section 83.01(1)(b)(i)(A) of the *Criminal Code* of Canada.

35 Kent Roach, “The New Terrorism Offences and the Criminal Law” in Ronald J. Daniels et al., eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 152-154.

36 Maureen Webb, “Essential Liberty or a Little Temporary Safety? The Review of the Canadian Anti-Terrorism Act” (2005) 51 *Crim L.Q.* 53 at 63.

37 “Home security watchdog foreseen” *The Toronto Star* (16 August 2006) A16.

Subsequent to the original presentation of this article, Justice Rutherford, in *R. v. Khawaja*³⁸ found that s. 83.01(1)(b)(i)(A) of the *Criminal Code* infringed the freedoms of conscience, religion, thought, belief, expression and association as guaranteed by s. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*. As such, the court severed from the definition of terrorist activity the requirement that the activity be completed “in whole or in part for a political, religious or ideological objective or cause”. In severing the motive based component of the definition of terrorist activity, Justice Rutherford expressed concern over the type of “evidence” that would be relied upon to prove the requisite mental state. In discussing this issue, Justice Rutherford cited with approval a passage from Professor Davis’ article *Cutting Off the Flow of Funds to Terrorists*:

In the context of prosecutions for some terrorism offences the best evidence that an accused possesses a culpable mental state (e.g. intention) is likely to be the fact that he or she has expressed support for a political, religious or ideological purpose, objective or cause that others have attempted to further through violent means. However, relying on this sort of evidence will expose people who express unpopular views to greater risk of prosecution than other members of society. This in turn implies that if the principal check on abusive prosecutions is the way in which the mental elements of the offences are defined, then people will have a strong incentive to refrain from expressing unpopular views. Some courts may conclude that these outcomes are objectionable on constitutional grounds and take steps to limit either the weight or the admissibility of such evidence.³⁹

Relying on several authors and commentators, Justice Rutherford found that the motive requirement in the definition of “terrorist activity” would focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups.⁴⁰ As such, Justice Rutherford held that s. 83.01(1)(b)(i)(A) of the *Criminal Code* violated s. 2(a) and (b) of the *Charter*.

38 (2006), [2006] O.J. No. 4245, 2006 CarswellOnt 6551 (Ont. S.C.J.), leave to appeal refused (2007), 2007 CarswellOnt 2154, 2007 CarswellOnt 2155 (S.C.C.).

39 *Ibid.* at para. 57.

40 *Ibid.* at para. 58.

6. RACIAL PROFILING IN THE MAHER ARAR CASE

(a) Justice O'Connor's Findings on Racial Profiling

Following an exhaustive factual analysis of the circumstances under which Mr. Arar first became a "person of interest" to the RCMP, Justice O'Connor held that the evidence did not demonstrate that racial profiling played a role in initiating surveillance of Mr. Arar. In the Report, Justice O'Connor found that there was no direct evidence to suggest that the decision to conduct surveillance on Mr. Almalki and Mr. Arar was the result of the fact that they were Muslims or of Arab origin:

Mr. Arar first came to the attention of Project A-O Canada as a result of a meeting he had with Abdullah Almalki at Mango's Café in Ottawa on October 12, 2001. I am satisfied that, based on the information available to them, the Project members had reasonable grounds to conduct surveillance of this meeting. This was a routine and proper investigative step and was not the result of racial profiling.⁴¹

I am satisfied that Project A-O Canada's decision to conduct surveillance of this meeting was a reasonable step in the course of investigating its target, Mr. Almalki, and entirely proper in the circumstances. Although I did not conduct a thorough review of the Almalki file, I did hear some evidence about the nature of the investigation into Mr. Almalki's activities and the level of interest of the various agencies. Having received information that a meeting was to take place, Project A-O Canada made a routine decision to conduct surveillance. There is nothing in the evidence to suggest that the decision was motivated by the fact that Messrs. Almalki and Arar were Muslims or of Arab origin, or that the surveillance was the result of racial profiling.⁴²

The issue that is left outstanding, however, is an explanation for the RCMP description of Maher Arar and Dr. Monia Mazigh as members of a "group of Islamic Extremist individuals suspected of being linked to the al-Qaeda terrorist movement". In other words, there is an important distinction between how Mr. Arar first appeared on the RCMP's radar screen (which the Report validates) and the subsequent actions of the RCMP during the course of the investigation (which the Report criticizes). While the O'Connor Report goes on to find that no justification exists for the subsequent RCMP labeling of Mr. Arar and his wife as members of a "group of Islamic Extremist individuals" with links to al-Qaeda, it unfortunately does not posit the very significant question as to

41 Analysis and Recommendations Report of the Events Relating to Maher Arar, Minister of Public Works and Government Services, 2006 at 18.

