

## Chapter 6: Canada

### 6.0 Introduction

This chapter considers the historical development of counter terrorist financing (CTF) legislation in Canada and identifies some of the implications of these provisions on the right to trial by jury. Following the terrorist attacks in September 2001 Canada implemented legislation to counter terrorism and the financing of terrorism. The importance of counter terrorism legislation has not diminished, as Canada has not escaped the growth in regularity of terrorist attacks.<sup>1</sup> For example, in 2006 authorities foiled a terrorist plot in Ontario and eighteen people were arrested and charged with the planning of terrorist attacks in Canada.<sup>2</sup> In October 2014, two terrorist attacks occurred within just days of each other and in 2016, another terrorist attack was prevented.<sup>3</sup> The suspect was shot and killed after setting off an explosive device in a taxi that was allegedly intended for detonation at an urban centre.<sup>4</sup> Whilst terrorism remains a threat in Canada, its history of dealing with terrorism is relatively recent.<sup>5</sup> Some legislative provisions to counteract terrorism were in operation prior to the attacks in September 2001, but this legislation targeted domestic terrorism, as Canada had never experienced an act of international terrorism.<sup>6</sup> Despite this, the attacks in the United States of America (U.S.) in 2001 and the legal obligation to comply with

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<sup>1</sup> The FATF remarked upon this stating, “terrorism and terrorist financing have been increasing in the last two years and more resources were therefore shifted by the authorities to address these threats” (FATF Anti Money Laundering and Counter-Terrorist Financing Measures, Mutual Evaluation Report, Canada, September 2016 at 15)

<sup>2</sup> The ‘Toronto 18’ or ‘Ontario Terrorism Plot’ is discussed in more detail later in the chapter. Seven of the accused pleaded guilty to terrorist related crimes contrary to Part II.1 of the Criminal Code. Another seven suspects saw their charges dropped or stayed and the other four men were found guilty after a trial. One of the terrorists, Steven Chand was also found guilty in 2010 of counselling to commit fraud over \$5000 for the benefit of a terrorist group contrary to s. 83.18(1). He was sentenced to 10 years imprisonment.

<sup>3</sup> On October 20, 2014, Martin Couture-Rouleau drove his car into two Canadian Armed Forces Soldiers in a shopping centre car park in Saint-Jean-Sur-Richelieu. One victim died and the other was injured. (Mahdi Darius Nazemroaya, Canada and the War on Terror: The Ottawa Shootings, What Really Happened? Centre for Research on globalization, available at: <http://www.globalresearch.ca/ottawa-attack-isi/5409706> (accessed: 05.01.17).

<sup>4</sup> CNN News *Canada terror threat ends in death of suspect*, August 11 2016. Available at: <http://edition.cnn.com/2016/08/11/americas/canada-ontario-police-kill-terror-suspect-aaron-driver/> (accessed 05.01.17).

<sup>5</sup> The Government of Canada regard the terrorism threat in Canada to be ‘medium’ suggesting that “a violent act of terrorism could occur” (Government of Canada, Canada’s National Terrorism Threat Levels, available at: <https://www.canada.ca/en/services/defence/nationalsecurity/terrorism-threat-level.html> (accessed: 05.01.16).

<sup>6</sup> This is in stark contrast to the U.K. who had a long history of tackling terrorism and consequently had numerous counter terrorism provisions in place prior to September 2001.

United Nations Security Council Resolution (UNSCR) 1373<sup>7</sup> prompted the introduction of new anti-terrorism legislation in Canada including the introduction of a series of CTF measures. Its CTF policy can be divided into three parts - the criminalisation of terrorist financing, the freezing of assets and the use of Suspicious Transaction Reports (STRs).<sup>8</sup> As is the case with the United Kingdom (U.K.), Canada's approach is very similar to the U.S. policy.<sup>9</sup> A further similarity with the U.S. and U.K. is that Canada's policy on countering terrorism and terrorist financing has adversely affected the human rights of its citizens. In line with previous chapters, the speedy implementation of CTF legislation post September 2001 shall be discussed and the consequences of these laws for a citizen's right to trial by jury shall be examined. This chapter contends that the introduction and operation of CTF legislation has not provided due consideration to human rights and the suspect's right to trial by jury has been violated. However, Canada has adopted a more conscientious approach to implementing such legislation, with it being more heavily debated than the CTF laws in the U.S. and U.K. The inclusion of sunset clauses in Canadian counter terrorism legislation has gone some way to ensuring that the provisions in place continue to be necessary.<sup>10</sup> It is important to note that like the U.S. and the U.K., Canada is a common law jurisdiction. They operate a dual legal system, which has a federal parliament in Ottawa to develop laws for all of Canada and a legislature in each province to manage local affairs. The federal government deals with matters of criminal law and the Constitution of Canada is deemed to be the Supreme law.<sup>11</sup> This chapter begins by examining the counter terrorism measures that predate September 2001 including Canada's ability to suspend human rights under the War Measures Act 1914.<sup>12</sup> This subject is important because it illustrates Canada's previous history of prioritising national security over human rights. It then discusses the CTF provisions that were established following the terrorist attacks in 2001, and looks at the manner in which legislation was implemented. Next, the chapter goes on to observe Canada's

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<sup>7</sup> Hereafter UNSCR 1373

<sup>8</sup> N Ryder, 'Islamophobia or an important weapon? An analysis of the US financial war on terrorism' [2009] 10(4) *Journal of Banking Regulation* 307-320 at 309. N Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011) 66.

<sup>9</sup> For further commentary, see, section 4.2, chapter 4 and section 5.2, chapter 5.

<sup>10</sup> The U.K. and U.S. have also used such sunset clauses in anti terrorism legislation. For instance the U.K's Anti Terrorism, Crime and Security Act 2001 contains such a provision as does the U.S' PATRIOT Act 2001.

<sup>11</sup> By virtue of the Constitution Act 1982.

<sup>12</sup> Hereafter WMA. This ability to derogate from human rights was briefly mentioned in chapter 3 and will be discussed in greater detail later in this chapter.

CTF policy to assess its accordance with international human rights obligations in particular the right to trial by jury. The chapter also discusses the ability of the Canadian government to suspend certain human rights in particular situations and considers the impact of such a power.

## 6.1 Pre September 2001 Legislation

Prior to 2001, there was no provision in Canadian law for the prevention and detection of terrorist financing.<sup>13</sup> However, whilst Canada has enjoyed a comparatively peaceful history, it has experienced many acts of domestic terrorism, which emanated from the Front de liberation du Quebec (FLQ), an organisation with the objective of achieving an independent Quebec.<sup>14</sup> The FLQ has been responsible for terrorist attacks on the federal government, the Canadian National Railway, the Royal Canadian Mounted Police and the Montreal Stock Exchange.<sup>15</sup> Despite these attacks, it was not until the events of October 1970, that the Canadian government took action against terrorism. The ‘October Crisis’ began on October 5 1970, when four men kidnapped the then British Trade Commissioner, James Cross. The men were members of the FLQ and wished to negotiate the release of ‘political prisoners’. Five days later, the FLQ kidnapped the Labour Minister Pierre Laporte, which resulted in the then Prime Minister Pierre Trudeau invoking powers under the WMA.<sup>16</sup> Prior to this, the legislation had only been utilised during the First and Second World Wars; it transferred numerous powers from Parliament to the federal cabinet. The WMA permitted the use of emergency measures to be taken in the event of a declaration of war, invasion or insurrection.<sup>17</sup> The WMA afforded the Governor-general in Council the power to make such regulations as the government deemed fit

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<sup>13</sup> Until this time, Canada was, like the U.S. focussed upon combatting money laundering whilst the U.K. had made provision for the prevention of terrorist financing via the Prevention of Terrorism Act 1989 and in fact had laws in effect since the 19<sup>th</sup> Century, for excellent commentary on this, see Laura.K. Donohue *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001).

<sup>14</sup> C.I. Crouch, *Managing Terrorism and Insurgency: Regeneration, Recruitment and Attrition*. (Routledge 2010) 33.

<sup>15</sup> Examples of such attacks by the FLQ are: On March 8 1963, three military barracks in Montreal and Westmount were the victims of incendiary bombs. Later, on April 1 1963, three bombings were carried out, one at a Federal Tax Building, a second at the Railway Central Station in Montreal and the third on a Canadian National Railway. On February 13 1969 the FLQ bombed the Montreal Stock Exchange.

<sup>16</sup> On October 16 1970.

<sup>17</sup> War Measures Act, S.C. 1914, c. 2, s. 6.

for the “security, defence, peace, order and welfare of Canada”.<sup>18</sup> In particular the legislation permitted the Governor-general in Council: “(a) to censure, suppress or control publications; (b) to arrest, detain, exclude or expel individuals; (c) to control ports and the movement of ships; (d) to control all forms of transportation; (e) to control trade, exports, imports, production, and fabrication; (f) to take over, control, confiscate or dispose thereof or use any property”.<sup>19</sup>

The enactment of this legislation allowed the Canadian government access to emergency powers that were originally designed for use in times of war. Article 2 of the WMA provided that the government was not required to prove that a state of war existed, only that it was “apprehended”.<sup>20</sup> This meant that the proclamation could not be legally challenged. The October Crisis represented the first time that the WMA had been invoked during peacetime.<sup>21</sup> The then Prime Minister Trudeau stated that he would do whatever was necessary to protect Canadian citizens from the FLQ.<sup>22</sup> In a statement reminiscent of President George Bush’s proclamation of the “War on Terror” in September 2001, Trudeau stated “I think that society must take every means at its disposal to defend itself against the emergence of a parallel power which defies the elected power in this country.”<sup>23</sup> This included the suspension of civil liberties, which became reality three days later with the execution of the WMA. The Prime Minister proclaimed a state of “apprehended insurrection” and emergency provisions were employed.<sup>24</sup>

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<sup>18</sup> Article 3 WMA 1914.

<sup>19</sup> Article 3 WMA 1914.

<sup>20</sup> Article 2 WMA 1914 states: “The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended exists”

<sup>21</sup> However, Clement claims that the October Crisis does not represent the first time that the WMA 1914 had been used during peacetime. See D Clement ‘The October Crisis of 1970: Human Rights Abuses Under the War Measures Act,’ [2008] 42(2) *Journal of Canadian Studies* 178 (Footnote 1).

<sup>22</sup> [www.cbc.ca/archives/categories/politics/civil-unrest/the-october-crisis-civil-liberties-suspended/just-watch-me.html](http://www.cbc.ca/archives/categories/politics/civil-unrest/the-october-crisis-civil-liberties-suspended/just-watch-me.html) (accessed 03.04.14).

<sup>23</sup> President Bush address to the Joint Session of the 107<sup>th</sup> Congress, 20 September 2001. Available at: [http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected\\_Speeches\\_George\\_W\\_Bush.pdf](http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf). (accessed 16.03.17).

<sup>24</sup> J.L. Granatstein *Canada’s Army: Waging War and Keeping the Peace*. 2nd Ed (UTP publishing 2010) 365. For further discussion in this area, see: R.E. Riendeau, R.E. *A Brief History of Canada*. 2nd Ed. (Facts on file Inc 2007) 338.

The WMA allowed the authorities to suspend certain civil liberties in order to facilitate the swift discovery of those involved in terrorism, thereby preventing future attacks. For example, Article 6 (5) of the Act provides; “the protection and guarantees extended to Canadians by the Canadian Bill of Rights, and other Charters of Rights in operation provincially in Canada, are waved aside while the Proclamation is in effect”.<sup>25</sup> In practice, this permitted the police to arrest individuals and detain them without charge. The police used these powers and arrested any person suspected of involvement with the FLQ. The police carried out 3,000 searches, arrested and detained 497 suspected terrorists and terrorist supporters.<sup>26</sup> Under the WMA, the police were not required to offer any explanation for the arrests and could search residences without warrants. They were permitted to detain suspects for seven days without charge and this period could be extended to 21 days by order of the Attorney General.<sup>27</sup> Significantly, no opportunity was provided to obtain legal advice and the result of these powers was that a conclusion of guilt or innocence was made by the executive rather than by a court of law. The then New Democratic Party Leader Tommy Douglas stated:

“Right now there is no Constitution in this country, no Bill of Rights, no provincial constitutions. This government now has the power by Order in Council to do anything it wants—to intern any citizen, to deport any citizen, to arrest any person or to declare any organization subversive or illegal. These are tremendous powers”.<sup>28</sup>

Whittaker supports such a view commenting, “Canada acted swiftly and forcefully with no regard for civil liberties”.<sup>29</sup> Perhaps more worrying than the ferocity of the measures taken by the Government was that even with the employment of such extensive powers, the results of the arrests were limited. For example, Clement notes:

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<sup>25</sup> Article 6(5) War Measures Act 1914.

<sup>26</sup> D Clement “The October Crisis of 1970: Human Rights Abuses Under the War Measures Act”. 42(2) *Journal of Canadian Studies*. [2008] 160-186 at 167.

<sup>27</sup> Clement, D ‘The October Crisis of 1970: Human Rights Abuses Under the War Measures Act,’ 42(2) *Journal of Canadian Studies* [2008] 167.

<sup>28</sup> New Democratic Party Leader Tommy Douglas speaking in Parliament on October 16 1970.

<sup>29</sup> *Ibid* at 248.

“The average detainee spent a week in jail; yet the vast majority of them (87%) were later released and never charged with a crime. Sixty-two people were charged by January 1971. Within a month, half of them were released and the charges were dropped. In the end, only 18 people were convicted of a crime arising from the crisis”.<sup>30</sup>

These factors surrounding the arrests and detention meant that suspects were denied due process, a fundamental principle of democracy.<sup>31</sup> The rule of law and due process exists to ensure that a state cannot act arbitrarily and that the legal rights of nationals are safeguarded. The fact that such protection was suspended at the time of the October Crisis is of great significance to the contention that counter terrorism measures, albeit emergency provisions can have a detrimental impact on human rights. Indeed, it is this very fact that attracted criticism and the use of the WMA at the time was controversial.<sup>32</sup> Roach notes that whilst many Canadians took the view that the government had acted irrationally in response to the October Crisis, Prime Minister Pierre Trudeau never expressed regret for his use of the WMA in 1970.<sup>33</sup> However, as Roach highlights, Trudeau was later instrumental in the establishment of a Canadian Constitution with a Charter of Rights and Freedoms; legislation which would protect against the unnecessary use of police powers and provide rights to due process.<sup>34</sup> The rights afforded by this Charter and international human rights provisions shall be discussed later in this chapter.

