The Challenges of Securing an Open Society

The Honourable
A. Anne McLellan, P.C.*

Prelude

The fifth anniversary of 9/11 has just passed. It is an appropriate time to take stock of how our world changed on that morning in New York City, because it *did* change. It is now hard to remember a time before 9/11 — a time before security became the filter or the screen through which our actions, our words, and our movements would be assessed and judged.

I remember the morning well. I was Minister of Justice and Attorney General of Canada and was attending the annual federal/provincial/territorial meeting of Ministers of Justice and Solicitors General with my colleague Lawrence MacCauley, the Solicitor General. Our host was Michael Baker, Minister of Justice for Nova Scotia, and we were at the White Point Lodge, outside Halifax. We had just begun our morning session, when I received a note, telling me that a plane had crashed into one of the towers of the World Trade Center in New York City.

I announced this to my colleagues and while everyone expressed shock and concern, at that time we presumed a tragic accident. Shortly after, I received a second note that another plane had crashed into the second tower. By this time, while we still did not know what was happening, we knew that this was not a tragic coincidence.

We, like most other people around the globe, soon watched in disbelief and horror as the television screen filled with images: bruised and bleeding victims; stunned journalists and politicians; a President frozen in disbelief for brief seconds in a grade two class in Florida as the early news was conveyed to him; and the heroic first responders as they poured into the area of the World Trade Center, unaware of the magnitude of the situation confronting them.

From that moment on *everything* changed, and no more so than for governments around the world, as we began to face the reality of the new face of transnational, non-state terrorism. Five years later it is our responsibility to reflect upon these changes and consider whether ours is a safer and more stable world because of the actions taken by governments like our own.

Introduction

Terrorism was not invented on 11 September 2001. In just the past twenty-five years, there have been close to 2000 documented incidents of terrorist actions. We recognize many of the names over these twenty-five years: Baader-Meinhoff, the Red Brigade, Black September, the IRA, the PLO, Hezbollah, Hamas, the Tamil Tigers, and the Shining Path. We also remember the events: the Munich Olympic Massacre, Air India Flight 182, Pan Am Flight 103, the first World Trade Center attack, the Oklahoma bombing, the bombings of the U.S. embassies in Kenya and Tanzania, and the attack on the U.S.S. Cole.

The United Nations (UN) had identified terrorism as the single biggest threat to global security and stability long before 9/11. Ministers and officials from many countries had

been participating in working groups for years to develop conventions (of which the UN now has thirteen), the most recent being the *International Convention for the Suppression of Acts of Nuclear Terrorism*.[1]

In the days following 9/11, then Prime Minister Jean Chrétien established the Ad Hoc Cabinet Committee on Public Safety and Anti-Terrorism, chaired by John Manley, then Minister of Foreign Affairs. As then Minister of Justice and Attorney General, I was a member of the Committee along with other key Ministers (Finance, Transport, Solicitor General, Immigration, Defence, Foreign Affairs, International Trade, Intergovernmental Affairs, and Revenue). Our mandate was to review policies, programmes, legislation and regulations across the government to assess both our approach to national security and our operational readiness to fight terrorism.

It was decided that, as part of our strategy, we would introduce a piece of legislation that was comprehensive in its approach to terrorism. Within my department, we worked long hours to develop the key provisions that would form the basis of this legislation.

Some have suggested that this legislation was created in haste. If what they are suggesting is that the legislation was drafted without careful thought, then they are wrong. If they are suggesting that there was a sense of urgency about our work, then of course, that is accurate.

Within the department, we had been working for some time on the necessary domestic legislation to permit us to ratify two of the UN Conventions Against Counter Terrorism — those dealing with terrorist financing and with the suppression of terrorist bombings. Our officials also were engaged fully in various international fora where discussions on different aspects of counter-terrorism were being pursued, for example the G-8 and the United Nations. Both the required orientation of anti-terrorism legislation as well as some of the more contentious sticking points were well known to Department of Justice lawyers.

However, it is fair to say that Justice officials, and others, worked very long hours to draft the piece of legislation that was introduced on 15 October 2001 and which is known as the *Anti-Terrorism Act* (ATA).[2] It should be noted that, as part of the drafting exercise, officials worked in teams so that proposed provisions were subjected to rigorous assessment by not only the Department's policy people and its legislative drafters, but also by its *Charter* and human rights lawyers.[3] We were fully aware that at least some of the provisions (*e.g.* preventative arrest and investigative hearings) were new tools being provided to police and would come under additional scrutiny and criticism.

Our government's goal, in the weeks following 9/11, was to get the balance right.[4] A government's fundamental obligation is to provide for the collective security of its people. However, in doing so we must always be guided by our fundamental values, which include our commitment to the *Charter of Rights and Freedoms*, the rule of law and relevant international laws.[5] We must also be mindful of our ethnic, racial and religious diversity as a country, and of our commitment to multiculturalism.

All of this is by way of background to my lecture, entitled "The Challenges of Securing an Open Society." I want to underscore, however, that the challenges, and the strategies and policies to meet them, are many in number, varied in kind, and will continue to test the fortitude and resilience of us all. In a society where we value the relatively free movement of people within our country and across its borders, where the arrival of immigrants from all over the world is seen not only as a societal good but a necessity, where we value the free and open expression of ideas and opinions, and where the Internet has created a borderless world in relation to the dissemination of those ideas and opinions, it becomes even more difficult to provide for our collective security while respecting the "openness" which we all value and dare I say, take for granted.