42 *Ibid.* at 78.

what motivated this label. It is the contention of this paper that the description of Mr. Arar and Dr. Mazigh in this fashion is a classic example of racial profiling and that, with respect, the O'Connor Report falls short of the mark when it failed to apply the racial profiling analysis to this issue.

(b) The Arars Described as Islamic Extremists

As stated above, no explanation was ever advanced that would come close to justifying the RCMP label for the Arars as Islamic extremists with links to al-Qaeda. The Report states the following in this regard:

In their testimony, Staff Sergeant Callaghan and Corporal Lemay agreed that "Islamic Extremist" was an improper characterization of Mr. Arar and Dr. Mazigh, given the limited information Project A-O Canada had about them at the time. Moreover, Constable Lang testified **that when he made the request for a lookout, he had no information to justify this description of Mr. Arar and Dr. Mazigh.** In Inspector Cabana's view as well, the description was a poor choice of words.⁴³ [emphasis added]

The impact of the RCMP blunder was catastrophic. It is important to understand what the "lookout" request means. U.S. Customs use a computer system called TECS (Treasury Enforcement Communications Systems). TECS is referred to by experts who testified before Justice O'Connor as "the mother of all data bases" in that its systems feed into databases across North America and are accessible to 19 U.S. Federal agencies that provide information. All told, more than 30,000 people have been authorized to input information into TECS.⁴⁴ As noted above, in late October 2001, Constable Michel Lang of the RCMP (Project A-O Canada) wrote to U.S. Customs (as well as Canadian border authorities) asking that Maher Arar and Dr. Monia Mazigh be entered as lookouts in the American databases as members of a **"group of Islamic Extremist individuals suspected of being linked to the al-Qaeda terrorist movement"**.⁴⁵ U.S. authorities repeated and relied upon the RCMP label in their decision to send Mr. Arar to Syria to be tortured. The impact is documented in a ruling issued by U.S. Immigration and

43 *Ibid.* at 62.

44 *Ibid.* at 60-62.

45 Report of the Events Relating to Maher Arar, Factual Background, Volume I, Minister of Public Works and Government Services, 2006, pg. 59 (hereinafter "O'Connor Report, Volume I") – N.B. references to Volume 1 and 2 are intended to refer to the factual volumes whereas the *Analysis and Recommendations* volume is referred to by name separately.

Naturalization Services (INS) dated October 7, 2002 which ordered Mr. Arar's removal to Syria. In that document reliance is placed on the fact that "Mr. Arar was subject to a secondary inspection, and it was determined that he was the subject of a TECS/NAILES lookout as a member of a known terrorist organization."

The identification to American authorities of Maher Arar and Dr. Mazigh as Islamic extremists with suspected links to al-Qaeda was exacerbated by repeated and misleading statements from Canadian enforcement authorities to the Americans in which Mr. Arar was described as "a suspect", "principal subject" or "an important figure" in RCMP investigations. This was inaccurate. Mr. Arar's status, in the eyes of Project A-O officers, never went beyond a person of interest.

(c) Legal Principles Re Racial Profiling

Racial profiling is very rarely proven by direct evidence. Officers, for either conscious or subconscious reasons, are very rarely going to acknowledge the existence of bias in their decision-making.⁴⁶ Rather, racial profiling is more often proved by circumstantial evidence:

A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.

The respondent submits that where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling. I accept that this is a way in which racial profiling could be proven. I do not think that it sets the hurdle either too low (which could be unfair to honest police officers performing their duties in a professional and unbiased manner) or too high (which would make it virtually impossible for victims of racial profiling to receive the protection of their rights under section 9 of the *Charter*).⁴⁷

46 D.M. Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-based Conception of Arbitrary Detention" (2002) 40 *Osgoode Hall L.J.* 145.