Despite the small number of convictions arising from the October Crisis, the success of the measures is plain. For example, Whittaker stated “the result was clear and unequivocal: the FLQ and, with it, the entire terrorist tendency of the sovereignty

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<sup>30</sup> D Clement, ‘The October Crisis of 1970: Human Rights Abuses Under the War Measures Act, 42 (2) *Journal of Canadian Studies*[2008] 167

<sup>31</sup> Democracy: Its Principles and Achievement. 1998. Geneva: Inter-Parliamentary Union at 7. Available at: [http://www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf) (accessed 17.02.15).

<sup>32</sup> Clement argues “the War Measures Act was responsible for extensive human rights abuses across the country” (D Clement, “The October Crisis of 1970: Human Rights Abuses Under the War Measures Act” 42(2) *Journal of Canadian Studies* [2008]160-186 at 160).

<sup>33</sup> K Roach, *The 9/11 Effect, Comparative Counter-Terrorism*, 2011, Cambridge University Press at 368. The WMA was repealed and replaced by the Emergencies Act. R.S.C, 1985, c.22. This Act limited the application of emergency powers and required the Cabinet to acquire parliamentary approval within 30 days.

<sup>34</sup> K Roach, *The 9/11 Effect, Comparative Counter-Terrorism*, 2011, Cambridge University Press at 368.

movement in Quebec, was eradicated”.<sup>35</sup> However, does the outcome of the methods employed by the Canadian government justify the restriction on human rights? This example would have been of great significance to concerns surrounding the implementation of the Anti-Terrorism Act (ATA) 2001. However, before the terrorist attacks in September 2001, and in stark contrast to the manner in which the government reacted to the October Crisis, is their response to the Air India bombing in 1985.<sup>36</sup> On 23 June 1985, Sikh extremists placed bombs in two suitcases, one detonated at Narita airport and the second exploded on a passenger jet mid air off the coast of Ireland and resulted in the death of 329 people. The investigation concluded that those responsible for the terrorist attack were members of the Sikh militant group Babbar Khalsa.<sup>37</sup> However, it took approximately 20 years to bring the alleged perpetrators to trial and after a two year trial only one member was convicted. Inderjit Singh Reyat pleaded guilty to manslaughter and aiding the construction of a bomb and was sentenced to five years imprisonment. He was later convicted of perjury after it was proven that he had repeatedly lied in the trials of his co-accused, Ripudaman Singh Malik and Ajaib Singh Bagri.<sup>38</sup> Further convictions were unachievable due to insufficient evidence.

A public inquiry following the acquittals condemned the Canadian authorities and illustrated the numerous failings that permitted these terrorist attacks to occur.<sup>39</sup> Furthermore, the public inquiry concluded how the subsequent investigation had been littered with errors. The Commission of Public Inquiry concluded that before the attacks took place, the Canadian Security Intelligence Service <sup>40</sup> and the Royal Canadian Mounted Police <sup>41</sup> had not reported potentially useful information. The Commission also found that subsequent to the bombings, cooperation between the

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<sup>35</sup> Ibid at 249. Despite this act of domestic terrorism and the Air India Bombing in 1985, the Canadian government still failed to implement permanent counter terrorism legislation.

<sup>36</sup> These terrorist acts were linked to animal rights extremists and environmental groups.

<sup>37</sup> BBC News, 1985: Air India jet crashes killing 329, [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/23/newsid\\_2518000/2518857.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/23/newsid_2518000/2518857.stm). (accessed 05.05.15). Singh Parmar, believed to be the leader of the group to carry out the Air India bombings was killed by Police in India in 1992.

<sup>38</sup> Reyat appealed against his sentence for perjury but his appeal was rejected in January 2013. He was released from prison in January 2016.

<sup>39</sup> The Air India Flight 182 Inquiry suggests that the Canadian government were armed with “a mosaic of information which clearly identified a particularised threat to Air India for the month of June 1985”(Air India Flight 182: A Canadian Tragedy, 2010, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, at 27.

<sup>40</sup> Hereinafter CSIS

<sup>41</sup> Hereinafter RCMP

two agencies was poor. This situation is comparable to the U.S. following the September 2001 attacks, that there had been significant communication lapses between the Federal Bureau of Investigation (FBI) and Central Intelligence Agency (CIA).<sup>42</sup> The public inquiry in Canada demonstrated the importance of intelligence information to detect and prevent acts of terrorism when it concluded that, the RCMP had failed to “understand the value of intelligence”<sup>43</sup> and as such had failed to act on it.<sup>44</sup> Whilst Canada had some experience and legislation for the countering of terrorism, this was not the case for CTF. At the time of these attacks, there were no CTF legislative measures in Canada and the importance of detecting and tracking terrorist funds was not recognised in Canadian Law until after September 11 2001 with the implementation of UNSCR1373. This chapter now turns to a discussion of CTF policy implemented in Canada since the September 11 2001 attacks.

## **6.2. Canadian Counter Terrorist Finance Policy**

Despite a weak response to a terrorist attack in its own country, Canada reacted “quickly and nimbly”<sup>45</sup> to the September 11 attacks.<sup>46</sup> This swift action was prompted by the U.S. influence over Canada. This is a view supported by Dowrowolsky *et al.* who stated that, “given Canada’s geographic proximity, its longstanding political vulnerabilities, and with its strong economic ties to its neighbour to the south, this country was particularly susceptible to U.S. influence”.<sup>47</sup> Additionally, Canada’s support of the counter terrorism effort instigated by the U.S.<sup>48</sup> was important due to

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<sup>42</sup> The agencies had failed to share key information in relation to two of the hijackers involved in the September 2001 terror attacks (9/11 Commission The 9/11 Commission Report--Final Report of the National Commission on Terrorist Attacks upon the United States (Norton & Company: London, 2004). This point is discussed further in chapter 4.

<sup>43</sup> Air India Flight 182: A Canadian Tragedy, 2010. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 at 23.

<sup>44</sup> Rather importantly, the Department of Justice saw no need for this inquiry as they were of the opinion that no changes to counter terrorism policy was required. Taking into consideration the conclusions of this Report, the significance of a public inquiry and governmental accountability is clear. (Air India Flight 182: A Canadian Tragedy, 2010. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 a 36 Volume One: The Overview).

<sup>45</sup> Dobrowolsky et al, ‘Security, insecurity and human rights, contextualizing post 9/11’ in *Anti-Terrorism, Security and Insecurity after 9/11* (eds). S Rollings-Magnusson (Fernwood Publishing 2009) 20

<sup>46</sup> Up until this point, Canada did not have any CTF legislation in operation.

<sup>47</sup> Dobrowolsky et al, ‘Security, insecurity and human rights, contextualizing post 9/11’ in *Anti-Terrorism, Security and Insecurity after 9/11* (eds). S Rollings-Magnusson (Fernwood Publishing 2009) 22.

<sup>48</sup> For further commentary on the U.S influence on CTF policy, see chapter 3.



claims made in the U.S. media that the Canadian - U.S. border was porous<sup>49</sup> and that the terrorists concerned had entered the U.S. through Canada.<sup>50</sup> Roach explains that whilst this suggestion was erroneous, it was not unsurprising due to the earlier arrest of Ahmed Ressay in 2000.<sup>51</sup> Ressay was captured trying to cross the Canadian-U.S. border in a car, which was loaded with explosives. He planned to bomb the Los Angeles International Airport in 1999. On his arrest, he was found to have been travelling with a fake Canadian passport. He was found guilty and sentenced to 37 years imprisonment. McGuire opines that the, “American fear was predicated on the notion that, as primary targets are hardened by enhanced security measures, terrorists would seek out softer targets in other countries.”<sup>52</sup> Canada were, for economic reasons, keen to avoid a closure of the Northern Border. With this in mind and the obligation to comply with international CTF legislative measures, Canada implemented the ATA in 2001.<sup>53</sup>

Canada’s current CTF policy is included within their counter terrorism strategy, ‘Building Resilience Against Terrorism’,<sup>54</sup> which was implemented in 2011. Counter terrorism strategy was concerned with four primary objectives, ‘prevent, detect, deny and respond’. Their policy is multi dimensional and includes aiming to detect terrorism through intelligence and investigation. This includes the gathering and sharing of financial intelligence between law enforcement agencies to route out sources of terrorist funding. This policy has a three pronged approach; the criminalisation of terrorist financing, the freezing of assets and the use of Suspicious

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<sup>49</sup> The U.S. government made specific provision to this effect in the PATRIOT Act 2001 titled Subsection A, “Protecting the Northern Border”.

<sup>50</sup> This is a view supported by German who argues, “The early reaction in Canada to September 11<sup>th</sup> was very similar to that in other countries but it was significant from a perspective of the Americas, because it really was a concern that Canada, as Mexico and others, could be conduits for terrorists into the United States”. (P German, ‘Organized crime, terrorism, and money laundering in the Americas’ [2002] 15 *Florida Journal of International Law* 25).

<sup>51</sup> K Roach, *The 9/11 Effect, Comparative Counter-Terrorism*, (Cambridge University Press 2011) 374.

<sup>52</sup> S K. McGuire Legislating Against the Threat: The U.S. and Canadian Policy Elite Response to the Terrorist Threat [2013] 6 (3) *Journal of Strategic Security* at 248.

<sup>53</sup> The U.S. also views Canada as a major threat regarding money laundering due to the length of the Canadian-U.S. border. The FATF recently observed this vulnerability stating “Canada and the US share the longest international border in the world, at over 8,800 kilometres. Some passages are unguarded and provide opportunity for criminals to move easily between countries. OCGs in Canada and the US actively exploit the border for criminal gain.” (FATF Anti Money Laundering and Counter-Terrorist Finance Measures, Canada Mutual Evaluation Report, September 2016 at 17).

<sup>54</sup> Government of Canada, ‘Building Resilience Against Terrorism: Canada’s Counter Terrorism Strategy’ 2nd ed., 2013. Available at: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rslnc-gnst-trrrsm/rslnc-gnst-trrrsm-eng.pdf> (accessed 16.03.17).

Transaction Reports.<sup>55</sup> This chapter now turns to a discussion of the foundation of Canada's CTF policy; the criminalization of terrorist financing.

### 6.2.1. Criminalisation of Terrorist Financing

Canada's response to the September 11 attacks was to implement the UN Suppression of Terrorism Regulations.<sup>56</sup> These Regulations extended terrorist financing listings and sanctions and brought Canada into line with UN Resolution 1373. However, it is Bill C-36 that represented Canada's primary legislative response to the terrorist attacks in September 11 2001 and symbolises a transformation of the laws relating to terrorism. The Bill was "produced with record speed"<sup>57</sup> and it attempted to define terrorism.<sup>58</sup> Importantly, it also criminalised the financing of terrorism and the facilitation of terrorism.<sup>59</sup> The latter two measures were in response to opinion that some acts of terrorism were funded in Canada. For instance, the Mackenzie Institute claims that, "Canada is one of the most fertile grounds for insurgents, terrorist groups, and criminal cartels to operate- mostly by raising funds and laundering money".<sup>60</sup> Further to this, Beare and Schneider noted that the CSIS has recognized the prevalence of terrorist groups living in Canada. The CSIS state, "With the possible exception of the United States, there are more international terrorist organizations active in Canada than anywhere else in the world".<sup>61</sup>

Prior to September 11 2001, changes to its CTF legislative measures were needed, yet it has been suggested that the Canadian government lacked the desire and political will.<sup>62</sup> This quickly changed and during debate on the Bill, it was argued that this

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<sup>55</sup> Nicholas Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011) 66

<sup>56</sup> SOR 2001-360.

<sup>57</sup> Roach, K (2003) *September 11: Consequences for Canada*, (McGill-Queens University Press 2003) 21.

<sup>58</sup> Part 1 of the Anti Terrorism Act 2001 amended the Criminal Code and provides a definition of "terrorist activity" in S.83.01(1) Criminal Code. R.S.C., 1985, c. C-46 (Hereafter C.C.)

<sup>59</sup> S.83.02 C.C.

<sup>60</sup> Turlej 2000 quoted in 'M.E. Beare and S. Schneider *Money Laundering in Canada, Chasing Dirty and Dangerous Dollars*' (University of Toronto Press 2007) 259.

<sup>61</sup> CSIS 2002 quoted in 'M.E. Beare and S. Schneider *Money Laundering in Canada, Chasing Dirty and Dangerous Dollars*' (University of Toronto Press 2007) 259.