Much of the attention of legislators, the media, and the public has focused on the ATA. However, I do want it understood that this piece of legislation is only one part of Canada's framework of laws, policies, and programmes focused

on the challenges of twenty-first century, transnational terrorism. There are UN conventions and domestic laws that implement them; enhanced *Criminal Code*[6] provisions dealing with money laundering; agencies such as the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP), the Financial Transactions Reports Analysis Centre of Canada (FINTRAC), the Canadian Border Service Agency (CBSA), and the Canadian Air Transport Security Authority (CATSA); a new department, Public Safety and Emergency Preparedness; a national security advisor reporting directly to the Prime Minister; the first ever integrated national security policy issued in 2004, as well as a new foreign policy in 2005, which put greater emphasis on protecting North America from the threat of global terrorism.[7]

In addition, we have bilateral agreements with the U.S.; for example, the Smart Borders Declaration, signed in December, 2001 and trilateral agreements such as the Security and Prosperity Partnership Agreement of North America (SPP), signed by Presidents Fox and Bush and Prime Minister Martin in March, 2005, which focus on aspects of our collective security.

Further, starting with the federal Budget of December, 2001, and in every budget since, billions of dollars — well over 10 billion dollars to date — have been committed to enhancing our national security infrastructure.

Challenges in Developing a Counter-Terrorism Strategy

Terrorism is both inexcusable and unacceptable. There must be no equivocation about this principle. As Koffi Anan, Secretary General of the UN, said in his report to the General Assembly during its sixtieth session:

> Terrorists must never be allowed to create a pretext for their actions. Whatever the causes they claim to be advancing, whatever grievances they claim to be responding to, terrorism cannot be justified . . . we must make absolutely clear that no cause, no matter how just, can excuse terrorism. This includes the legitimate struggle of people for self-determination. Even this fundamental right defined in the Charter of the United Nations does not excuse deliberately killing or maiming civilians and non-combatants.[8]

A counter-terrorism strategy must define the action or set of actions which it seeks to counter. The challenge to define terrorism has been a long-standing and contentious one. Too often, we hear that "one person's terrorist is another person's freedom fighter." This is to misunderstand the defining characteristics of terrorism — terrorist acts are not only a form of violent struggle but the violence is used *deliberately* against *civilians* to achieve political goals.[9] As Boaz Ganor wrote in his book *The Counter-Terrorism Puzzle*, "terrorism is not the result of random damage inflicted on civilians who happened to find themselves in an area of violent political activity, rather it is directed *a priori* at harming civilians. Terrorism takes advantage of the relative vulnerability of the civilian 'soft underbelly,' as well as the tremendous fear and media impact it causes."[10]

It seems that we become confused easily about what is and what is not a terrorist activity. I think that if we stay focused on the "means" employed, and not the asserted end or goal, we have a better chance of establishing clarity around the definition. What distinguishes the terrorist from others, including the guerilla and the freedom fighter, is the deliberate targeting of civilians in the pursuit of his or her goals.

We understood the challenges involved in providing a comprehensive definition of what constitutes terrorist activities when drafting the ATA but felt that it was essential to the legislation. As we predicted at the time of drafting, the definition has proven to be controversial and continues to attract a considerable amount of academic and judicial consideration.[11] In addition, if the member-states of the United Nations are able to agree on a definition for the purpose of a comprehensive convention on terrorism, the government should then decide whether that definition is one that it wishes to adopt for the purposes of domestic law.

Much is made of the conflict between providing for the security of Canadians and pro-

tecting their rights and liberties. There should be no conflict. However, there will probably be a "tension," as discussed by the Supreme Court of Canada in *Charkaoui v. Canada*.[12] If one postulates a conflict, it will lead, inevitably, to a discussion focused on the rights and freedoms to be surrendered in the name of security, as opposed to a discussion focused on the rights to be protected and safeguarded.[13]

Section 7 of the *Charter* accords to persons the right to life, liberty, and security of the person. Life and liberty can only have meaning where there exists the precondition of human security. As Koffi Annan has stated, "Terrorist acts are violations of the right to life, liberty, security, well-being and freedom from fear. Therefore, adopting and implementing effective counter-terrorism measures is a human rights obligation for states."[14]

And, as my former colleague Irwin Cotler said in a presentation to the Special Committee of the Senate, in conducting the mandated three-year review of the ATA, "counter-terrorism is anchored in a twofold human rights perspective. First, that transnational terrorism — the slaughter of innocents [civilians] — constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants — the right to life, liberty and security of the person. Accordingly, counter-terrorism is the promotion and protection of the security of a democracy and fundamental human rights in the face of this injustice — the protection, indeed, of human security in the most profound sense."[15]

I have some hope that this conceptualization will help us avoid "conflicting rights" analysis and the theory of the zero-sum game. It establishes counter-terrorism laws and actions as an obligation on the part of government to provide for the collective security of its people. If this obligation is not met, people will live in fear and a strong, vibrant civil society will become impossible.

However, this leads me to another important underpinning of our counter-terrorism strategy — that of comportment with the *Charter of Rights and Freedoms*, the rule of law, and international law. We can not ignore our values in developing our counter-terrorism strategy. To do so is "to let the terrorists win." That is why, as I mentioned earlier, when we worked in teams in the Department of Justice, those teams included our human rights and *Charter* lawyers, to ensure that we understood both domestic and international human rights laws and the judicial interpretation thereof. Our focus (and our obligation) was to draft a law and related counter-terrorism measures that would be effective in protecting our security while ensuring respect for our fundamental values.