47 *R. v. Brown* (2003), 64 O.R. (3d) 161, 2003 CarswellOnt 1312 (Ont. C.A.) at paras. 44 and 45; see also Julian Falconer, "Litigating Race in the Criminal Courts" in Christine Boyle et al., eds., *The Law of Evidence, Fact Finding, Fairness, and Advocacy* (Toronto: Emond Montgomery Publications Ltd., 1999).

Racial profiling is a subset of pretext policing. That is to say that racial profiling often involves the employment of facially valid, objective grounds as a pretext for police conduct that is in reality based on ulterior or improper purposes (i.e. racial profiling). In *Brown v. Durham Regional Police Force*, the Ontario Court of Appeal addressed this problem by holding that a proper highway stop can be invalidated if it is based on an improper motive (i.e. racial profiling):

While I can find no sound reason for invalidating an otherwise proper stop because the police used the opportunity afforded by that stop to further some other legitimate interest, I do see strong policy reasons for invalidating a stop where the police have an additional improper purpose. Highway safety concerns are important, but they should not provide the police with a means to pursue objects which are themselves an abuse of the police power or are otherwise improper. For example, it would be unacceptable to allow a police officer who has valid highway safety concerns to give effect to those concerns by stopping only vehicles driven by persons of colour. Section 216(1) of the *HTA* does not, in my view, authorize discriminatory stops even where there is a highway safety purpose behind those stops.⁴⁸

In David Tanovich's article on racial profiling, the learned author suggests that one method of determining whether racial profiling was a motivation for police action is to determine whether the officers followed standard police procedures.⁴⁹ Tanovich's article focuses on eight separate factors relating to a traffic stop. The farther the officers deviated from normal police procedures the greater the likelihood that racial profiling exists.⁵⁰ Justice Malloy, in her decision in *R. v. Khan*, held that racial profiling may also be established through similar fact evidence

48 (1998), 131 C.C.C. (3d) 1, 1998 CarswellOnt 5020 (Ont. C.A.), leave to appeal allowed (1999), 133 O.A.C. 200 (note) (S.C.C.) at para. 38; see also Justice Malloy's decision in *R. v. Khan* (2004), [2004] O.J. No. 3819, 2004 CarswellOnt 5234 (Ont. S.C.J.) at para. 49.

49 *Supra* note 46 at 269; see also Julian Falconer, "Litigating Race in the Criminal Courts" in Christine Boyle et al., eds., *The Law of Evidence, Fact Finding, Fairness, and Advocacy* (Toronto: Emond Montgomery Publications Ltd., 1999).

50 It should be noted, that in the Court of Appeal's decision in *Peart v. Peel Regional Police Services Board* (2006), [2006] O.J. No. 4457, 2006 CarswellOnt 6912 (Ont. C.A.), leave to appeal refused (2007), 2007 CarswellOnt 1882, 2007 CarswellOnt 1883 (S.C.C.), Justice Doherty held that racial profiling will not always taint or invalidate subsequent police action. In addition, Justice Doherty's decision can be interpreted as rejecting Tanovich's analysis (at para. 135).

indicating that the officers involved have engaged in racial profiling in the past.⁵¹

(d) Analysis of Arar

In reviewing the materials referenced above, the authors suggest that proving racial profiling is best described as diagnosis by exclusion. That is to say that racial profiling can be shown to exist when all other rational and legal justifications for an action are eliminated. For example, take the case of a young black male driving an expensive car stopped by the police. Where it can be established that the black male was neither speeding nor driving erratically then you begin to eliminate the reasonable basis for stopping the driver. By excluding all the legitimate reasons for the stop, a finding of fact can be made that the circumstances of the detention correspond to the phenomenon of racial profiling – a young black male driving an expensive car.⁵²