<sup>62</sup> German, P 'Organized crime, terrorism, and money laundering in the Americas', [2002]15 *Florida Journal of International Law*, 25.

legislation was required to prevent acts of terrorism.<sup>63</sup> The then Minister of Justice opined, “the Criminal Code offences in C-36 will allow us to convict those who facilitate, participate in and direct terrorist activity and they must include preventive measures which are applicable whether or not the ultimate terrorist acts are carried out”.<sup>64</sup> Conversely, the Criminal Code already contained criminal offences for terrorism related crimes such as hijacking a plane<sup>65</sup> or conspiracy to murder.<sup>66</sup> Moreover, Roach noted that Canada previously had the power to convict on the basis of intention to commit a terrorist related crime and suggests that, “the failure of September 11 was one of law enforcement, not of the criminal law”.<sup>67</sup> Therefore, the need for new counter terrorism measures can be disputed and their negative impact on human rights is even more significant. Pue agrees with Roach’s argument stating that, “the success of the 9/11 attackers resulted more from failure of intelligence capacity rather than inadequacy in law”.<sup>68</sup> Rollings-Magnuson further supports this view by highlighting the fact one of the perpetrators of the September 11 attacks had been previously stopped by police for a traffic offence and released as information relating to his inclusion on a terrorist watch list had not been shared with local authorities.<sup>69</sup> Therefore, the need for such extensive CTF measures is questionable and suggests that their negative impact upon human rights is even more unnecessary and unjustifiable. Therefore, the ATA was primarily designed with compliance with international obligations in mind. However, whilst counter terrorism legislation may arguably have been sufficient prior to the enactment of the ATA, there was no CTF legislative provision in Canada. Whilst the authorities were tasked with the detection and prevention of money laundering, preventive measures in relation to the financing of terrorism was not a concern.<sup>70</sup> In this sense Canada differed from the U.K who had

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<sup>63</sup> Professor Irwin Cotler opined that “the domestic criminal law due process model, standing alone, is insufficient” (I Cotler, ‘Terrorism, Security and Rights: The Dilemmas of Democracies’ [2002] 13 *National Journal of Constitutional Law* 18-19).

<sup>64</sup> Notes for her 20 November appearance before the House of Commons Justice Committee.

<sup>65</sup> S.76, C.C.

<sup>66</sup> S. 465, C.C.

<sup>67</sup> K Roach ‘September 11: Consequences for Canada,’ (McGill-Queens University Press 2003) 23.

<sup>68</sup> Wesley Pue, ‘The War on Terror: Constitutional Governance in a State of Permanent Warfare?’ [2003] 41 *Osgoode Hall Law Journal* 267.

<sup>69</sup> S Rollings-Magnusson ‘Buying Security with Freedom, The Vulnerability of Human Rights in Canada in the Post 9/11 Era, in S Rollings Magnusson (eds.) *Anti-Terrorism, Security and Insecurity after 9/11* (Fernwood Publishing 2009) 85.

<sup>70</sup> The RCMP and Department of Finance Canada.

some CTF measures in place,<sup>71</sup> and the ATA represented a huge change to Canadian criminal law.

### 6.2.1.1. Anti Terrorism Act 2001

The ATA received Royal Assent on December 18 2001 with the government declaring that the Act was compatible with the Charter.<sup>72</sup> Despite the changes made, the Act still received a great deal of criticism.<sup>73</sup> This is a point that needs further discussion in relation to the notion that the ATA is incompatible the right to a fair trial. The Canadian Department of Justice suggested that the ATA is a “key component of the governments (sic) anti-terrorism plan”.<sup>74</sup> The anti-terrorism plan contained four main objectives:

“to prevent terrorists from entering Canada and protect Canadians from terrorism; to provide the tools to identify, prosecute, convict and punish terrorists; to maintain the security of the Canada-U.S. border and ensure economic security; and to cooperate with the international community to bring terrorists to justice and address the root causes of violence”.<sup>75</sup>

The ATA was brought into force in time for Canada’s first report to the U.N. Security Council’s Counter-Terrorism Committee. This Report details how Canada complied with the U.N. counter terrorism policy.<sup>76</sup> Prior to the enactment of this legislation, many of Canada’s provisions for dealing with terrorism were contained within the Criminal Code which is a federal statute enacted in accordance with the Constitution

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<sup>71</sup> CTF legislation that existed in the U.K. prior to 2001 is discussed in section 5.1, chapter 5.

<sup>72</sup> Anti Terrorism Act S.C. 2001, C.41.

<sup>73</sup> For instance Roach notes that Canada were concerned about preserving multicultural community relations so did not go as far as making membership of a terrorist organisation a crime as such an offence would be incompatible with the Canadian Charter. (K Roach, *The 9/11 Effect, Comparative Counter-Terrorism* (Cambridge University Press 2011) 363). Canada has aimed to protect the Charter which guarantees certain fundamental freedoms, such as the freedom of speech, association and religion. The major change made to the ATA before its implementation was the addition of sunset clauses to certain provisions of the Act.

<sup>74</sup> Department of Justice ‘About the Anti Terrorism Act’. Government of Canada. Available at: <http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.htm>

<sup>75</sup> Department of Justice ‘About the Anti Terrorism Act’. Government of Canada. Available at: <http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html>

<sup>76</sup> Report by Canada to the UN Security Council Counter-Terrorism Committee pursuant to Security Council Resolution 1373, UNSC S/2001/1209.

Act 1867.<sup>77</sup> The majority of criminal laws in Canada are contained in the Criminal Code. However, prior to the implementation of the ATA offences relating to terrorism were limited.<sup>78</sup> This legislation introduced a whole new section to the Criminal Code including provisions relating to the financing of terrorism. Part II-1 provides that an offence is committed if a person wilfully and without lawful justification or excuse, provides or collects property intending that it will be used in terrorist activity<sup>79</sup> or any other act intended to cause death or serious harm to a civilian.<sup>80</sup> Further to this, S. 83.03 provides that an offence is committed if any person collects property or invites others to provide property or financial or other related services intending that they will be used for the purpose of terrorist activity or for the purpose of benefitting any person engaged in such activity<sup>81</sup> or with the knowledge that they will be used to benefit a terrorist group.<sup>82</sup> Additionally, S. 83.04 relates to possession of terrorist property and makes it an offence for a person to use property for the purposes of carrying out terrorist activity<sup>83</sup> or to be in possession of property knowing that it will be used for terrorist activity.<sup>84</sup> These offences are consistent with those implemented in the U.S.<sup>85</sup> and the U.K,<sup>86</sup> following the terrorist attacks in September 2001 where the prevention and detection of the funding of terrorism has also become a priority.

Furthermore, the ATA 2001 provided controversial powers in relation to investigative hearings and preventive arrests of suspected terrorists. For example, S. 83.28 of the Criminal Code allowed for a peace officer to apply to a judge for an order obliging a person to attend a specified location to be examined by a presiding judge regarding information surrounding a terrorism offence. Such an application is only possible with the consent of the Attorney General and if certain conditions are met pursuant to S.83.28 (4). This includes that there are reasonable grounds to believe that a terrorism offence has been committed and that information concerning the offence, or information that may reveal the whereabouts of the suspect, is likely to be obtained as

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<sup>77</sup> Enacted in July 1892, Constitution Act 1867, s. 91(27).

<sup>78</sup> The ATA 2001 introduced broad definitions of “terrorist activity and “terrorist group” into the Criminal Code (S.83.01(1)).

<sup>79</sup> S. 83.02(a) *ibid.*

<sup>80</sup> S. 83.02(b) *ibid.*

<sup>81</sup> S. 83.03(a) *ibid.*

<sup>82</sup> S. 83.03(b) *ibid.*

<sup>83</sup> S. 83.04(a) *ibid.*

<sup>84</sup> S. 83.04(b) *ibid.*

<sup>85</sup> For further commentary on this, see section 4.2, chapter 4.

<sup>86</sup> For further commentary on this, see section 5.2, chapter 5.

a result of the order. This application may only be made when reasonable attempts have been performed to obtain the information by other means or that there are reasonable grounds to believe that a terrorism offence will be committed. This also applies to a situation where there are reasonable grounds to believe that a person has direct and material information that relates to the potential offence or to the whereabouts of the potential perpetrator. Again, such action may only be taken where reasonable attempts to obtain such information have been made by other means.<sup>87</sup> S. 83.3 grants enforcement agencies with the power to carry out arrests to prevent terrorist activity before it occurred.<sup>88</sup> A peace officer has the power to make an arrest where there are reasonable grounds to believe that a person will commit a terrorist act. The peace officer must suspect on reasonable grounds that the detention of a person is necessary to prevent a terrorist activity<sup>89</sup> and that due to the exigency of the situation; it is impracticable to obtain the consent of the Attorney General or to lay information before a provincial court judge.<sup>90</sup> The government's reasoning for the use of such arrests without a warrant and investigative hearings is that "prevention is the most effective approach to combat terrorism".<sup>91</sup> However, this preventative approach to the financing of terrorism is not without its criticism. Even the swift manner in which the legislation was implemented leaves it vulnerable to suggestions that the measures have not been properly considered.<sup>92</sup> This argument is especially pertinent as the legislation has not been temporary but has become permanent in Canada and extensive powers have been in operation for over 16 years. This hasty manner in which CTF legislation was implemented was unusual for Canada. German comments, "We [Canada] tend to always take that sober second look and if the United States goes ahead with the legislation today, we will look at it, think about it, and six months or a year from now, we will follow the lead. But that certainly was not the case at this time".<sup>93</sup>

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<sup>87</sup> S. 83.28(4) *ibid.*

<sup>88</sup> This provision came under the heading "recognizance with conditions".

<sup>89</sup> S. 83.3(4)(b) *ibid.*

<sup>90</sup> S. 83.3(4) *ibid.*

<sup>91</sup> Annual Report on the Use of Arrests Without Warrant 2004, Public Safety Canada, Government of Canada. Available at: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rrsts-wtht-wrrnt-2004-eng.aspx>

<sup>92</sup> This argument has also been put forward in relation to the U.S. and U.K. in chapters 4 and 5.

<sup>93</sup> P German, 'Organized crime, terrorism, and money laundering in the Americas' [2002] 15 *Florida Journal of International Law* 25.

The ATA 2001 was enacted less than four months after the terrorist attacks in 2001. The immediate implementation of this law was a result of Canada's obligation to comply with UNSCR 1373 and their need to follow the example set by the U.S. PATRIOT Act 2001, thereby contributing to the international effort to counter the financing of terrorism. Canada's reaction to the 2001 attacks was similar to other countries such as the U.K. in that "...legislation was quickly cobbled together as a reaction to the terrorist attacks, but without the kind of debate and scrutiny that parliament and others are called upon to provide for less 'crisis-driven' legislation".<sup>94</sup> The Hon. Raynell Andreychuk, Senator for Canada stated, "One may seriously question whether the government set aside enough time to adequately assess the full ramifications of adopting this wide-reaching bill".<sup>95</sup> This assertion is significant to this chapter, as it will be illustrated that the CTF measures can potentially have a negative impact on human rights, such as the right to a fair trial. However, whilst the Canadian government knew that the legislative schedule was being rushed, they argued that this was due to its need to comply with international obligations. Roach comments that, "for better or for worse, amendments to the Criminal Code were being driven by the need to comply with international standards and schedules".<sup>96</sup> Indeed the preamble to the ATA explains the purpose of the legislation in contributing to the international efforts to combat terrorism.<sup>97</sup> It states "the challenges of eradicating terrorism, with its sophisticated and trans-border nature, requires enhanced international cooperation" and "Canada must act in concert with other nations in combating terrorism, including fully implementing United Nations and other international instruments relating to terrorism".<sup>98</sup> These obligations were paramount and pressed the implementation of CTF legislation and this was also the case for the U.K. and the U.S. The measures brought in were not just inappropriate due to the extensive powers they bestowed on authorities but also because they had not been subjected to legal procedure, which is exercised in accordance with due process.

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<sup>94</sup> Case Study: Canada's Anti Terrorism Legislation. Hon. Raynell Andreychuk, Senator for Canada, Commonwealth Human Rights Initiative 5th-6th June 2003: Human Rights and Anti- Terrorism Legislation in the Commonwealth, at 1.

<sup>95</sup> Case Study: Canada's Anti Terrorism Legislation. Hon. Raynell Andreychuk, Senator for Canada, Commonwealth Human Rights Initiative 5th-6th June 2003: Human Rights and Anti- Terrorism Legislation in the Commonwealth, at 5.

<sup>96</sup> K Roach *'September 11: Consequences for Canada'* (McGill-Queen's University Press 2003) 32. It is worth noting here that the ATA 2001 was implemented in time for Canada's first report to the UNSC's Counter Terrorism Committee.

<sup>97</sup> S.C 2001, c.41

<sup>98</sup> Preamble, Anti Terrorism Act 2001, c.41.

However, it is crucial to note that whilst the period of review was short, the CTF legislation adopted in Canada was arguably more heavily debated than the laws implemented in the U.S. and U.K.<sup>99</sup> In contrast to the USA PATRIOT Act 2001, Bill C-36 attracted significant opposition and was heavily criticised before its enactment. For example, opposition parties, Cabinet Ministers and human rights groups voiced concerns about certain aspects of the proposed legislation.<sup>100</sup> Disapproval centred on the legislation's inconsistency with human rights. For instance, a Senate Committee warned, "Bill C-36 gives powers that if abused by the executive or security establishments of this country could have severe implications for democracy in Canada".<sup>101</sup> The Canadian Bar Association opined that, "these measures dramatically expand state powers at the expense of due process and individual rights and freedoms".<sup>102</sup> The Civil Liberties Association accepted that some rights might need to be constrained but issued concern that "such measures not be allowed to dismantle basic liberties which it has taken centuries to achieve".<sup>103</sup> Beare and Schneider remark that the CTF provisions are "a reflection of American enforcement priorities and approaches"<sup>104</sup> and come "with a pretty hefty price tag as far as due process rights are concerned".<sup>105</sup> The priorities of the Canadian government are clear, the need to provide national security and to contribute towards international security is extremely important but concerns including those regarding human rights had been voiced and had been taken into account. McGuire observes, "the resulting legislation was the product of intense debate between members of Parliament and the Senate, and

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<sup>99</sup> Roach supports such a view arguing, "the ATA was subject to a much more vigorous debate in civil society than the Patriot Act or even the United Kingdom's and Australia's initial responses to 9/11" (K Roach, *The 9/11 Effect, Comparative Counter-Terrorism* (Cambridge University Press 2011) 363).

<sup>100</sup> Parliament of Canada, Proceedings of the Special Senate Committee on Bill C-36, Issue 9- Evidence (Afternoon Sitting). Available at: [http://www.parl.gc.ca/Content/SEN/Committee/371/sm36/09evb-e.htm?Language=E&Parl=37&Ses=1&comm\\_id=90](http://www.parl.gc.ca/Content/SEN/Committee/371/sm36/09evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90).