Now, the question of whether this comportment was achieved continues to be a matter of heated debate, both in civil society and in the courts. The Supreme Court of Canada has ruled on only one of the provisions of the ATA, dealing with investigative hearings, and upheld the constitutionality of the provision.[16] My point is a simple one — that, we, in government at the time, were mindful of the importance of developing a counter-terrorism framework that was respectful of our fundamental values and constitutional obligations.

Much of our counter-terrorism strategy is preventive or preemptive in effect. Modern terrorism, which is based on the exhortation that the more civilians you kill, the more successful you are, does not offer much scope for the traditional approaches of the criminal law, which are based on reactive measures and a theory of general deterrence. My firm belief, which I stated many times, before more House of Commons and Senate Committees than I care to remember, was “If they're on the planes — it's too late.”

Early detection and preemption have become key elements of our counter-terrorism strategy. That is why much of our approach, and many of our resources, are focused on increased intelligence gathering and analysis, and on the police investigations which often flow from the information gathered. “Detect, identify, and break-up before harm is done” has become the new mantra.[17]

Globally, what we see is an approach that not only has led to significant new resources being

devoted to intelligence gathering agencies like CSIS, but also a reorganization of agencies that collect intelligence within governments to ensure not only the collection of more and better information but also its sharing among relevant agencies in real time.[18] We all remember that the key recommendations of the 9/11 Commission, and their most damning criticisms, were reserved for intelligence gathering agencies in the U.S.[19] The new emphasis on prevention has dictated a rethinking of the importance of intelligence to our national security and of how that intelligence is analyzed and used.[20]

This emphasis on prevention also led us to enact the provisions dealing with preventative arrest and investigative hearings.[21] These provisions attracted significant criticism at the time and were described as departures from the normal approach of the criminal law and due process. The criminal law, however, is not static and unchanging. The practice of terrorism has evolved over time. As terrorists and their methods become increasingly sophisticated and lethal, our criminal laws will have to adapt.

With our new emphasis on detection and prevention, we understood that we were supplementing the more accepted operation of the criminal law, which is reactive: to investigate, prosecute, convict, and (through the sentence imposed) deter those who might have similar intentions. This model is of limited utility when those plotting harm do so with the goal not only of mass murder, but also of their own death and subsequent martyrdom.

Although we were well aware of the focus we were placing on preventative actions, I do not think that we appreciated that these measures were to become a small piece of a now much larger global debate around the doctrine of preemption in the criminal law. In his recent book entitled *Preemption: A Knife That Cuts Both Ways*, Alan Dershowitz argues that "The democratic world is experiencing a fundamental shift in its approach to controlling harmful conduct."[22] Dershowitz reminds us that after 9/11, "the 'number one priority' of the [U.S.] Justice Department [was] 'prevention'."[23] He describes this asserted shift in the following terms:

> The shift from responding to past events to preventing future harm is part of one of the most significant but unnoticed trends in the world today. It challenges our traditional reliance on a model of human behavior that presupposes a rational person capable of being deterred by the threat of punishment. The classic theory of deterrence postulates a calculating evildoer who can evaluate the cost-benefits of proposed actions and will act — and forbear from acting - on the basis of these calculations. It also presupposes society's ability (and willingness) to withstand the blows we seek to deter and to use the visible punishment of those blows as threats capable of deterring future harms.
>
> . . .
>
> The classic theory of deterrence contemplates the state's absorbing the first harm, apprehending its perpetrator, and then punishing him publicly and proportionally, so as to show potential future harmdoers that it does not pay to commit the harm. In the classic situation, the harm may be a single murder or robbery that, tragic as it may be to its victim and family, the society is able to absorb. In the current situation the harm may be a terrorist attack with thousands of victims or even an attack with weapons of mass destruction capable of killing tens of thousands. National leaders capable of preventing such mass attacks will be tempted to take preemptive action.[24]

Dershowitz does not argue against preemptive measures so much as he argues for a new jurisprudence of preemption that seeks, in his words, "to balance security with freedom."[25] Whatever else may happen, one thing is clear: greater emphasis will continue to be placed on the tools available to preempt and prevent terrorists from carrying out their lethal plots.

We acknowledged that the balance struck in our counter-terrorism strategy should be open to periodic reassessment. For example, within the ATA we made provisions for a three-year review,[26] as well as a five-year sunset provision for those sections dealing with preventative arrest and investigative hearings. However, we saw neither the *Act*, nor any other of our measures, as being based upon the existence of an emergency, declared or not, and therefore temporary in nature. I do not think anyone saw then or sees

now that the challenges presented by recent terrorist actions and strategies will be susceptible to either quick or simple solutions. What we see may well be the "new normal."

The contents of a country's counter-terrorism tool kit may grow or shrink on the basis of its assessment of the situation in which it finds itself. If we, in Canada, were to suffer an event like 9/11, the Madrid train bombings, or 7/7 in London, we would call upon our government to reassess our counter-terrorism strategy. In carrying out that reassessment, the challenge for government is neither to overreact, thereby limiting people's freedoms unnecessarily, nor to under react, thereby putting in jeopardy people's right to security.

We also acknowledged the necessity for enhanced oversight and review,[27] whether performed by the judiciary, by parliamentarians, or by civil society.

Transparency and accountability will be the best protectors of rights and the best defences against government excess or abuse. Of course, oversight and review mechanisms of various kinds were in place before 9/11: the office of the Inspector General and Security Intelligence Review Committee (SIRC) for CSIS, the Public Complaints Commission for the RCMP, and the Office of the Commissioner, which reviews the activities of the Canadian Security Establishment (CSE). Further, we have an enlarged and increasingly expert Federal Court to deal with a growing number of national security matters, including ministerial decisions regarding the issuance of security certificates.[28] But with new and expanded counter-terrorism measures, including new legislation, the need for enhanced oversight and accountability was clear.