Justice O'Connor's detailed factual review provides the foundation for a diagnosis by exclusion analysis. In reviewing all the testimony and evidence provided by the RCMP and other intelligence agencies, Justice O'Connor found no basis for characterizing Mr. Arar and Dr. Monia Mazigh as Islamic extremists with links to al-Qaeda. With no factual basis for the false characterization all one is left with is that Mr. Arar is an Islamic male under observation as a person of interest, therefore he must be an Islamic extremist with connections to al-Qaeda. Following through on this analysis, Dr. Monia Mazigh is married to an Islamic male under observation as a person of interest therefore she too must be an Islamic extremist with connections to al-Qaeda. If Mr. Almalki met a white male at the Mango Café would that individual be labelled as an Islamic extremist with connections to al-Qaeda? What is more alarming is that there was no facially valid pretext for labelling Mr. Arar and Dr. Monia Mazigh as Islamic extremists with connections to al-Qaeda.

The RCMP's actions are explainable only on the basis that Mr. Arar and Dr. Monia Mazigh are Muslims. Respectfully, if the O'Connor Report's findings with respect to racial profiling had been extended beyond the initial surveillance stage (i.e. How Mr. Arar became a person of interest?), the conclusion would have been inescapable: the RCMP designation of the Arars was entirely based on racial stereotyping.

51 *R. v. Khan*, *supra* note 48 at para. 50.

52 *R. v. Brown*, *supra* note 47 at para. 46.

Despite finding that the surveillance of Mr. Arar and Mr. Almalki was not based on racial profiling, Justice O'Connor did recommend that Canadian intelligence agencies conducting national security investigations should have clear written policies stating that investigations must not be based on racial, religious or ethnic profiling. In making this recommendation Justice O'Connor was cognizant of the reality that terrorist investigations currently focus on Muslim and Arab people:

Although this may change in the future, anti-terrorism investigations at present focus largely on members of the Muslim and Arab communities. There is therefore an increased risk of racial, religious or ethnic profiling, in the sense that the race, religion or ethnicity of individuals may expose them to investigation. Profiling in this sense would be at odds with the need for equal application of the law without discrimination and with Canada's embrace of multiculturalism. Profiling that relies on stereotypes is also contrary to the need discussed above for relevant, reliable, accurate and precise information in national security investigations. Profiling based on race, religion or ethnicity is the antithesis of good policing or security intelligence work.⁵³

7. THE CIVIL RIGHTS RAMIFICATIONS OF BILL C-36 INVESTIGATORY HEARINGS

The Supreme Court of Canada in an *Application Under s. 83.28 of the Criminal Code, Re*,⁵⁴ upheld the constitutionality of the investigatory hearings proscribed by s. 83.28 of the *Criminal Code* of Canada.⁵⁵ The majority decision, penned by Justices Iacobucci and Major, held that the purpose of the *Act* as a whole is the prosecution and prevention of terrorism offences.⁵⁶ The majority further held that a purposive reading of "any objection" as stated in s. 83.28(9) provides for more fulsome participation by counsel, including objections based on relevancy and objections are not restricted to the grounds in s. 83.28(8).⁵⁷

The majority went on to hold that a person subject to the investigatory hearing is entitled to protections under the *Canada Evidence Act* such as: spousal privilege (s. 4(3)), procedures concerning cross-examination of adverse witnesses (s. 9), and cross-examination in relation to prior statements (ss. 10 and 11). In addition, the majority held that the

53 *Supra* note 41 at 356.

54 2004 SCC 42, 2004 CarswellIBC 1378, 2004 CarswellIBC 1379, [2004] 2 S.C.R. 248 (S.C.C.).

55 Since the publication of this paper, the investigatory hearings clause and preventive arrests clauses were not renewed by the Federal Government.

56 *Supra* note 54 at para. 40.

57 *Ibid.* at para. 47.

common law rules of evidence are applicable in an investigatory hearing.⁵⁸ Lastly, the majority held that the right to silence/right against self-incrimination was not violated by s. 83.28 because s. 83.28(10) provides both use and derivative use immunity to the individual named in an order for the gathering of information.