Canadian Bar Association Submission on Bill C-36 Anti Terrorism Act 2001, October 2001. Available at: <https://www.cba.org/cba/pdf/reccs.pdf>

<sup>101</sup> "Report of the Committee, The Special Senate Committee on the Subject Matter of Bill C-36", Nov 1 2001. Available at: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/sm36-e/rep-e/rep01oct01-e.htm>>

<sup>102</sup> Submission on the three year review of the Anti Terrorism Act, Canadian Bar Association, May 2005 at 1. Available at: <http://www.cba.org/cba/submissions/pdf/05-28-eng.pdf>

<sup>103</sup> A Brief on Bill C-36, the Anti-Terrorism Bill, Civil Liberties Association, National Capital Region, 2001. Available at: <http://civil-liberties.ncf.ca/specialreports/briefbill-c-36.html>

<sup>104</sup> M.E. Beare & S. Schneider *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars*, (University of Toronto Press 2007) 298.

<sup>105</sup> M.E. Beare & S. Schneider *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars*, (University of Toronto Press 2007) 312.



members of interested civil society groups.”<sup>106</sup> As a result of such debate, the Act was amended and provision made for revisiting the Act after five years.<sup>107</sup> Thus, in contrast to the U.S. and U.K, Canada recognised that the exigent circumstances that were said to exist at the time required provisions that may cease to be necessary. This is reflected by the inclusion of sunset clauses in relation to preventive arrests and investigative hearings. Whilst debating the Act, Senator Joyce Fairbairn concluded that, “in summary, the government believes that the powers granted under this Bill are the right ones for a tough job and that they can be exercised with standards of fairness and justice which Canadians expect”.<sup>108</sup> Nevertheless, she noted that some of the legislation would need to be examined again after five years once the government had gained experience with the operation of what she deemed “critical measures”.<sup>109</sup> The Special Senate Committee recommended the inclusion of this clause stating, “the government would be required to return to Parliament to justify the continuance of the powers granted, assuring Canadians that the tools are sufficient, yet not exorbitant and that they continue to be justifiable and necessary”.<sup>110</sup> The sunset clauses were included with the intention of allaying human rights concerns and ensured that the government was not permitted to act in an arbitrary manner, as these measures would be reviewed every five years.<sup>111</sup> Such clauses could be deemed as a safeguard to emergency powers such as CTF measures, as Freeman correctly suggests, “the key to the safe use of the emergency powers was that the emergency powers themselves did not weaken any of the safeguards that could check abuses of power. These safeguards ensured that abuses would both be limited and temporary”.<sup>112</sup> However, the adoption of sunset clauses did not provide adequate protection against human rights abuses that were permitted to occur in the first five years of the ATA’s operation. Such a point is examined in more detail later in the chapter.

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<sup>106</sup> S K. McGuire ‘Legislating Against the Threat: The U.S. and Canadian Policy Elite Response to the Terrorist Threat [2013] 6(3) *Journal of Strategic Security* 251.

<sup>107</sup> S. 83.32(1) Anti Terrorism Act 2001 states, “Sections 83.28, 83.29 and 83.3 cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless, before the end of that day, the application of those sections is extended by a resolution...passed by both Houses of Parliament.”

<sup>108</sup> Debates of the Senate (Hansard), 1st Session, 37th Parliament, Volume 139, Issue 68, November 7, 2001

<sup>109</sup> Ibid at n. 104.

<sup>110</sup> The Special Senate Committee on the subject matter of Bill C-36, First Report, Parliament of Canada, 1 November 2001 at 3.

<sup>111</sup> Such recognition that extensive powers should be temporary was not replicated in the U.S. and U.K. For further commentary see, chapters 4 and 5.

<sup>112</sup> M Freeman ‘*Freedom or Security: The consequences for democracies using emergency powers to fight terror*’ (Praeger Publishers 2003) 74.

Despite the addition of sunset clauses, the eventual implementation of these measures regardless of potential human rights breaches demonstrates that Canada, like the U.S. and U.K. were willing to limit certain human rights in order to combat terrorism. Despite possibly believing that a balance had been struck between CTF measures and human rights, it is clear that national security was indeed the priority. The government continued to argue the need for such measures to prevent terrorism and maintained that they were consistent with Charter rights.<sup>113</sup> These powers were intended to provide the police, prosecutors and courts with the necessary means to prevent terrorist acts. It was hoped that by exercising these powers any potential terrorist activity could be promptly identified and investigated. This pattern is similar to measures adopted under the WMA following the October Crisis and, allowed for law enforcement authorities to arrest a person whom they believed was likely to be involved in future terrorist activity. At this point no charges need to have been laid. These powers when combined with the ability to compel someone to provide a hearing with information regarding terrorism could have significant consequences for human rights. For instance, an investigative hearing effectively cancels out the right to silence protected by S. 7 of the Charter and has an impact on the right not to be arbitrarily detained pursuant to S. 9 of the Canadian Charter of Rights and Freedoms. The existence of such powers presents the potential for a situation comparable to that experienced during the October Crisis where some human rights are sidelined to allow for alleged efficient counter terrorism provisions. In an attempt to pacify concerns that Bill C-36 provided extensive powers, which had been scarcely debated in Parliament, the government included an obligation to review such powers. Pursuant to S.83.31 CC, the Attorney General of Canada was obliged to prepare an annual report on the use of arrests without warrant and investigative hearings. Significantly, these annual reports dating 2002-2007 conclude that the powers were never exercised.<sup>114</sup> However, the reports filed were brief and did not consider the impact that the use of these measures could have on human rights.

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<sup>113</sup> The Government of Canada states that, “respecting and protecting human rights is an integral part of Canada’s counter-terrorism strategy. Canada supports efforts to promote human rights, democracy and good governance around the world” (Permanent Mission of Canada to the United Nations, [www.canadainternational.gc.ca](http://www.canadainternational.gc.ca)).

<sup>114</sup> Annual Report on the use of arrest without warrant pursuant to the Anti Terrorism Act, 2003, 2004, 2005, 2006 and 2007. Available at: [www.publicsafety.gc.ca](http://www.publicsafety.gc.ca)

As regards the lack of the use of preventive arrests,<sup>115</sup> Public Safety Canada<sup>116</sup> explain that this may be regarded as a positive sign that law enforcement authorities have recognised that the employment of such a power has implications. Moreover, they suggest that such a situation illustrates that the ATA has been effective in its intention, which is “ensuring the legislative means of protecting Canadians and the global community, while at the same time respecting Canadian values of fairness and human rights”.<sup>117</sup> However, these preventive arrests and investigative hearing provisions were not intended to exist indefinitely as they were made the subject of a five year review. This sunset clause insisted on a review of S. 83.28, 83.29 and 83.3 and the powers would expire unless extended by resolutions of both Houses of Parliament.<sup>118</sup> This sunset clause came into effect in February 2007, and following a vote in the House of Commons 159-124, the provisions were not renewed.<sup>119</sup> Perhaps the most significant fact in relation to the legislation for preventive arrests and investigative hearings is that, it has never been applied. Consequently, it is difficult to argue that the provisions were ever necessary and thus their non-renewal seems logical. However, it should be noted that extensive powers in relation to preventive arrests and investigative hearings were re-instated in July 2013 by virtue of the Combating Terrorism Act.<sup>120</sup> The revival of these counter terrorism measures puts Canada at increased risk of human rights violations.

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<sup>115</sup> It should be noted here that the conditions necessary to carry out a preventive arrest under the ATA 2001 were considerably more stringent than those under the Terrorism Act 2000 in the U.K.

<sup>116</sup> Public Safety Canada is a government organisation which is responsible for ensuring coordination across all federal departments and agencies that are responsible for national security in Canada.

<sup>117</sup> Annual Report Concerning Recognizance with Conditions: Arrests without Warrant 2004-2005, Public Safety Canada. Available at: <http://www.publicsafety.gc.ca/cnt/rsracs/pblctns/rsts-wtht-wrrnt-2005-eng.aspx>

<sup>118</sup> S.83.32(1) ATA 2001.

<sup>119</sup> The provisions in relation to preventive arrests and investigative hearings expired on March 1<sup>st</sup> 2007.

<sup>120</sup> S.C. 2013, c. 9. The need for these powers is debatable as they were not previously utilised under the ATA. Furthermore, just before the Combating Terrorism Act was implemented, the Canadian authorities successfully thwarted a terror plot to attack a Via Rail passenger train. Chiheb Esseghaier and Raed Jaser were arrested in Toronto and Montreal and despite evidence in relation to terrorist financing, the two men were not charged with terrorist financing offences. Esseghaier and Jaser were both charged with four offences, conspiring to damage transportation property with intent to endanger safety for a terrorist organisation, conspiring to commit murder for a terrorist group, plus two counts of participating or contributing to a terrorist. Esseghaier was found guilty of all four charges plus another charge for participating in a terrorist group. Jaser was convicted of all charges apart from that of “conspiring to damage transportation property with intent to endanger safety for a terrorist organization. In September 2015, both men were sentenced to life imprisonment. The provisions in relation to preventive detention and investigative hearings in the Combating Terrorism Act mirror those which were included in the ATA 2001, they are also the subject of a 5 year sunset clause however in this instance, the government is obliged to explain on an annual basis, why the provisions are considered necessary.

Contention surrounding the enactment of the original ATA centred on potential breaches of human rights.<sup>121</sup> Interestingly, criticism was not as forthcoming regarding CTF provisions. However, the inclusion of powers in relation to preventive arrests and investigative hearings illustrates that Canada were prepared to limit certain human rights included in the Charter in order to comply with the international effort to counter terrorism. This was a situation that Canada had found itself in during the October Crisis; whilst the measures invoked at that time were temporary, the ATA was implemented on a permanent basis. Rollings-Magnusson comments that the ATA “is an unjustifiable intrusion into the lives, rights, and welfare of the people it purports to protect...and violates several provisions of the Canadian Charter of Rights and Freedoms”.<sup>122</sup> Pue suggests “the knee-jerk reaction of security bureaucrats has been to move further in the preferred directions of concentrating power, constraining liberties, and enhancing both criminal justice and security bureaucracies”.<sup>123</sup> The suggestion that certain human rights have been breached or constrained by the implementation of terrorist financing legislation will be examined later. This chapter now turns to a discussion of the CTF provisions adopted in Canada.

### 6.2.2. Asset Freezing

The ability to freeze the assets of those suspected of involvement in terrorism is a key component of the international effort to combat terrorist financing.<sup>124</sup> UNSCR 1373 represents the cornerstone of that effort and in order to ensure compliance

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<sup>121</sup> In opposition to this, Jenkins claims that the ATA “responds to terrorism in a manner that is both firm and conscientious of Charter rights...it attempts to accommodate valid concerns in a response to terrorism that is neither overreactionary nor weak and ineffective” (D Jenkins, ‘In support of Canada’s Anti-terrorism Act: A comparison of Canadian, British and American Anti-terrorism law’ [2003] 66 *Sask. L. Rev* 419).

<sup>122</sup> S Rollings-Magnusson ‘Buying Security with Freedom, The Vulnerability of Human Rights in Canada in the Post 9/11 Era, in S Rollings Magnusson (eds.) *Anti-Terrorism, Security and Insecurity after 9/11*, (Fernwood Publishing 2009) 83.

<sup>123</sup> Wesley Pue, ‘The War on Terror: Constitutional Governance in a State of Permanent Warfare?’ [2003] 41 *Osgoode Hall Law Journal* 267.

<sup>124</sup> Nicholas Ryder, *The Financial War on Terror: A Review of Counter-Terrorist Financing Strategies since 2001* (Ashgate 2015)

with this Resolution.<sup>125</sup> Canada implemented the United Nations Suppression of Terrorism Regulations (UNST) in 2001.<sup>126</sup> These regulations are similar to Presidential Executive Order 13,224 employed in the U.S.<sup>127</sup> and centre on freezing the assets of certain listed persons in order to starve terrorists of their funds. The ATA contains provisions, which are almost identical to those contained in the Regulations and ensures that Canada fulfils their obligations under UNSCR 1373. Alongside criminalizing the financing of terrorism, the ATA included provision for the freezing and forfeiture of terrorist funds.<sup>128</sup> In particular S. 83.08 (1) ATA (pursuant to S 83.12) makes it an offence for a person to knowingly deal in any property that is owned or controlled by or on behalf of a terrorist group<sup>129</sup> or to enter into or facilitate any transaction in relation such property.<sup>130</sup> Furthermore, it is an offence to knowingly provide financial or other related services in respect of terrorist property.<sup>131</sup> Nelen argues that criminal's assets are their "most vulnerable spot"<sup>132</sup> and on detection of such property owned or controlled by or on behalf of a terrorist group, the property concerned may be seized and restrained by virtue of s.83.13. Following seizure, the Attorney General may apply to the Federal Court for an order of forfeiture in respect of the property concerned. Forfeiture may be defined as "the surrender or loss of property or rights without compensation".<sup>133</sup> Such a power does not just apply to property that has been used by a terrorist group but also to property that is intended to be used to facilitate a terrorist activity.<sup>134</sup> However, a potential problem with this provision is that traditional methods for detecting money laundering such as forfeiture and confiscation may not be effective for the combating of terrorist financing.<sup>135</sup> The funding of terrorism may only take a

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<sup>125</sup> This action also brought Canada into line with the International Convention for the Suppression of the Financing of Terrorism. They ratified this Convention in February 2002. For further commentary, of UNSCR 1373, see chapter 3.

<sup>126</sup> Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism (SOR/2001-360).

<sup>127</sup> For further commentary, see chapter 4.

<sup>128</sup> These provisions can be found in Ss. 83.02-83.16 Criminal Code of Canada.

<sup>129</sup> S. 83.08 1 (a) CC.

<sup>130</sup> S.83.08 1 (b) CC.

<sup>131</sup> S. 83.08 1 (c) CC.

<sup>132</sup> H. Nelen, "Hit them where it hurts most? The Proceeds of Crime approach in the Netherlands" [2004] 41 *Crime, Law & Social Change* 517

<sup>133</sup> M. Gallant, *Money Laundering and the Proceeds of Crime* (Edward Elgar, 2005) 54.