At this point it is appropriate to say a few words about Justice O'Connor's Report into the events relating to Maher Arar.[29] He produced a thorough, insightful report that not only confirmed the personal tragedy of Maher Arar and his family but identified concerns with certain aspects of the conduct of national security investigations as carried out, in particular, by the RCMP.

For purposes of this discussion, those of Justice O'Connor's recommendations that are most relevant relate to enhanced review. He concluded "that the RCMP's national security activities can most effectively be reviewed by a new review mechanism with enhanced powers that would be located within a restructured Commission for Public Complaints (CPC)."[30] Justice O'Connor recommended renaming this entity the Independent Complaints and National Security Review Agency (ICRA). He also recommended that the ICRA's mandate should include authority to conduct joint reviews or investigations with the SIRC and the SCE Commissioner into integrated national security operations involving the RCMP (Rec. 3(c)). He would also grant the ICRA extensive investigative powers; encourage it to hold open and transparent hearings to the greatest extent possible (Rec. 5(g)); and give it discretion to appoint security-cleared counsel, independent of the RCMP and the government (Rec. 5(h)).

Justice O'Connor did not restrict his recommendations to the review of the national security activities of the RCMP. He also recommended that there be independent review of the national security activities of the CBSA, Citizenship and Immigration Canada, Transport Canada, FINTRAC, and the Department of Foreign Affairs and International Trade (DFAIT) (Rec. 4). He suggested that ICRA review the national security activities of the CBSA, and that the SIRC review the national security activities of the other four agencies (Rec. 10). Finally, he recommended the creation of a co-coordinating Committee made up of the chairs of the ICRA, the SIRC, and the CSE Commissioner with an outside person as Chair. Among other things this committee would try to avoid duplicating oversight functions (Rec. 12). Further, he suggested the appointment of an independent person to reexamine this framework for independent review at the end of five years to ensure that the review of national security activities keeps pace with changing circumstances and requirements (Rec. 13).

I must caution, at this point, that while enhanced transparency and accountability are necessary objectives, we must be cognizant

of the risk of layering on so many review and oversight processes that our national security agencies spend more time "looking over their shoulders" than they do working to secure our country and its people.

Having said that, I do believe that parliamentary review should be robust. Ministers and heads of agencies are regularly asked to appear before either standing committees or special committees of the House of Commons and Senate. In fact, the ATA itself was passed only after two months of intensive hearings, in both the House and the Senate. The two special committees created each heard from approximately 100 witnesses. The three-year review of the ATA involved committee review in both the House of Commons and the Senate and again involved the hearing of many witnesses both from government and from civil society.

So important did we believe the role of parliamentarians to be, that then Prime Minister Martin committed the government to creating a new, all-party committee of both the House of Commons and the Senate whose task would be to provide review in relation to Canada's national security agenda, policies and apparatus. We had suggested that the proposed committee be based on the model of the all-party committee established by the United Kingdom Parliament. That committee appears to have set aside partisan politics and has developed expertise and an understanding of national security issues that serves the government, Parliament, and the people of the United Kingdom well.[31]

In November 2005, we introduced legislation to create this new committee and to establish its mandate and membership.[32] I encourage Minister Day, now Minister of Public Safety, to move forward with this initiative because I think it can become an important part of our commitment to transparency and accountability. It is clear that national security issues will take up more of Parliament's attention and a specialized committee that develops expertise in the area, and whose members are given security clearance to receive sensitive information, may be the way to reconcile the operational secrecy of much of our national security apparatus with the need for parliamentary accountability.

The courts have a key role to play in ensuring respect for, and observance of, the rule of law and compliance with the *Charter* and international law. The Federal Court has played a key role in the issuing of security certificates and probably will continue to do so. It also has an important role in the review process for listed entities. Provincial and superior court judges will continue to play an important role in the interpretation of the ATA, including challenges to the constitutionality of its provisions. Moreover we have recently seen our Supreme Court, as well as those of the U.S. and the U.K., discharge their responsibilities to ensure that national security frameworks comply with constitutions, domestic legislation, and international conventions.[33]

There are many other examples of oversight or review mechanisms that operate in relation to our anti-terrorism framework. For example:

- The annual reports of the Minster of Justice and Minister of Public Safety to Parliament and the counterpart reports of provincial ministers to their respective legislatures;
- The Information and Privacy Commissioners' offices;
- The authorization or consent of the Attorney General for the purpose of prosecution of certain terrorist offences;
- Review of a decision to list a group as a terrorist entity by the Minister of Public Safety and then by the Federal Court. Listed entities must be reviewed every two years by the Minister;
- The annual report by the Minister of Public Safety on the implementation of Canada's national security policy.

One cannot emphasize enough the role of the courts, parliamentarians, and civil society in providing meaningful oversight and review. As Justice O'Connor commented in the Arar Inquiry: "Threats of terrorism understandably arouse fear and elicit emotional responses that, in some cases, lead to overreaction."[34] Transparency and clear lines of accountability are, in the end, the best means by which to avoid, or at least limit, that overreaction.