Pursuant to s. 83.2(4)(a) and (b) a judge may order an investigatory hearing where the following conditions are satisfied:

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that

- (i) a terrorism offence has been committed, and
- (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(b) that

- (i) there are reasonable grounds to believe that a terrorism offence will be committed,
- (ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and
- (iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

Because the above noted section incorporates, as a threshold to obtaining an order, the use of “terrorist activity” and “terrorism offences” the power of the investigatory hearing could be used for purposes other than preventing terrorist actions. The power could be used to target normal political activity and to inappropriately determine the political, religious or ideological position of individuals or organizations.⁵⁹

Bill C-36 provides peace officers, including RCMP officers, with increased powers. The RCMP, unlike some municipal police forces, is not subject to any form of external oversight. As such, there is no

58 *Ibid.* at paras. 50-55.

59 Maureen Webb, “Essential Liberty or a Little Temporary Safety? The Review of the Canadian Anti-Terrorism Act” (2005) 51 *Crim. L.Q.* 53 at 80.

mechanism to ensure that the RCMP uses these powers in a responsible manner:

A contextual approach to law reform should pay more attention to how proposed laws will be enforced. Much of the debate in the media and in committee about Bill C-36 focused on legalistic discussions of the definition of terrorist activities as opposed to questions about whether either Bill C-36 or existing laws would be administered in a manner that unfairly targeted people for investigation because of their religion or national and ethnic origin. Although some reporting requirements were added after second reading to record the "number" of times preventive arrests and investigative hearings are used, such quantitative data may not be sufficient to judge any allegations of racial profiling. Much greater attention needs to be paid to ensuring that oversight bodies can inquire into and audit the exercise of the new police powers and provide effective remedies for any abuse of new and existing powers. Bill C-36 is dangerous in this respect because it gives all peace officers increased powers even though many are not subject to effective external oversight. It remains to be seen whether requirements of consent from either the federal or provincial attorneys general for the use of many of the new police powers and criminal offences in Bill C-36 will provide sufficient safeguards. Attorneys general should use these powers in an independent manner to prevent their abuse, but much will depend on the information they receive from the police.⁶⁰

The authors suggest that the lessons learned by the Report and the increased powers provided by the *Act* necessitate an external oversight board to effectively monitor the RCMP and to formulate policies with respect to the proper use of investigative hearings and other preventative provisions of the *Act*.

In the Report, Justice O'Connor recommends that the RCMP's information-sharing practices and arrangements should be subject to review by an independent, arm's-length review body.⁶¹ Justice O'Connor holds that an important function of the independent review body would be to report to the Solicitor General and to Parliament and the Canadian public on problems with the RCMP's information sharing, particularly in regard to the interpretation of and compliance with ministerial directives and directions. With the greatest respect to Justice O'Connor, the authors suggest that this recommendation does not go far enough.

There is no doubt that the tragedy that befell Mr. Arar was, to a significant extent, a result of the RCMP not following their internal intelligence-sharing policies. As such, external review of these policies and compliance with said policies is necessary. This, however, does not

60 Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism" (2002) 47 R.D. McGill 893 at 914.

61 *Supra* note 41 at 343 (Recommendation 10).

provide an adequate review body for conduct that occurs outside of information sharing. In particular, Justice O'Connor's recommendation does nothing to provide external oversight with respect to the RCMP's use of investigative hearings or recognizance without bail. The powers now afforded to the RCMP by virtue of the *Act* have the potential to be severely abused, thereby requiring an external review body to ensure accountability in all aspects of the RCMP, national security investigations or otherwise.

8. FUTURE UNRESOLVED ISSUES: PROTECTING GOVERNMENT OFFICIALS

One of the more interesting issues that remains unresolved since the completion of the Report and the settling of Mr. Arar's civil lawsuit against, amongst others, the Canadian government, is the issue of the government leaks. In his report, Justice O'Connor detailed a number of media reports that contained classified information that was misleading or false. Justice O'Connor found that government officials were responsible for the leaks and that the intent of the leaks, both before and after Maher Arar's return to Canada, were done to smear his reputation and portray him as a terrorist:

Over a period of time, Government of Canada officials intentionally released selected classified information about Mr. Arar or his case to the media. The first leak occurred in July 2003, even before Mr. Arar's return to Canada, and the leaks intensified in the period immediately following his return in October 2003.