<sup>134</sup> S. 83.14 1 CC

<sup>135</sup> The use of such a model may be flawed as the financing of terrorism is not a profit driven crime. Ryder and Turksen argue that methods of dealing with money laundering are not valuable to the prevention and detection of terrorist funds as money laundering and terrorist financing are the reverse of each other. They note that the financing of terrorism has been referred to as "reverse money

small amount of money and thus any financial transactions linked to terrorism and terrorist organisations may fall below the radar and thus proceed unnoticed.<sup>136</sup> Moreover, even if assets are identified as having links to terrorism, their forfeiture by the Attorney General may have a limited impact as a lack of money may not preclude a terrorist attack from taking place if the amount of funds required is minimal. For example, it is reasonable to suggest that the terrorist attack in Saint-Jean-Sur-Richelieu in 2014 would have cost very little as would the attack at Parliament Hill two days earlier.<sup>137</sup> With this in mind, perhaps more useful to the area of increased financial intelligence<sup>138</sup> surrounding terrorism is the power to list those persons suspected of involvement in terrorism.

Whilst the United Nations Afghanistan Regulations (UNAR) created a list of persons and entities that are suspected of involvement with terrorism, the Criminal Code provides the Governor in Council with, the power to establish his own list. S. 83.05 provides, that an entity may be placed on the list if the Governor in Council is satisfied that “the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity<sup>139</sup>; or the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a)”.<sup>140</sup> An entity can also be listed by means of the United Nations al Qaida and Taliban Regulations<sup>141</sup> (UNAQTR) and the Regulations Implementing the United

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laundering”. For more on this see: N Ryder & U Turksen. Banks in defence of the homeland: Nexus of ethics, legality and suspicious activity reporting in the United States of America. [2013] 12(4) *Contemporary Issues in Law, Law Ethics and Counterterrorism* 311-338 at 313 and N Ryder. To Confiscate or not to Confiscate? A Comparative Analysis of the Confiscation of the Proceeds of Crime Legislation in the United States and the United Kingdom, [2013] 8 *Journal of Business Law*, 767-798.

<sup>136</sup> N. Ryder *The Financial War on Terrorism, A review of counter-terrorist financing strategies since 2001* (Routledge 2015) 20-23. This argument has been put forward in relation to combatting terrorist financing in the U.S. (chapter 4) and U.K. (chapter 5).

<sup>137</sup> The terrorist attack carried out in Saint-Jean-Sur-Richelieu was done so with the use of the perpetrators car which he drove into two Canadian Armed Forces Soldiers. The finance required to carry out the shootings at Parliament Hill would also have been minimal. It may be suggested that in both instances it is unlikely that there were any large scale transactions employed.

<sup>138</sup> In the case of Project Saluki in 2002, the FATF have noted that “timely intelligence from FINTRAC was instrumental in identifying domestic and foreign accounts” ((FATF Anti Money Laundering and Counter-Terrorist Financing Measures, Mutual Evaluation Report, Canada, September 2016 at pg.64).

<sup>139</sup> S.83.05 (a) CC. The Governor in Council is the Governor in General acting on the advice of the federal cabinet. The U.S. and U.K. also have their own list. The U.S. has a Specially Designated Nationals List and the U.K. has a Consolidated List of Financial Sanctions Targets. For further commentary see, chapters 4 and 5 respectively.

<sup>140</sup> S.83.05 (b) CC.

<sup>141</sup> SOR/99-444.

Nations Resolutions on the Suppression of Terrorism<sup>142</sup> (RIUNRST). When a person or organisation is listed under the UN Regulations,<sup>143</sup> the Office of the Superintendent of Financial Institutions (OSFI) is charged with immediately notifying financial institutions in Canada to freeze the assets of the party concerned. From this point, any financial transactions with these entities are prohibited. The powers to list or designate entities as having links with terrorist groups and to promptly freeze their assets are consistent with the policy adopted in the U.S. and the U.K.<sup>144</sup> The Canadian government assert that the listing process is “a powerful means of denying terrorists the ability to improve their capabilities”<sup>145</sup> by restricting their access to funds.<sup>146</sup> A further similarity with the U.S. and the U.K. is the criticism that can be made of the listing process. Public Safety Canada argued that the listing procedure “is a public means of identifying a group or individual as being associated with terrorism”.<sup>147</sup> It also claims that it is not a criminal offence to feature on this list. However, whilst it might not be a crime, the costs incurred with being listed can be severe. For example, a suspects name can be kept on the list even when no charge or conviction ensues. Whilst this in itself has significant consequences for that person’s reputation, ability to work and travel, it also has severe impact on the suspect’s family and friends. For instance, with no access to his/her own money, the listed person would find it difficult to support his/her family and friends may be wary of associating with the suspect for fear of themselves being branded terrorists. The very fact that the person accused is later cleared of any wrongdoing could be of little worth. The Canadian Peace Alliance shared its concerns regarding the ATA with the Prime Minister of Canada in 2001, it opined, “While those wrongfully charged, arrested and imprisoned may be vindicated in the fullness of time, the stigma, shame and humiliation that come with wrongful

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<sup>142</sup> SOR/2001-360.

<sup>143</sup> The Department of Foreign Affairs and International Trade is responsible for the designation of entities and individuals in Canada associated with terrorism.

<sup>144</sup> For a further discussion of the CTF policy in the US and U.K. , please see chapters 5 and 6 respectively.

<sup>145</sup> Building Resilience Against Terrorism, Canada’s Counter Terrorism Strategy, Government of Canada at 21. Available at: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rslnc-gnst-trrrsm/rslnc-gnst-trrrsm-eng.pdf>.

<sup>146</sup> The Criminal Code provides procedures for listed entities to apply to be de-listed. Under S. 83.05(2) of the Code, the entity can request the Minister of Public Safety and Emergency Preparedness to consider recommending de- listing to the Governor in Council within 60 days. Under S. 83.06, the entity can seek judicial review of the listing, However, during this process, the judge must consider intelligence that is not disclosed to the entity on the grounds that disclosure would be detrimental to national security.

<sup>147</sup> Listed Terrorist Entities, Public Safety Canada website. Available at: <http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/index-eng.aspx>. (accessed 24.01.17).

accusations will have devastating effects on families, reputations, friendships, businesses and jobs”.<sup>148</sup>

Further to this, the means by which to request a revocation of a designation are inadequate. Pursuant to S. 83.05(2) CC, a person or entity that is designated may apply in writing to the Minister of Public Safety and Emergency Preparedness to be considered by the Governor in Council for de-listing. If no answer is given within 60 days, then the suspect may assume that they are deemed as not suitable for de-listing. S. 83.05 (5) CC provides for judicial review and is available after the denial of a revocation of designation. This review mechanism appears to offer adequate procedural fairness to the suspect and by virtue of S. 83.05(6c) provides the designee with a reasonable opportunity to be heard. Alongside this appeal mechanism, the Minister of Public Safety and Emergency Preparedness is also charged with reviewing the list of designees every two years to determine whether there are still reasonable grounds for suspect’s inclusion on the list.<sup>149</sup> Whilst judicial review may provide an opportunity for the listed party to be heard and to learn what the evidence is against him, the process is likely to be a lengthy one and as the Canadian Peace Alliance have expressed above, by the point of revocation, irrefutable damage may have already been done to the designee’s reputation. Such a situation suggests that by not offering procedural protection inherent in a criminal prosecution, CTF legislation is having a negative impact on human rights such as the right to a fair trial. This is a point that will be developed later in the chapter.<sup>150</sup>

The suggestion that the CTF regime is breaching some human rights questions the legality of the measures. For instance, it is difficult to argue that a process whereby a person is guilty until proven innocent can be deemed legitimate.<sup>151</sup> Roach comments that the listing procedure “constitutes a bill of attainder which fuses executive, legislative and judicial power in one act and precludes due process and

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<sup>148</sup> Open Letter from the Canadian Peace Alliance to Prime Minister Jean Chrétien, Opposing Bill C-36, November 28, 2001. Available at: <http://www.acp-cpa.ca/C-36openletter.htm>

<sup>149</sup> S. 83.05 (9) Criminal Code of Canada.

<sup>150</sup> See section 6.3.1.

<sup>151</sup> The Charter of Rights and Freedoms promises the right to be presumed innocent until proven guilty in a fair and public hearing (S. 11(d), Canadian Charter of Rights and Freedoms, The Constitution Act 1982).



adversarial challenge before a person or group has been listed”.<sup>152</sup> Such a view accurately reflects the reality of the operation of the listing and asset freezing procedure and has resulted in legal challenges regarding the constitutionality of CTF provisions.<sup>153</sup> For instance, Canada’s respect for constitutional principles has been called into question with regard to its implementation of the UNSCR 1267<sup>154</sup> regime. In the case of *Aboufian Abdelrazik*,<sup>155</sup> criticisms have been made concerning the consequences that the listing procedure has had on Abdelrazik’s human rights. In July 2006, Abdelrazik, a dual citizen of Canada and Sudan was informed, without notice, that he had been added to the U.N.’s Consolidated List of individuals and entities associated with al-Qaeda and the Taliban.<sup>156</sup> He was not offered any information or explanation of this action and in line with the 1267 regime, his assets were immediately frozen. Abdelrazik was also the subject of an international travel ban, he could not leave Sudan to return to Canada and this remained the case until June 2009 when the Federal Court of Canada ruled that Abdelrazik’s human rights had been violated and his return to Canada should be facilitated.<sup>157</sup> Despite declarations from the RCMP and the CSIS that he had not been engaged in any terrorist activities, his request continued to be denied with no justification given. He was eventually removed from the list in November 2011.<sup>158</sup> Significantly, he was never charged with any crime, terrorism related or otherwise and thus was not afforded the right to trial by jury and was never privy to any of the information that had led to his listing. However, due to the fact that being featured on a terrorist blacklist does not amount to a criminal charge, then the right to trial by jury pursuant to s. 11 of the Canadian Charter of Rights and Freedoms is not usual. Therefore, the sanctions, which deprive a person of their assets and label them a terrorist, are punitive in nature and as such individuals should be afforded

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<sup>152</sup> K Roach ‘*Counter-Terrorism and Beyond, The Culture of Law and Justice after 9/11* (Routledge 2010) 55.

<sup>153</sup> Challenges have also been brought in the U.K. with regard to a lack of procedural protection. The highly significant case of *Ahmed and Others v United Kingdom* [2010] UKSC 2 is discussed in detail in chapter 5.

<sup>154</sup> (1999), hereafter UNSCR 1267. For a more detailed discussion of this Resolution, see chapter 3: International Policy.

<sup>155</sup> *Abdeirazik v Canada (Minister of Foreign Affairs)* 2010 1 F.C.R. 267.

<sup>156</sup> Pursuant to UN Security Council Resolution 1267.

<sup>157</sup> By denying Abdelrazik the right to return to Canada, the government had breached his Mobility Rights pursuant to s.6 of the Canadian Charter of Rights and Freedoms.

<sup>158</sup> United Nations Security Council, ‘Security Council Al-Qaida Sanctions Committee Deletes Entry of Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq from Its List,’ Press Release SC/10467. Available at: <http://www.un.org/press/en/2011/sc10467.doc.htm>.

greater protection. Legras argues that “it has been accepted as a judicial principle that the greater the potential penalties facing an accused, the greater the burden of proof the state must satisfy and the more important a defendant’s right to a public trial”.<sup>159</sup> Such an argument can be shown to be pertinent with the case of *Abdeirazik*,<sup>160</sup> who was labelled a terrorist suspect for five years with no knowledge of what the evidence was against him. Due to the sanctions imposed on him, getting a job was difficult, as employers would need to secure an exemption from the 1267 Committee to pay Abdelrazik a wage. Thus, Cheung notes that the only money at his disposal between 2006 and 2011 was an allowance from the government of Quebec in fulfilment of the humanitarian exemption provision in s. 5.7 of the 1267 Regulations.<sup>161</sup>

The state’s obligation to comply with international policy is leading to questions surrounding legitimacy. As is the case here, Canada’s conformity with UNSCR 1267 has led to a breach of human rights afforded by the Canadian Charter. Abdelrazik challenged the Canadian government on the basis of a contravention of his s. 6 mobility rights in which “every citizen of Canada has the right to enter, remain in and return to Canada”.<sup>162</sup> It was held that Abdelrazik’s application for judicial review should be allowed. This application centred on the proposition that the Government of Canada had prevented Abdelrazik’s return to Canada and in doing so had breached his s. 6 Charter rights. The court held that a refusal to let a Canadian citizen enter Canada must be justified as being required to meet a reasonable state purpose. On this basis, Canada was found to have breached an applicant’s right to enter Canada. Challenges such as these in relation to the constitutionality of terrorism and indeed terrorist financing legislation are set to continue until legislation is amended to comply with the Charter.

Whilst there are clearly harmful side effects to the operation of CTF legislation, Canada have had some success in its goal of detecting terrorist funding. The

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<sup>159</sup> Canadian “anti-terrorism” law attacks democratic rights,’ 20 Nov 2001, F Legras, available at: <http://www.wsws.org/en/articles/2001/11/can-n20.html>

<sup>160</sup> *Abdeirazik v Canada (Minister of Foreign Affairs)* 2010 1 F.C.R. 267.

<sup>161</sup> C.K Cheung ‘The UN Security Council’s 1267 Regime and the Rule of Law in Canada’ B.C. Civil Liberties Association.