The Challenges of Security in a Pluralistic Society

Canada takes great pride in being not only one of the most ethnically diverse countries in the world, but the only country with a legislated commitment to multiculturalism. As Janice Stein noted recently in a piece in the *Literary Review of Canada*, not only are we unique among western democracies because of this commitment, but we have done extraordinarily well in practice.[35] She writes that, "At its best, multiculturalism in Canada is inclusive rather than exclusionary," and that "Different communities live side by side, if not exactly together, in Canada's cities, with relatively little cross-cultural violence."[36] Of course Stein, and others, have contrasted this with that which we see in many western European cities, where ethnic ghettoization is a growing phenomenon and where the sense of "belonging" and of shared citizenship is being eroded, if it ever existed at all. And of course, in the United States, clearly a pluralistic society, there is an assimilationist policy which encourages one to take up the indicia of "being American" as quickly as possible.

Now, what does this have to do with the threat of transnational terrorism and our country's national security policy? Should Canada's cultural diversity be seen as a strength or a weakness as we pursue our collective security? In fact, the events of 9/11, and since, have brought into sharper relief, tensions that have been bubbling beneath the surface in pluralistic, western democracies for some time. These tensions include concerns regarding immigration and integration. Since 9/11, these tensions play out under the shadow of the West's growing anxiety about, and fear of, Islamic violence.

We were aware of the fears and concerns of the Muslim community, in particular, as we developed our national security framework. Some of the harshest criticism of our anti-terrorism legislation and policies has come from members of the Arab and Muslim communities. After 9/11, there was a feeling on the part of many in those communities that they were the "target" of our legislation and our actions. Of course that was not the case. But there can be unintended consequences. I think in a pluralistic society like ours, with a commitment to multiculturalism, we need to be ever mindful of how any community, any minority, may become fearful, may become the object of hate on the part of some, or may feel singled out for differential or discriminatory treatment. It is then that government, but also civil society, needs to speak up and underscore that the targets, the only targets of laws and policies dealing with national security, are those who might do harm and, moreover, that those people are of every colour, profess every religion, and speak every language.[37]

As we drafted and amended our proposed anti-terrorism legislation in the fall of 2001, I met with many groups, including representatives of Arab and Muslim organizations. We attempted to reassure them of our commitment to a fair and balanced law.

For example, we included new provisions in relation to hate. Building on existing anti-hate provisions in the *Criminal Code*, we empowered the courts to order the deletion of publicly available hate propaganda from computer systems such as an Internet site. We amended the *Canadian Human Rights Act*[38] to make it clear that using telephone, Internet, or other communications tools for the purposes of hate or discrimination was prohibited. We created a new offence of mischief motivated by bias, prejudice, or hate based on religion, race, colour, or national or ethnic origin, committed against a place of worship or associated religious property.

However, I think that, as a government, we did not engage the Arab and Muslim communities, and perhaps others, to the extent necessary to allay their fears. This is why, when we released our integrated National Security Policy in April, 2004, we included a further statement of principles and launched a new initiative: the cross-cultural roundtable.

Our National Security Policy stated: "Our commitment to include all Canadians in the ongoing *building* of this country must be extended to our approach to *protecting* it." Further: "[W]e do not accept the notion that our diversity or our openness to newcomers needs to be limited

to ensure our security." [39]

As part of the Policy, we committed the Government to the creation of a cross-cultural roundtable to provide a forum for individuals from diverse ethno-cultural backgrounds to gain a broader understanding of the security situation, and of the reasons government and its agencies pursued certain policies or actions. We hoped, also, that the Roundtable would better inform policy makers by providing a vehicle through which ethno-cultural communities could discuss candidly the effects, real or perceived, of those policies and actions on their members.

In addition, it was important for me, and the Government of which I was a part, to deal with assertions from Arab, Muslim, and other minority communities that various agencies dealing with security and safety were involved in racial profiling. I joined with senior officials of CSIS, the RCMP, and the CBSA in sessions with Imams and other Muslim leaders in Toronto, and with multiethnic groups elsewhere in Canada. We learned things about each others' perceptions that were invaluable in creating an atmosphere of greater trust and understanding.

The Canada Border Services Agency's fairness initiative was something that I asked the Agency to put in place to deal directly with complaints that its agents racially profiled people going back and forth across our borders. Better training for officers, as well as a transparent and timely complaints process, were part of this initiative.[40]

Justice O'Connor expressly called for further consultation and engagement with Canada's Muslim and Arab communities from CSIS, the RCMP, and the CBSA. He also suggested that training programmes should involve members of those communities with an aim to inform investigators of their culture, values, and history.[41]

We also introduced a new action plan on racism, entitled "A Canada for All." This plan called on all Canadians and their governments to embrace actions against racism as a shared endeavour with common responsibilities and benefits. A lessening of feelings of victimization and marginalization, leading, we hoped, to enhanced social cohesion and a shared sense of citizenship, were goals of this anti-racism policy.[42]

We also encouraged the RCMP to expand its policy on bias-free policing. As Justice O'Connor pointed out, although the RCMP has such a policy, concerns about racial profiling were raised by many of the interveners at his Inquiry. He commented that "[t]here is much value in the RCMP's policy regarding bias-free policing"[43] and that he accepted that the RCMP had an unwritten policy against racial, religious, or ethnic profiling. However, he suggested that there should be a written policy as to what constitutes racial, religious, or ethnic profiling and that the policy should clearly state that such profiling is prohibited. He believed such action would go some distance in alleviating the concerns of those who, as he said, "rightly or wrongly perceive that discriminatory profiling has occurred in some instances."[44]

I do believe that the work we did after the introduction of the National Security Policy in 2004 helped, among other things, to allay fears in Muslim communities here in Canada after the bombings of 7 July 2005 in London. Actions such as the issuance of a fatwa by over 120 Imams condemning the attacks in London were evidence that Canadian Muslims saw an important role for their communities in ensuring our collective security.[45]

In the conclusion to his report, Justice O'Connor accepts that the RCMP and CSIS are taking steps to enhance their interaction with Canada's large and diverse Muslim and Arab communities: "Increased efforts in this respect can and should be made, to ensure that discrimination does not occur and to improve relations with and co-operation from these communities."[46]

But there is more to do. These initiatives must be built upon, evaluated and re-evaluated, and taken seriously by all involved. They are not a "frill," they cannot be "window dressing." They cannot serve as "cover" for a government

or agency that wants to avoid criticism. They must build trust and understanding; they must help create a sense of inclusion and shared responsibility and alert governments to situations where our laws, policies, and actions may have unintended consequences.