There were at least eight media stories containing leaked information about Mr. Arar and/or the investigation that involved him. Typically, the leaked information was attributed to an unnamed government official, an official closely involved in the case, or some similar source. Some of the leaks sought to portray Mr. Arar as someone who had been involved in terrorist activities, mentioning, for example, that he had trained in Afghanistan. In one, he was described as a "very bad guy;"¹⁰ in another, the source was reported to have said that the guy was "not a virgin,"¹¹ adding that there was more there than met the eye.

Several of the leaks were inaccurate, unsupported by the information available from the investigations, and grossly unfair to Mr. Arar. At least one leak sought to downplay the mistreatment and torture Mr. Arar had suffered in Syria.

...

There have been several investigations into the sources of the Arar leaks. To date, none of the sources have been identified. All witnesses at the Inquiry who

were asked about them denied any knowledge. The sources of the leaks appear to be a complete mystery to everyone and the prospects of identifying those responsible seem uncertain at best. The only remaining investigation is the criminal investigation into the O'Neill leak, which is now two years old.

Leaking confidential information is a serious breach of trust. Obviously, it is important that all available steps be taken to prevent it.

Quite predictably, the leaks had a devastating effect on Mr. Arar's reputation and on him personally. The impact on an individual's reputation of being called a terrorist in the national media is severe. As I have stated elsewhere, labels, even unfair and inaccurate ones, have a tendency to stick.⁶²

Following the release of the Report, the investigation into Juliet O'Neill hit a major roadblock. In November, 2003, the Citizen published a story by O'Neill that included accounts of what Maher Arar had told his Syrian interrogators under torture. As a result of this article, the RCMP suspected that there had been an unauthorized leak in violation of ss. 4(1)(a), 4(3) and 4(4)(b) of the *Security of Information Act* ("SOIA"). Generally, s. 4 of the SOIA makes it a criminal offence to communicate, possess and retain "secret official" and "official" information. As a result, on January 4, 2004, the RCMP, relying on the leakage provisions of the SOIA, conducted a search of Ms. O'Neill's home.

Ms. O'Neill brought an application challenging the validity of the searches and seizures on three grounds: ss. 4(1)(a), 4(3) and 4(4)(b) of the SOIA violate ss. 7 and 2(b) of the *Canadian Charter of Rights and Freedoms*; the issuance and execution of the search warrants constituted an abuse of process; and the search warrants were invalid. On October 19, 2006, Justice Ratushny held that s. 4 of the SOIA violated s. 7 of the *Charter* because the section was overbroad, vague, and that parts of s. 4 eliminated any fault requirement. Finally, Justice Ratushny held that s. 4 violated s. 2(b) of the *Charter* and that the violation was not saved pursuant to s. 1 of the *Charter*.⁶³

Ms. O'Neill has been unwilling to reveal her confidential sources. As such, there is a possibility that the government officials responsible for using the media to defame Mr. Arar and his family are still in office. It is left to the professional ethics of journalists to determine whether informant confidence should be maintained where it is clear that the informant has lied and used journalists to further an improper purpose.

62 *Ibid.* at 46-47.

63 *O'Neill v. Canada (Attorney General)* (2006), 82 O.R. (3d) 241, 2006 CarswellOnt 6396 (Ont. S.C.J.).

The authors' submit that the purpose of protecting confidential sources was to encourage whistle-blowers to reveal wrongful acts of a powerful organization. It was not meant to shield government officials from accountability for their wrongful acts. Hopefully, in the future, journalists will ensure that confidential sources understand that their confidentiality may be breached if it is determined that the journalist was used to further an unlawful or improper act.

9. CONCLUSION

Maher Arar's experience is an extreme tragedy which ought to be seen as a natural consequence of actions borne of panic. The fear of a further wave of terrorist attacks led to the reorganization of RCMP priorities. Prevention became the single most important part of the RCMP's mandate. With the passing of Bill C-36, the legislature further legitimized the fear and the shift in priorities. Rather than manage the climate of fear, Bill C-36 further fanned its flames.

With a mandate of prevention, legitimized by the passing of Bill C-36, the RCMP was thrust into preventative investigations that resembled national security investigations as opposed to criminal prosecution investigations. Seen in this light, the tragedy that befell Maher Arar and his family was a natural consequence of the post-9/11 climate that caused the hasty passage of Bill C-36 and the reorganization of the RCMP mandate.