<sup>162</sup> S.6(1) Canadian Charter of Rights and Freedoms.

landmark case of *R v Thambithurai*<sup>163</sup> saw the first charges being brought under Canada's CTF law.<sup>164</sup> Prapaharan Thambithurai was accused of collecting money for the Liberation Tigers of Tamil Eelam (LTTE), contrary to S. 83.03(b) of the Criminal Code.<sup>165</sup> On his arrest, he informed police that he collected between \$2,000 and \$3,000 and later pleaded guilty to the CTF offence. Thambithurai was sentenced in 2010 to six months imprisonment. The only other terrorist financing related conviction to be secured thus far derives from the so-called 'Toronto 18' terrorism plot. The suspects were arrested and charged in 2006 of planning terrorist attacks in Canada. The case against them proceeded through the courts at a very slow pace and resulted in seven of the accused pleading guilty to terrorist related crimes contrary to Part II.1 of the Criminal Code.<sup>166</sup> Another seven suspects saw their charges dropped or stayed and the other four men were found guilty after a trial. One of the terrorists, Steven Chand was also found guilty in 2010 of counselling to commit fraud,<sup>167</sup> over \$5000 for the benefit of a terrorist group contrary to s. 83.18(1). He was sentenced to 10 years imprisonment.<sup>168</sup> Furthermore, Mohammed Momin Khawaja was also charged with crimes under the CTF provisions pursuant to the ATA 2001.<sup>169</sup> He was a co-conspirator of a bomb plot, which was destined for the U.K., but the group's plans were thwarted and he was arrested and charged in 2004 with five terrorism offences. These charges engage ss. 83.03 providing property or services for terrorist purposes, ss. 83.18 participating in the activities of a terrorist group, ss. 83.19 facilitating a terrorist activity and ss. 83.21 instructing people to carry out an activity for a terrorist group. Khawaja is the only person that has been charged with these offences thus far. It was over 4 years after his arrest that his trial took place and he was subsequently convicted and sentenced to 10 years and 6 months imprisonment. Notwithstanding a very small number of convictions for terrorist financing, the potential impact of CTF legislation is patent. A suspect can be designated as a terrorist and have their assets

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<sup>163</sup> 2011 BCCA 137

<sup>164</sup> The FATF notes that charges were also brought in another case but were subsequently withdrawn (FATF Anti Money Laundering and Counter-Terrorist Financing Measures, Mutual Evaluation Report, Canada, September 2016 at 62).

<sup>165</sup> Canada declared the LTTE to be a terrorist organisation in 2006.

<sup>166</sup> *R v Ahmad* 2011 SCC 6

<sup>167</sup> Pursuant to s.380 C.C.

<sup>168</sup> 'Toronto 18 terror plotter sentenced to 10 years in prison', *The Globe and Mail*, Nov. 26 2010. Available at: <http://www.theglobeandmail.com/news/national/toronto-18-terror-plotter-sentenced-to-10-years-in-prison/article1315700/>

<sup>169</sup> *R v Khawaja* [2006] OJ 4245

frozen based on an unsubstantiated suspicion. It has been discussed how this reason for action may never be validated with evidence and the lack of a appropriate appeal mechanism means that it cannot be effectively challenged. The impact of these actions illustrates that Canadian CTF measures can have a substantial negative impact on human rights and is a point, which will be further, discussed later in the chapter.

Following the same pattern as its U.S. and U.K. counterparts, in addition to the freezing of assets, Canada has called upon those working within the financial sector to assist it in detecting terrorist funds.<sup>170</sup> It is a discussion of the reporting obligations of financial entities to which this chapter now turns.

### **6.2.3 Reporting Requirements**

Prior to 2001, it is evident from legislation that, the government in Canada was primarily concerned with money laundering rather than the financing of terrorism.<sup>171</sup> The Proceeds of Crime (Money Laundering) Act 1991 was introduced to tackle the laundering of the proceeds of crime through the confiscation of the property of people convicted of money laundering. This legislation was amended in December 2001 by the Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000,<sup>172</sup> which merged Canada's anti money laundering (AML) and CTF policies.<sup>173</sup> This approach is consistent with the method used during the Bush administration in the U.S.<sup>174</sup> It was discussed in chapter four how CTF laws were integrated with AML legislation. This move proved to be a significant mistake as the funds of terrorism are completely different to the proceeds of money laundering.<sup>175</sup> Money to support terrorism is originally clean and legitimate whilst funds involved in money laundering

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<sup>170</sup> Insert further analysis on the amount of money that has been frozen.

<sup>171</sup> The Proceeds of Crime (Money Laundering) Act 1991 did not make any provision for the countering of the financing of terrorism. This situation mirrors that of the U.S. where the legislative focus was upon money laundering, fraud and the illegal drugs trade. For further commentary, see chapter 4.

<sup>172</sup> S.C. 2000, c.17

<sup>173</sup> This Act is supported by the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (SOR 2002/184).

<sup>174</sup> The U.K. have legislated for money laundering and terrorist financing separately. For further commentary see chapter 5.

<sup>175</sup> For further commentary, see footnote 126.

begin as dirty and illegitimate money which is then cleaned through the financial system. This implies that the application of the same method of detection for AML and CTF monies is fundamentally flawed.<sup>176</sup> Nonetheless, the Proceeds of Crime Money Laundering and Terrorist Financing Act implements specific measures to combat money laundering and terrorist financing. This is achieved through the facilitation of the investigation or prosecution of such offences. Those working within the financial sector have a very important role to play in these objectives and are obliged to be diligent and to report any financial activity, which they deem to be suspicious.<sup>177</sup> They are responsible for retaining records of financial transactions and recognising suspicious transactions and reporting their finding to FINTRAC.<sup>178</sup> The reports that need to be made include Suspicious Transaction Reports (STRs), Terrorist Property Reports (TPRs), Large Cash Transactions Reports (LCTRs) and Electronic Funds Transfer Reports (EFTRs). The requirement for the submission of such reports is included within S. 7 of the PCMLTFA and requires that a STR report be filed with FINTRAC where there are reasonable grounds to suspect that a transaction (whether or not it has actually been carried out) is related to money laundering or terrorist financing.<sup>179</sup> Financial entities are also required to file a TPR to FINTRAC if they have or suspect that they may have in their possession or control property that is owned or controlled on behalf of a terrorist or terrorist group or property that is owned or controlled on behalf of a listed person. This obligation applies to all financial entities including banks, credit unions, life insurance companies and accountants.<sup>180</sup> The mandate of FINTRAC was subsequently amended to make them responsible for the analysis and sharing of the information reported. The original reporting regime brought in by the Proceeds of Crime (Money Laundering) Act 2000 was implemented due to the need to comply with international legislation.<sup>181</sup> In its Annual Report in

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<sup>176</sup> For further discussion on such a point please see: N Ryder & U Turksen, Banks in defence of the homeland: Nexus of ethics, legality and suspicious activity reporting in the United States of America [2013] 12(4) *Contemporary Issues in Law, Law Ethics and Counterterrorism* 311-338 at 313. Ryder and Turksen argue that the money laundering model is not appropriate for CTF as terrorist financing is not a profit driven crime.

<sup>177</sup> The legal responsibility to report is applicable to “financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities” (s. 3(a)(i) Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000).

<sup>178</sup> [www.fintrac.gc.ca](http://www.fintrac.gc.ca).

<sup>179</sup> The penalty for contravening S.7 PCMLTFA is the imposition of a fine of up to \$2,000,000 or up to 5 years imprisonment.

<sup>180</sup> The list of organisations to which this legislation relates is contained in S. 5 PCMLTFA.

<sup>181</sup> UN Vienna Convention 1998.

1998, the FATF concluded that Canada's voluntary suspicious transaction reporting system was not "working effectively"<sup>182</sup> and thus suspicious financial activity was going undetected. The Proceeds of Crime (Money Laundering) Act legislated for the obligation on financial entities to report any suspicious financial activity. The Act also created an independent agency tasked with receiving and analysing Currency Transaction Reports (CTR) and STRs. This agency is FINTRAC.

Whilst the FATF had advocated the need for a strengthened reporting regime in Canada, its implementation has met some criticism.<sup>183</sup> Whilst there are many transaction reports made, few are in relation to terrorist financing.<sup>184</sup> This is due to the small amounts of money involved in terrorism.<sup>185</sup> Terrorist finances are less obvious to detect than funds that are being laundered. Furthermore, whilst money laundering involves large amounts of illegal money, funds intended for terrorist purposes may also come from a legitimate source. This is not a problem unique to Canada but a common failing of the reporting regimes in the U.S. and the U.K. also.<sup>186</sup> Moreover, whilst the U.K. has separate legislation for money laundering and terrorist financing, the U.S. and Canada have adapted existing money laundering legislation to include provisions to counter terrorist financing. German discusses the notion that traditional techniques for detecting money laundering are now being effectively used to counter terrorist finance such as following the paper trail to pursue terrorists and terrorist supporters.<sup>187</sup> However, such provisions have not proven to be successful as transactions for small amounts of money are likely to go undetected.<sup>188</sup> Pue supports

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<sup>182</sup> FATF on Money Laundering, Annual Report 1997-1998 at 12-13.

<sup>183</sup> The FATF expressed such an opinion even before the September 11 attacks. In their annual report in 1998, the FATF opined that Canada's voluntary suspicious reporting regime was not working effectively and what was needed was the creation of "a new regime which makes reporting mandatory, and to create a new financial intelligence unit" (Financial Task Force on Money Laundering, Annual Report 1997-1998, at 13).

<sup>184</sup> This fact is the same in the U.S. and the U.K. For further commentary and statistics, see section 4.2.3, chapter 4 and section 5.2., chapter 5.

<sup>185</sup> The Air India bombing is estimated to have cost as little as \$10,000. (Air India Flight 182: A Canadian Tragedy, Final Report, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, at 185). Currently, TF regulations follow money laundering regulations and target transactions that are over \$10,000 implying that they will not be effective in detecting funds destined for the financing of terrorism.

<sup>186</sup> For further commentary on this, please see, chapters 4 and 5.

<sup>187</sup> P German 'Organized crime, terrorism, and money laundering in the Americas', [2002] 15 *Florida Journal of International Law* 25.

<sup>188</sup> Further to this, the report of the Air India Commission suggested that terrorist financing and money laundering should be decoupled. They concluded that "In general, money laundering laws focus on the large amounts of money that are proceeds of crime – "dirty money." In contrast, TF may involve

such an argument stating that, “little knowledge, ingenuity, foresight, planning, intelligence, money, or support infrastructure is required to achieve mass murder”.<sup>189</sup> Indeed, even the FATF recognized the futility of using the reporting regime to identify terrorists, they stated, “financial institutions will probably be unable to detect terrorist financing as such. Indeed, the only time that financial institutions might clearly identify terrorist financing (...) is when a known terrorist or terrorist organization has opened an account”.<sup>190</sup>

Figures in relation to the reporting regime in Canada suggest that there is a large amount of transaction reports submitted to FINTRAC, although only a marginal amount will lead to a conviction.<sup>191</sup> The number of SAR’s filed in Canada has increased steadily from 81,735 in 2013-2014 to 92,531 in 2014-2015 and 114,422 in 2015-2016.<sup>192</sup> Despite such an increase in the number of reports filed, there have been no convictions for terrorist financing in that period. In fact, the last and only terrorist financing conviction secured in Canada was in 2010.<sup>193</sup> This is similar to other countries that also have a low rate of terrorist financing conviction.<sup>194</sup> Such a low number of convictions have led to questions being raised regarding the efficacy of the

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smaller sums that are not necessarily proceeds of crime.” (Air India Flight 182: A Canadian Tragedy, Final Report, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. Vol. 5 at 15).

<sup>189</sup> W Pue *The War on Terror: Constitutional Governance in a State of Permanent Warfare?* [2003] 41 *Osgoode Hall Law Journal* 267. This is a view supported by Ryder, see N Ryder, *A false sense of security? An analysis of legislative approaches towards the prevention of terrorist finance in the United States and the United Kingdom* [2007] *Nov Journal of Business Law* 821-850.

<sup>190</sup> Financial Action Task Force on Money Laundering, *Guidance for Financial Institutions in Detecting Terrorist Financing*, 24 April 2002 at 3.

<sup>191</sup> It should be noted here however that although the reporting of CTF and AML are coupled together, there are generally a much smaller number of CTF reports made than AML reports.

<sup>192</sup> FINTRAC Annual Report 2016 at 4.

<sup>193</sup> *R v Thambithurai* 2011 BCCA 137

<sup>194</sup> “The [Egmont Group of Financial Intelligence Units](#) noted that seizures of assets and convictions for terrorist financing are rare in many jurisdictions.” (House of Commons, Canada, *Terrorist Financing in Canada and Abroad: Needed Federal Actions*, Report of the Standing Committee on Finance, 41st Parliament, 2nd session, June 2015 at 10). However, it should be noted that the statistics in relation to convictions may not be a true reflection of reality as sometimes perpetrators of terrorist attacks are not charged with terrorist financing but are charged and convicted of more serious terrorist related crimes instead. This contention has been observed by the FATF in its Mutual Evaluation Report in 2016. They state, “participants may be tactically disrupted for a variety of reasons, including triggering reactions or behavioural changes of the main targets. TF investigations therefore do not always result in TF charges, if other charges for terrorism or other offenses are being laid and the evidence is most cogent and appropriate or would best serve the public interest.” An example of this is provided with the Via Rail case. For further commentary. See FATF *Anti-money laundering and counter-terrorist financing measures*, Canada, Mutual Evaluation Report 2016.

reporting regime in relation to its costly nature.<sup>195</sup> A report by the Standing Senate Committee on Banking Trade and Commerce concluded that, “the Committee feels that there is a lack of clear and compelling evidence that Canada’s Regime is leading to the detection and deterrence of money laundering and terrorist financing, as well as contributing to law enforcement investigations and a significant rate of successful prosecutions”.<sup>196</sup> The Committee went on to argue that the effectiveness of the current regime was not in proportion to the amount of resources that are being committed by reporting entities and federal departments and agencies.<sup>197</sup> This suggestion of ineffectiveness of the reporting regime is in line with submissions made in this thesis with regard to the U.S. and U.K. The reporting regimes operating in all three countries are costly and burdensome but produce modest results.