While we Canadians take pride (some may suggest we are unjustifiably smug) in our multicultural society, there are emerging questions and tensions relating to our multicultural policies as to whether these policies are doing enough to ensure a socially cohesive society and therefore a more secure society. I raise this issue in the context of the radicalization of second and third-generation Muslim youth, such as we have seen in the U.K. and now see in Toronto.

I do think that we have the opportunity to learn from what has happened elsewhere, and to work with ethno-cultural communities and new Canadians in particular, to ensure that our basic values are understood and that they form the basis of a "shared citizenship." Such a society is one in which the possibility of conflict is reduced. But it is also one that is less likely to become a recruiting ground for those who would threaten and undermine our collective security and well being.

Conclusion

Any country's national security strategy must be reassessed regularly in light of new information and greater understanding regarding the nature of the threats to its people. After 9/11, we acted in ways that we believed to be responsible, effective, and measured. That there was vigorous discussion as to whether this was indeed the case was not surprising to us. In fact, in a vibrant pluralistic democracy it would be surprising if it were otherwise.

We believed that the actions we took as a Government were not only necessary but in comportment with our constitution and our basic values. Again the challenge for governments, and for intelligence and law enforcement agencies, is neither to overreact nor to under react. Overreaction may limit or constrain rights and freedoms; under reaction may put at risk our nation's security, and that of our neighbours and allies.

Ensuring our country's national security is an on-going challenge. It will require vigilance, as well as patience and understanding on the part of all of us, but most particularly, on the part of the Government of Canada and its agencies. However, I do believe that the actions taken by our Government after 9/11 provide us with a strong foundation from which to meet the challenges ahead, from wherever and whomever they may come.

Notes

* The Honourable A. Anne McLellan, of the law firm of Bennett Jones LLP, is a former Deputy Prime Minister of Canada and the first Minister of Public Safety and Emergency Preparedness. This article is a revised and updated version of a public lecture, the eighteenth McDonald Constitutional Lecture, which she delivered at the Faculty of Law, University of Alberta, 21 September 2006. The author would like to thank Andrew Buddle, LL.B. (Alberta), of the law firm Bennett Jones, and Anna Lund, LL.B. (Alberta) for their research assistance in the preparation of this lecture.

1.

1. *Convention on Offences and Certain Other Acts Committed On Board Aircraft*, 14 September 1963, 704 U.N.T.S. 219, Can. T.S. 1970 No. 5 *(Aircraft Convention).*
2. *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105, Can. T.S. 1972 No. 23 *(Unlawful Seizure Convention).*
3. *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177, Can. T.S. 1973 No. 6 *(Civil Aviation Convention).*
4. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, 1035 U.N.T.S. 167, Can. T.S. 1977 No. 43 (*Diplomatic Agents Convention*).
5. *International Convention against the Taking of Hostages,* 17 December 1979, 1316 U.N.T.S. 206, Can. T.S. 1986 No. 45 (*Hostages Convention*).
6. *Convention on the Physical Protection of Nuclear Material*, 3 March 1980,

1456 U.N.T.S. 124, Can. T.S. 1987 No. 35 *(Nuclear Materials Convention).*

7. *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 24 February 1988, 1589 U.N.T.S. 474, Can. T.S. 1993 No. 8, (Extends and supplements the *Montreal Convention on Air Safety*) *(Air Protocol).*
8. *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,* 10 March 1988, 1678 U.N.T.S. 221, Can. T.S. 1993 No. 10 *(Maritime Convention).*
9. *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 U.N.T.S. 304, Can. T.S. 1993 No. 9 *(Fixed Platform Protocol).*
10. *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, Can. T.S. 1998 No. 54, [2005] ATNIA 18 *(Plastic Explosives Convention).*
11. *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 U.N.T.S. 284, Can. T.S. 2002 No. 8 *(Terrorist Bombing Convention).*
12. *International Convention for the Suppression of the Financing of Terrorism,* 9 December 1999, 2178 U.N.T.S. 229, Can. T.S. 2002 No. 9 *(Terrorist Financing Convention).*
13. *International Convention for the Suppression of Acts of Nuclear Terrorism*, 14 September 2005, [2005] ATNIF 20 *(Nuclear Terrorism Convention).*

Available online: United Nations Treaty Collection – Conventions on Terrorism <http://untreaty.un.org/English/Terrorism.asp>.

2. Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001 (came into force 24 December 2001); *Anti-terrorism Act*, S.C. 2001, c. 41 [ATA].
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11.
4. See Canadian Bar Association, *Submission on Bill C-36* (Ottawa: CBA, 2001), online: The Canadian Bar Association <http://www.cba.org/PDF/submission.pdf> at 7-8, where the CBA recommends "that the federal government's response to recent terrorist attacks balance collective security with individual liberties, with minimal impairment to those liberties in the context of the rule of law and our existing legal and democratic framework."
5. The Supreme Court of Canada described this responsibility to get the balance right in the following terms in *Charkaoui v. Canada*, 2007 SCC 9, [2007] 276 D.L.R. (4th) 594 at para. 1 (CanLII) [*Charkaoui*].