Beare and Schneider question whether the limited results of the reporting regime is worth the cost of implementation, they state “the application of transaction reporting to terrorist financing represents the proverbial shotgun approach to killing flies”.<sup>198</sup> Interestingly they suggest that the heightened checks and balances carried out in the financial sector may push terrorists and their financiers to use the unregulated financial sectors. Such a move means the detection of these funds becomes highly improbable. The reporting regimes whilst delivering healthier results for money laundering, is not proving valuable for the prevention and detection of terrorist

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<sup>195</sup> In the wake of terrorist attacks in Canada recently, SARs in relation to terrorist financing have increased from 157 in the fiscal year 2012/2013 to 234 in 2013/2014. (‘Reports of possible terrorist financing increase in Canada after deadly attacks’ November 20, 2014, D. Ljunggren, The Toronto Sun. Available at: <https://www.torontosun.com/2014/11/20/reports-of-possible-terrorist-financing-increase-in-canada-after-deadly-attacks>)

<sup>196</sup> Follow the Money: Is Canada making progress in combating money laundering and terrorist financing? Not really, Report of the Standing Senate Committee on Banking, Trade and Commerce, 10. Available at: <http://www.parl.gc.ca/Content/SEN/Committee/411/banc/rep/rep10mar13-e.pdf>. Further to this, in 2008, Canada was questioned on its lack of terrorist financing prosecutions and received 11 non compliant ratings from the FATF.

<sup>197</sup> Ibid

<sup>198</sup> ‘M.E. Beare and S. Schneider *Money Laundering in Canada, Chasing Dirty and Dangerous Dollars*’ (University of Toronto Press 2007) 294. Mihaescu comments on the high cost to financial entities of complying with their legal responsibility under the provisions and suggests, “their primary business interest is profit, which entails maintaining and cultivating the trust of their customers, yet the AML compliance obligation requires them to violate this trust” haescu further comments that “the transaction reporting regime alone, purportedly, has come at immense implementation costs for the Canadian financial sector, while it likely detected only a very small fraction of criminal funds” (S. Mihaescu (2012) *The Anti-Money Laundering Complex in Canada – A Private-public Approach to Governance. The compliance role of financial institutions*, University of Ottawa, Available at: <http://www.ruor.uottawa.ca/en/bitstream/handle/10393/23872/MIHAESCU,%20Sabina%2020125.pdf?sequence=1>. Mi).



financing. Indeed Conservative Senator Lang<sup>199</sup> questioned the point of the existence of CTF provisions in Canada if the authorities are not utilizing them. He notes the statistics on counter-terror operations from other countries such as the U.K. and the U.S, opining, “Canada doesn’t compare”.<sup>200</sup> Further to this, Finance Minister Joe Oliver asked the House of Commons Finance Committee to launch an investigation into the countering of terrorist financing. This request derives from the global effort to weaken the terrorist group ISIS and follows the disruption of a suspected ISIS network operating in Ottawa in early 2015.<sup>201</sup> Calls such as these to look into the efficacy of the CTF regime suggest that CTF provisions in Canada may not be proving successful. However, whilst it has been shown here that there has been limited success of the operation of the reporting regime and indeed the asset freezing system, the negative impact upon particular human rights is ever present. This chapter now turns to a discussion of Canada’s human rights obligations and identifies that CTF legislation specifically impacts upon the right to a fair trial.

### **6.3.1 The Impact of Counter Terrorist Finance Legislation on Human Rights Obligations**

Since the adoption of the Universal Declaration of Human Rights in 1948, the Canadian government have sought to incorporate human rights into Canadian law. Human rights in Canada are contained in the Charter of Rights and Freedoms that was implemented by the Constitution Act 1982. The Charter guarantees certain rights and freedoms to Canadian citizens such as the right to life, liberty and security and freedom of expression and association. Prior to the introduction of the Charter, human rights were protected by the Canadian Bill of Rights 1960. It contained many of the rights now found in the Charter, however as it was an act of Parliament and not part of the Constitution of Canada, its scope was limited. As a federal statute, its contents could be widely interpreted by the courts and the Act could be amended at any time

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<sup>199</sup> Senator wants to know why Canada lags on terror convictions, December 5 2014, I Macleod, Ottawa Citizen. Available at: <http://ottawacitizen.com/news/politics/senator-wants-to-know-why-canada-lags-on-terror-convictions>

<sup>200</sup> Ibid.

<sup>201</sup> The RCMP announced on February 3<sup>rd</sup> 2015 that it had charged three Ottawa men with terrorism offences including recruiting, financing and facilitating terrorism. John Maguire, Khadar Khalib, and Awso Peshdary, Maguire and Khalib are suspected to be ISIS fighters, while Mr. Peshdary is thought to have provided financial support to ISIS.

by a simple majority of Parliament. The implementation of the Charter into the Canadian Constitution affords much greater rights protection and seeks to ensure that legislation is constitutional. Human rights protection in Canada are further bolstered by Canada's accession to many human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR)<sup>202</sup> and the International Covenant on Economic, Social and Political Rights.<sup>203</sup> These treaties combined with the UDHR constitute an international human rights framework that commits Canada to respect individual's basic rights such as the right to life, freedom of religion, freedom of speech and rights in relation to due process. Further to this, Public Safety Canada has suggested that human rights should be safeguarded whilst countering terrorism, they state, "as we meet the threat of terrorism, we must also ensure the protection of our rights and freedoms".<sup>204</sup> Commenting on the Anti Terrorism Act 2015, former prime ministers and Supreme Court jurists have warned that, "Protecting human rights and protecting public safety are complementary objectives, but experience has shown that serious human rights abuses can occur in the name of maintaining national security."<sup>205</sup> Despite the standing of human rights within Canadian law, it is suggested here that the threat of terrorism has encouraged the Canadian government to jeopardize the commitments made to human rights. By operating laws, which allow assets to be frozen and possibly seized and to systematically deny a person, the right to trial by jury can have a significant impact upon their Charter rights.<sup>206</sup> It is to this issue that this chapter now turns.

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<sup>202</sup> This Treaty was ratified by Canada in May 1976.

<sup>203</sup> This Treaty was ratified by Canada in May 1976. Canada are also signatories to the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture, the Convention for the Elimination of Racial Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

<sup>204</sup> Public Safety Canada '2016 Public Report on the Terrorist Threat to Canada,' available at <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2016-pblc-rpr-trrst-thrt/2016-pblc-rpr-trrst-thrt-en.pdf> (accessed 05.01.17) at 1.

<sup>205</sup> Canadian anti-terror bill opens door for human rights abuses, law scholars argue, 27 February 2015. The Guardian. Available at: <https://www.theguardian.com/world/2015/feb/27/canada-anti-terror-bill-threat-democracy-stephen-harper> (accessed 16.01.17).

<sup>206</sup> Bahdi suggests that Canadian laws serve "as the site through which Canada expressed its commitment to the global war effort, showing its willingness to suspend the rights of citizens and non-citizens alike in the name of national and international security" (R Bahdi 'Constructing non-citizens: the living law of anti-terrorism in Canada', in *Counter-terrorism and the Post-democratic state* (eds) J Hocking and C Lewis (Edward Elgar Publishing 2007) 81.

### 6.3.1.2 Right to Trial by Jury

The operation of CTF legislation in Canada can have an adverse impact on a person's right to trial by jury. In order for CTF laws to be successful, the assets of those suspected of involvement in terrorism must be frozen immediately. This is done before any detailed investigation is carried out and a freezing order is permitted to continue until the suspected party is shown to be innocent. This effectively means that a person is denied access to their funds without learning the details of the case that has been mounted against them. A suspect has no knowledge of what they are suspected of doing and thus cannot protest their innocence if they are indeed within the law. Such a situation violates S. 11 of the Charter, which contains the rights of person's accused of public offences in Canada. S. 11 states that, "Any person charged with an offence has the right; to be informed without unreasonable delay of the specific offence... to be tried within a reasonable time...to the benefit of trial by jury".<sup>207</sup> The right to be made aware of the allegation against a person is a fundamental component of procedural fairness and the rule of law. Any divergence away from such basic constitutional rights leaves the state open to criticism and questions regarding legitimacy.

As is the case in the U.S. and the U.K, a person suspected of supporting terrorism is not privy to a presentation of the evidence, has no notification of a listing and has no opportunity to present evidence in opposition of the designation. Rather interestingly, Roach notes Canada's preference to use security certificates in the immediate aftermath of September 11, as they were more conducive to maintaining the secrecy of the intelligence. The security certificate mechanism pursuant to ss. 77-85 of the Immigration and Refugee Protection Act permits the government to detain and deport Canadian citizens or foreign nationals who are considered to be a security threat to Canada.<sup>208</sup> In *Charkaoui v Canada*,<sup>209</sup> the SCC held that this system was in violation of the Charter as there was no opportunity available to the accused to hear or indeed to challenge the secret evidence. In this case, five Muslim men had been held in detention or under house arrest without charge for a combined 26 years. The decision

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<sup>207</sup> S. 11 (a), (b), (f) Canadian Charter of Fundamental Rights and Freedoms

<sup>208</sup> S.C. 2001, c.27.

<sup>209</sup> 2007 SCC 9.

in this case suggests that the judiciary in this instance, assigned priority to the protection of fundamental human rights. Despite such a judgement, it is asserted that in Canada, like the U.S, national security is to some degree prioritised over human rights. The weakening of particular human rights and procedural safeguarding increases the risk of error in a process which is vulnerable to mistake. Indeed, mistakes have occurred in Canada, which have had severe consequences for those concerned. For instance, in November 2001, the U.S. listed Libyan Hussein, a Canadian businessman who ran al-Barakaat North America, as a terrorist supporter. Canada quickly followed suit and also listed Hussein as a terrorist. The Canadian government did not conduct their own investigation but merely took the U.S authorities allegation as enough to satisfy the ‘reasonable grounds’ test under S. 83.13 of the Criminal Code. As a consequence of this, Hussein’s assets were frozen and it became a criminal offence to have any financial dealings with him. His businesses were shut down and extradition proceedings began. However, no evidence could be found that Hussein was indeed involved in terrorism and all charges were dropped. He was removed from the terrorist list in Canada in June 2002 and subsequently de-listed from the U.S. list and the U.N. list at Canada’s request. By this point, Hussein’s reputation had been severely damaged and the Civil Liberties Association Ottawa claim that, “the government destroyed this man’s life without a single shred of evidence”.<sup>210</sup> Whilst Hussein was compensated for this error, the detrimental impact on his life and indeed his family’s life is impossible to quantify. Hussein was not given any opportunity to be heard in a court of law before his assets were frozen, his businesses closed and threats were made to extradite him. This action contravenes s. 11 of the Charter in which a Canadian citizen is promised a right to trial by jury.<sup>211</sup>

Further to this, the implementation of CTF legislation in which assets are frozen before a suspect is found guilty of any terrorist supporting offence, also breaches parts of the ICCPR. Canada asserts that they have “been a consistently strong voice for the protection of human rights and the advancement of democratic values”.<sup>212</sup> Despite this, rights promised under the ICCPR are not being adhered to. Article 14(2) states:

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<sup>210</sup> CanWest Interactive, Available at: <http://www.canada.com/ottawa/news/story.asp?id=A78521BF-B285-474C-AE87-F4B46D514657>, Thursday, October 2, 2003.

<sup>211</sup> S. 11(f) Canadian Charter of Rights and Freedoms.

<sup>212</sup> Canada’s International Human Rights Policy, Foreign Affairs, Trade and Development Canada, Government of Canada. Available at: <http://www.international.gc.ca/rights-droits/policy-politique.aspx>

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” Clearly, a situation in which a person is assumed guilty until proven otherwise is in violation of this right.<sup>213</sup>

Whilst it has been shown that some success has been gained from the operation of CTF provisions, it is not apparent whether the cost of this success, that is, the human rights infringements outweighs the positive impact of the measures. A procedure whereby individuals are deprived of property and denied their right to trial by jury, without ever learning what the evidence is against them is unlawful. The Canadian position is consistent with the U.S. and the U.K. where national security concerns are being prioritized over fundamental human rights.<sup>214</sup> Roach comments that “the [Canadian] government has traded the hope of deterring and convicting terrorists in the future against the certainty of limiting the rights of those listed or accused of terrorism”.<sup>215</sup> This move towards restricting human rights gives rise to questions regarding the legality of the Canadian government’s actions. However, when challenged the Canadian courts have upheld the counter terrorism legislation.<sup>216</sup> For example, following the aforementioned case of *R v Khawaja*, challenges were brought in relation to the constitutionality of the counter terrorism legislation. Khawaja claimed that the laws were disproportionately broad and that the motive clause of S.83.01 (1) of the Criminal Code violated his Charter right of Freedom of Expression.<sup>217</sup> The Supreme Court unanimously affirmed that there had been no violation of the Charter and upheld the constitutionality of Part II.1 of the Criminal Code.<sup>218</sup> Subsequently, Khawaja’s sentence was extended to life imprisonment. The case of *Sriskandarajah v. United States of America*<sup>219</sup> also challenged the legitimacy of counter terrorism legislation in relation to the right to remain in Canada pursuant to

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<sup>213</sup> S.11(d) of the Canadian Charter of Rights and Freedoms provides “Any person charged with an offence, has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”

<sup>214</sup> This contention is discussed throughout chapters 4 and 5.

<sup>215</sup> K Roach ‘*September 11: Consequences for Canada*’ (McGill-Queen’s University Press 2003) 99

<sup>216</sup> This has not been the case in the U.K. where asset freezing powers were struck down in the case of *Ahmed and Others v United Kingdom* [2010] UKSC 2 for being unconstitutional, for further discussion of this topic, see chapter 5: United Kingdom.

<sup>217</sup> S. 2(b) Charter of Rights and Freedoms

<sup>218</sup> This does not however imply that the legislation complies with international law. The FATF support the sanctions imposed in the two terrorist financing convictions secured in Canada since 2010, were “proportionate and dissuasive” (FATF Anti Money Laundering and Counter-Terrorist Financing Measures, Mutual Evaluation Report, Canada, September 2016 at 61).