   > One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

6. R.S.C. 1985, c. C-46.
7. *Securing An Open Society: Canada's National Security Policy* (Ottawa: Privy Council Office, 2004), online: Privy Council Office <http://www.pco-bcp.gc.ca/docs/InformationResources/Publications/NatSecurnat/natsecurnat_e.pdf>; Foreign Affairs and International Trade Canada, *A Role of Pride and Influence in the World* (Canada's International Policy Statement) (Ottawa, Department of National Defense, 2005), online: National Defence and Canadian Forces <http://www.forces.gc.ca/site/reports/dps/pdf/dps_e.pdf>.
8. Koffi Anan, *Uniting Against Terrorism: Recommendations for a global counter-terrorism strategy* (Report of the Secretary General), UN GA, 60th Sess., UN Doc. A/60/825 (2006) at 3.
9. Boaz Ganor, *The Counter-Terrorism Puzzle: A Guide for Discussion Makers* (New Brunswick, Prince Edward Island: Transaction Publishers, 2005) at 17.
10. *Ibid* at 17-18. See also Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York: Random House, 2006), and in particular Chapter 1, "What is Terrorism?" Richardson lists seven crucial characteristics of terrorism at 4-6:
    1. politically inspired;
    2. act must involve violence or

the threat of violence;
3. point is to send a message not defeat an enemy;
4. act and victim usually have symbolic significance
5. act of sub-state groups – not states;
6. victims of violence and the audience the terrorsts are trying to reach are not the same.
7. final and defining characteristic is the deliberate targeting of civilians;

11. In the decision of *R v. Khawaja* (2006), 42 C.R. (6th) 348, 214 C.C.C. (3d) 399 (Ont. Sup. Ct. Jus.) leave to appeal to S.C.C. refused, 31776 (April 5, 2007) Justice Rutherford struck down what has become known as the "motivation" clause, where in s. 83.01(1)(b)(i)(a) of the *Criminal Code*, *supra* note 7, a terrorist activity is defined as one that is committed "in whole or in part for a political, religious or ideological purpose, objective or cause." In spite of our best efforts to reassure concerned parties that this clause was one that circumscribed the definition of "terrorist activity," and in spite of the addition of s. 83.01(1.1), many continued to believe that this clause "[would require or encourage] police and security agencies to inquire into the personal beliefs of those under investigation or to engage in racial and religious profiling." This was the sentiment expressed by the Special Senate Committee on the *Anti-terrorism Act*: *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the* Anti-Terrorism Act (Ottawa: The Senate of Canada, 2007) at 20. It is important to note however, that in most definitions of "terrorism," achieving a political end, cause, or objective is a key component of the definition. For example, in questioning before the House of Commons Sub-committee on Public Safety and National Security, 38th Parl. 1st sess. (2 November 2005), Boaz Ganor said the following: "[W]hen I refer to political ends, they include ideological and religious ends, in my view, or the broadest sense of the term 'political.'" Further, in his book, *supra* note 10 at 17, he describes the goal underlying terrorism as always political: "… a goal aimed at achieving something in the political arena: over-throwing the regime, changing the form of governance, replacing those in power, revising economic, social or other policies … [w]ith no political agenda, the action in question is not considered terrorism." And in Richardson's list of seven characteristics she begins with the necessity of political inspiration. See note 10.
12. *Supra* note 5.
13. My former college Irwin Cotler has always been the most persuasive and eloquent proponent of this approach.
14. *Supra*. note 8 at 22.
15. Special Committee on the Anti-terrorism Act, *Proceedings*, 38th Parl. 1st sess., No. 2 (2 February 2005).
16. *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 248 (CanLII). The Supreme Court did consider the constitutionality of the security certificate process in *Charkaoui*, *supra* note 6, and found the process wanting in procedural safeguards but, of course, the process for the removal of non-citizens, on various grounds, including connections with terrorist activities, pre-dated 9/11 and the ATA.
17. See my comments before the Special Senate Committee on Bill C-36, *Proceedings*, 37th Parl. 1st sess., No. 1 (22 October 2001).
18. We created the Integrated Threat Assessment Centre (ITAC) as part of our reorganization of intelligence gathering, analysis, and sharing. The CSIS web-site (online: <http://www.csis-scrs.gc.ca/en/itac/itac.asp>) describes ITAC in the following terms:

> ITAC produces threat assessments for the Government of Canada, which are distributed within the intelligence community and to relevant first responders, such as law enforcement. The assessments evaluate the probability and potential consequences of threats, allowing policy-makers and first responders to have the information needed to make decisions and take actions that contribute to the safety and security of Canadians.
>
> . . .
>
> ITAC is a cooperative initiative, composed of representatives from various partner organizations, who bring information and expertise of their respective organizations to ITAC…
> ITAC also promotes a more integrated international intelligence community by developing liaison arrangements with foreign intelligence organizations. This contributes to both Canadian and international security.

19. The National Commission on Terrorist Attacks upon the United States was a bipartisan, independent commission created by legislation in 2002. It released its final report in 2004.
20. Both Justice O'Connor, in the Arar Inquiry, and Bob Rae, in his report on the bombing of Air India Flight 182, underline the importance of information sharing. However, Justice O'Connor reminds us that such sharing "must take place in a reliable and responsible fashion": Commis-

sion of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) at 331, online: Arar Commission <http://www.ararcommission.ca/eng/AR_English.pdf> [Arar Inquiry: *Analysis and Recommendations*]; Public Safety Canada, *Lessons to be learned: The report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* (Ottawa: Air India Review Secretariat, 2005), online: Public Safety Canada <http://sss.securitepublique.gc.ca/prg/ns/airs/repl-en.asp>.

21. Sections 83.28 and 83.29 of the *Criminal Code*, *supra* note 7. These provisions were subject to a five-year sunset clause, s.83.32, and despite efforts on the part of the Harper Government to extend them, they were allowed to expire. I have expressed my strong opposition to the sunsetting of these clauses elsewhere.
22. Alan M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* (New York: W.W. Norton, 2006) at 2. It is interesting that this book is dedicated to "my dear friend and colleague… the Honourable Irwin Cotler."
23. *Ibid*. at 3.
24. *Ibid*. at 7-10.
25. *Ibid*. See the final chapter of Dershowitz's book entitled "Toward a Jurisprudence of Prevention and Preemption."
26. Section 145 of the ATA, *supra* note 2, required a comprehensive review of the provisions and operation of the Act within three years.
27. Justice O'Connor talks about the difference between review and oversight in that part of his Inquiry Report which dealt with a new review mechanism for the RCMP: Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services, 2006) [*A New Review Mechanism*]. In Chapter IX at 457 he describes the two mechanisms in the following way:

    > In their pure forms, oversight mechanisms can be seen as direct links in the chain of command or accountability: they both review and are responsible for the activities of the overseen body. By contrast, review mechanisms are more appropriately seen as facilitating accountability: they ensure that the entities to which the organization under review is accountable, and the public, receive an independent assessment of the organization's activities.

28. One presumes that the Harper government will take the advice of the Supreme Court of Canada in relation to the procedural deficiencies identified with security certificates and amend the existing provisions accordingly. In fact, work had begun in the Department of Justice, at the request of my then colleague, Irwin Cotler, to consider how the existing process could be enhanced to provide greater procedural fairness.
29. Arar Inquiry: *Analysis and Recommendations*, *supra* note 20. It should be noted that I became Minister of Public Safety and Emergency Preparedness, as of 13 December 2003 and was asked by then Prime Minister Paul Martin "to get to the bottom of what happened to Maher Arar." By February, 2004, I and my colleague, then Minister of Justice, Irwin Cotler, and numerous senior Government officials, concluded that the only way "to get to the bottom of what happened" was to appoint a commission of inquiry under the *Inquiries Act*, R.S.C. 1985, c. I-11. In addition to conducting a factual inquiry into how and why Maher Arar was deported to Syria, we asked Justice O'Connor to make recommendations for an independent, arm's length review mechanism for the national security activities of the RCMP. His conclusions on this latter matter are found in *A New Review Mechanism*, *supra* note 27.
30. *A New Review Mechanism*, *ibid*, Chapter XI, at 499 ff.
31. The *Intelligence Services Act 1994* (U.K.), 1994, c. 13, s. 10 created the Intelligence and Security Committee. The Committee describes itself as an "oversight body - with a questioning spirit." It is not a committee of Parliament strictly speaking; it was created by statute, not by order of the House. It has a membership of nine, drawn from both the House of Commons and the House of Lords. The members are appointed by the Prime Minister in consultation with the leaders of the main opposition parties. The Committee reports directly to the Prime Minster and, through him, to Parliament.
32. Bill C-81, *An Act to establish the National Security Committee of* Parliamentarians, 1st Sess., 38th Parl., 2005 (first reading 24 November 2005), online: Parliament of Canada <http://www2.parl.gc.ca/HouseBills/BillsGovernment.aspx?Language=E&Mode=1&Parl=38&Ses=1#C81>.
33. A sampling of these decisions include: *Charkaoui, supra* note 5; *Hamdan v. Rumsfeld*, 598 U.S. 1 (2006); *A and others v. Secretary of State for the*

Home Department, [2004] UKHL 56 (BAILII).

34. *Supra* note 20, Arar Inquiry: *Analysis and Recommendations* at 25.
35. Janice Gross Stein, "Living Better Multiculturally" (2006) 14:7 *Literacy Review of Canada* 3.
36. *Ibid*. at 3.
37. And apparently can be a member of any profession, as the recent incidents involving health care professionals, including doctors, in the United Kingdom, would prove.
38. R.S.C. 1985, c. H-6.
39. *Supra* note 8 at 2 (emphasis added).
40. Canadian Border Services Agency, News Release, "CBSA launches consultation on a new Fairness Initiative" (11 July 2005), online: CBSA <http://cbsa.gc.ca/media/release-communique/2005/0711toronto-eng.html>.
41 Arar Inquiry – *Analysis and Recommendations*, *supra* note 21, Recommendations 3(E) at 327 and Recommendations 19 and 20 at 355-358, *supra.*
42 Department of Canadian Heritage, *A Canada for All: Canada's Action Plan Against Racism*, (Ottawa: Public Works and Government Services, 2005), online: Canadian Heritage <http://www.canadianheritage.gc.ca/multi/plan_action_plan/index_e.cfm>.
43 *A New Review Mechanism, supra* note 27 at 356.
44 *Ibid*.
45 Shortly after the events of 7 July 2005 Prime Minister Martin met with Imans from across Canada to, among other things, seek their help in better understanding the potential for radicalization of, in particular, young Muslim males in Canada.
46 Arar Inquiry: *Analysis and Recommendations*, *supra* note 20 at 358.