<sup>219</sup> 2012 SCC 70.

s.6 (1) of the Charter. The claims made in this case were considered at the same time as *R v. Khawaja* and this appeal was similarly dismissed. The Court confirmed the orders to extradite two men to the U.S., who had been accused of involvement with the terrorist group, the Tamil Tigers. It was noted that, “extradition does not violate the core values of s.6 (1). Rather, it fulfils the needs of an effective criminal justice system”.<sup>220</sup> The outcomes of these appeals may support the notion that counter terrorism provisions in Canada are considered necessary and legitimate. Indeed, Burd opines, “by dismissing both arguments, the SCC has given a constitutional pass to one of Parliament’s primary legislative responses to terrorism in the post 9-11 era”.<sup>221</sup>

Notwithstanding such rulings, the Supreme Court of British Columbia prioritised fundamental principles of justice over AML measures. In *Federation of Law Societies of Canada v Canada*,<sup>222</sup> the constitutionality of the reporting regime applicable to lawyers was challenged due to its infringement upon the attorney-client privilege. The court held that legal counsel should be exempt from the PCMLTFA on the basis that the reporting obligations violated s.7 of the Charter.<sup>223</sup> The FATF argue that the legal profession is “especially vulnerable”<sup>224</sup> to money laundering and terrorist financing and as such not being subject to AML and CTF measures “raises serious concerns”.<sup>225</sup> This outcome of this case illustrates that Canada, like the U.K. are concerned with safeguarding human rights whilst countering the financing of terrorism. With this in mind, the ruling could prove to be of huge significance in the future for challenges in relation to the constitutionality of CTF legislation. Despite the aforementioned cases, which upheld the legitimacy of counter terrorism legislation in Canada, it is proposed here that the threat of further challenge especially in regard to CTF provisions

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<sup>220</sup> *Sriskandarajah v United States of America* 2012 SCC 70.

<sup>221</sup> Paul Burd ‘Canada’s Terrorism Laws Stand: R v Khawaja and the Constitutionality of Criminalizing Terrorism’, January 30 2013, Osgoode Hall Law School, York University. Available at: <http://www.thecourt.ca/2013/01/30/canadas-terrorism-laws-stand-r-v-khawaja-and-the-constitutionality-of-criminalizing-terrorism/>

<sup>222</sup> (2013) BCCA 147.

<sup>223</sup> S. 7 of the Canadian Charter states “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. In February 2015, the Supreme Court of Canada struck down these unconstitutional provisions of the PCMLTFA in its decision in *Canada (A.G.) v Federation of Law Societies of Canada* (2015) SCC 7). The court unanimously struck down the reporting obligations on lawyers whilst upholding the provisions for other professions such as accounting.

<sup>224</sup> FATF Anti Money Laundering and Counter-Terrorist Financing Measures, Mutual Evaluation Report, Canada, September 2016 at 15.

<sup>225</sup> FATF Anti Money Laundering and Counter-Terrorist Financing Measures, Mutual Evaluation Report, Canada, September 2016 at 15.

remains. The legislation introduced post September 11 2001 to deal with terrorism and its financing has been constructed on that which was implemented in the U.S., the U.K. and in the UN. Importantly, it is this legal duty to comply internationally that has incited criticism of the Canadian legal system. Even 14 years after the September 11 attacks however, Canada still appear unable to strike a balance between national security measures and human rights. Indeed, the implementation of the Anti Terrorism Act 2015<sup>226</sup> further bolsters counter terrorism laws. This Act has been heavily criticised for the expanded powers it awards police and the CSIS including the expansion of powers to preventatively arrest people without warrant and increased powers to share information on terrorist suspects between government departments. Many of the measures implemented lack oversight and further threaten human rights.<sup>227</sup> Powers such as these and the CTF legislation discussed above can be condemned for their incompatibility with particular human rights. However, in certain circumstances, the Canadian government has the power to limit certain human rights, thus acting legitimately.

### **6.3.2. Derogation From and Limitation of Human Rights**

Contrary to the argument that some human rights are being unnecessarily weakened is the suggestion that sometimes it is necessary to derogate from these rights in the pursuit of national security. This approach has been adopted in the ECHR, the ICCPR, the U.S. Constitution (Suspension Clause) and the Canadian Charter of Rights and Freedoms. The Charter is the supreme law of Canada and such a standing implies that rules, which do not comply with the rights contained in the Charter should be deemed invalid. However s.1 of the Charter provides a limitation clause, which allows the government to action law, which may limit a person's rights if that limitation is justified. In addition to this, s.33 of the Charter provides a 'notwithstanding clause' which allows the government to override certain parts of the Charter. As regards the limitation clause contained in s. 1 of the Charter, the Canadian government has at its disposal the power to limit human rights. S. 1 states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such

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<sup>226</sup> S.C 2015, c.20.

<sup>227</sup> A discussion of this Act is outside the scope of this thesis but is an interesting area in which to focus future research.

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>228</sup> This operation of this limitations clause however demands the court to illustrate that the limitation was for a justifiable purpose and was proportional. Thus, there must be a lawful basis for the action, which causes a limitation on Charter rights. In order to prove that such a situation exists, a legal test is applied known as the Oakes Test. This analysis derived from the case of *R v Oakes*,<sup>229</sup> where the Supreme Court of Canada established a test, which generally considers the negative effect of a limitation on an individual’s right as opposed to the positive impact on society as a whole. The *Oakes* Test considers whether the action taken is prescribed by law, it then looks at whether the objective of the legislation is ‘pressing and substantial’ to society and the proportionality of the action is examined. Therefore, any steps taken which CTF law prescribes are likely to be justified on the basis that by detecting and freezing terrorist assets, terrorist attacks can be thwarted and therefore society is better protected. Thus, the countering of terrorism is ‘pressing and substantial’ to society. However, the proportionality part of the test may be the most difficult to demonstrate. Commenting in *R v Edwards Books and Art Ltd*<sup>230</sup> on the proportionality part of the test, Dickson C.J. opined:

“The proportionality aspect [...] normally has three aspects, the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights”.<sup>231</sup>

With this in mind, the objective of CTF legislation is obviously to starve terrorists of their assets with a view to preventing them from having the money to fund terrorist activity. This aim is ultimately seeking to maintain citizen’s right to life, liberty and security pursuant to S.7 of the Charter, However, owing to the *Oakes* Test, the

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<sup>228</sup> S. 1 Canadian Charter of Fundamental Rights and Freedoms.

<sup>229</sup> [1986] SCC 7. The decision in this case was that S.8 of the Narcotic Controls Act violates the presumption of innocence pursuant to S.11(d) of the Charter.

<sup>230</sup> [1986] 2 SCR 713. In this case, the Supreme Court of Canada unequivocally rejected the legislative objective holding that the Lord’s Day Act violated the right to freedom of religion. Consequently the Act was deemed unconstitutional.

<sup>231</sup> Dickson C.J. applying the Oakes test in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 at paragraph 122.



government needs to illustrate that the manner in which it pursues this goal is the most effective and interferes with rights as little as possible. The aim of the CTF measures is sufficiently important to warrant overriding constitutionally protected rights but a right such as right to trial by jury is so fundamental to due process that it should be better protected from a limitation clause such as that contained in S. 1 of the Charter. Even on challenging government actions, the burden first falls to the individual to prove that a right has been breached. This responsibility of illustrating proof then passes to the government who must show that their actions were justified. However, the standard of proof in this instance is a civil standard demanding that the government only need to illustrate that on a balance of probabilities the measures it has implemented are justified. If this is not illustrated then the Act in question may be found to be unconstitutional. However, Roach opines that in such a situation “Courts may be reluctant to strike down large parts of a law that the government has argued is necessary to prevent another September 11 and that has been so carefully vetted by the government’s Charter experts”.<sup>232</sup>

Further to this, the Canadian government can call upon a S.33 “notwithstanding clause”.<sup>233</sup> S.33 provides that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in S. 2 or Ss 7 to 15 of this Charter”<sup>234</sup> This clause implies that Parliament or a legislature can make a particular law exempt from sections of the Charter including S.11 which contains the right to a trial by jury<sup>235</sup> and indeed the right to be presumed innocent until proven guilty.<sup>236</sup> Therefore, even if a court were to strike down the legislation based on a conflict with the Charter, government may proceed with it anyway providing that they renew this decision every five years.<sup>237</sup> This clause has

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<sup>232</sup> K Roach *September 11: Consequences for Canada* (McGill-Queen’s University Press 2003) 99

<sup>233</sup> S. 33 Canadian Charter of Rights and Freedoms

<sup>234</sup> Ibid.

<sup>235</sup> S. 11(f) Canadian Charter of Rights and Freedoms

<sup>236</sup> S. 11(d) Canadian Charter of Rights and Freedoms. It is important to note however that not all Charter rights can be overruled by a s.33 ‘notwithstanding clause’. For example s. 3-5 Democratic Rights and s. 6 Mobility Rights cannot be overridden.

<sup>237</sup> S. 33(3) Canadian Charter of Rights and Freedoms

been rarely used but its very existence along with the S.1 limitation clause supports the notion that particular human rights in Canada are a long way from absolute.<sup>238</sup>

### 6.3.3 Conclusion

Canada is one of many states, including the U.S. and U.K., to employ extraordinary CTF measures following the terrorist attacks of September 11 2001. In order to comply with the UN CTF related obligations, Canada has to some degree repeated the mistakes they made during the October Crisis. However, in this instance the emergency measures have been allowed to become permanent. Whilst the success of CTF initiatives in the Canada is impossible to determine, the adverse impact of these provisions are more readily identifiable. Financial institutions have been burdened with heightened reporting requirements and Canadian citizens have needed to become more vigilant as to who they associate with for fear of being linked to terrorism. However, as, it is the impact on human rights enshrined in the Canadian Charter of Rights and Freedoms that has suffered the most significant consequences. The aftermath of the September 11 attacks encompassed the introduction of legislation to detect and prevent terrorist funding but this chapter has concluded that in doing so the Canadian government has adopted practices which have undermined human rights, in particular the right to trial by jury. It has been demonstrated how individuals have found themselves deprived of their assets for an indefinite amount of time and have been listed as involved with terrorism without ever having the opportunity to challenge the charge. Indeed, some have found themselves in a situation where they are accused of supporting terrorism and are ultimately never actually charged with any terrorist related crime. Therefore, the asset freezing powers and listing procedures

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<sup>238</sup> The first use of this clause occurred in 1982 when the Yukon Territory legislature invoked the notwithstanding clause when proposing the Land and Planning Development Act. This legislation however was never implemented. In 1988, the Saskatchewan legislature used s.33 in a law that forced striking workers back to work. Its use was later found to be unnecessary. Also, in 1988, the National Assembly of Quebec utilised s.33 in their Bill 178. This legislation permitted Quebec to continue to restrict languages other than French being used on commercial signs. Following criticism from the United National Human Rights Committee however, the legislation was amended that was consistent with the Charter and the s.33 clause was removed. Lastly, s.33 was used by the provincial government of Alberta in 2000 in an effort to restrict the definition of marriage within the province. They wanted 'marriage' to only apply to opposite sex couples. This attempt to use the notwithstanding clause failed on the basis that the definition of marriage belonged to federal jurisdiction.

are in violation of some of the human rights embodied in the Canadian Charter besides the international treaties which Canada is party to.<sup>239</sup>

In using the U.S. and U.K. as comparisons it has been shown that, an apparent failure to respect human rights in favour of CTF measures calls the legitimacy of the CTF framework into question. The power to derogate from or limit certain human rights only furthers concern. Whilst some restriction of human rights may be acceptable at times of crisis, the parameters of limitation on rights need to be clear. Furthermore, these limitations on human rights such as a right to trial by jury should only be permitted to exist on a temporary basis and should not be incorporated into permanent legislation. When the suspension of human rights becomes commonplace, it is not possible to argue that the measures taken are necessary and proportionate to the negative impact suffered by citizens. If action taken is not considered proportionate and is in violation of the right to trial by jury, for example, then CTF measures may be considered illegitimate. Concerns such as these are even more warranted considering recent moves by the Canadian government to strengthen counter terrorism provisions. Further powers are required to tackle terrorism and the Anti-Terrorism Act 2015<sup>240</sup> includes additional powers in relation to the investigation, arrest and detainment of suspected terrorists.<sup>241</sup> The granting of such powers suggests that human rights in Canada could be further undermined.<sup>242</sup>

To surmise, in attempting to comply with international policy in combating the funding of terrorism, the Canadian government has to some extent, weakened constitutional rights. The Canadian CTF legislation is in need of reform to ensure that it better complies with human rights and most importantly does not prevent citizens

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<sup>239</sup> ICCPR and has adopted the Universal Declaration of Human Rights.

<sup>240</sup> S.C. 2015, c. 20. This legislation enacts the Security of Canada Information Sharing Act and the Secure Air Travel Act

<sup>241</sup> Part 1 of the Anti Terrorism Act 2015 enacts the Security of Canada Information Sharing Act, which authorizes the Government of Canada institutions to disclose information to one other. Part 2 enacts the Secure Air Travel Act in order to enhance security in relation to transportation, with the aim of preventing air travel from being used to facilitate terrorist attacks. Part 3 makes amendments to the Criminal Code, giving judge's additional powers with respect to recognizances, to keep the peace relating to a terrorist activity or offence. Part 4 increases the power of the Canadian Canadian Security Intelligence Service to permit it to take, within and outside Canada, measures to reduce threats to the security of Canada, including measures that are authorized by the Federal Court. Lastly Part 5 makes amendments to Part 1 of the Immigration and Refugee Protection Act.

<sup>242</sup> Canadian Civil Liberties Association, 'CCLA's submissions to the Senate Committee on National Security Concerning Bill C-51', April 2015, Available at: <http://ccla.org/wordpress/wp-content/uploads/2015/04/CCLA-Senate-Committee-20-04-15.pdf>

from exercising their right to trial by jury. The next chapter discusses the conclusions of the research in this thesis and suggests ways in which situations might be improved.