

# National security and counter-terrorism in Canada: Past, present and future

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**Abstract: Sicurezza nazionale e contrasto al terrorismo in Canada: Passato, presente e future** – This Essay deals with the terrorist threat in Canada and how it has been managed by the Canadian legislator and courts since 2001 onwards, taking into consideration current anti-terrorism measures and forthcoming changes (through the analysis of Bill C-59, currently being discussed before the Canadian Parliament). A “look back” is provided as well, as this work retraces terrorist attacks before 2001 and how Canadian institutions reacted. Both legislation and case law are the object of this analysis, whose final aim is to assess how the balance between human rights and national security is framed in the Canadian context and which are future perspectives.

**Keywords:** Canada, National Security, Human Rights, Counter-Terrorism, Bill C-59.

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## 1. Introduction

The focus of this Essay is the Canadian approach to national security, in particular after the outbreak of an extremely serious and large-scale threat, i.e. international terrorism, on September 11, 2001. The most important tools aimed at enhancing national security are taken into consideration and their impact on human rights is evaluated, in order to assess whether Canada is fairly balancing two apparently competing interests, such as security needs and human rights protection.

With a view to analysing this topic according to a detailed and all-rounded attitude, not only does this Essay address the current situation, i.e. existing policies, laws and practices whose purpose is to guarantee security against terrorism, but it also provides an overview on how Canada reacted to past security threats as well as on possible changes to the current legal framework. This choice relies on two assumptions. On the one hand, a country’s background on national security issues often influences its reactions to following events. On the other hand, envisaged amendments to the current framework are important to understand which features are perceived as needing improvement and how.

In light of the presented pattern of analysis, this Essay is divided as follows. Section 1, focused on “The Past”, examines situations in which, before 2001, Canada had to deal with dangers for its own security. Specifically, responses to the so-called October crisis – insurrections led by Quebecois independence movement – are retraced, together with reactions to one of the largest air attacks before 9/11:

the 1985 Air India bombing. Section 2 – “The Present” – gets into the core of the analysis, studying the most important anti-terrorism laws enacted from the immediate aftermath of 9/11 to date, most of which are still into force. Alongside, this Section focuses on some practices that are not regulated by law, but nonetheless represent important features of the Canadian fight against terrorism, such as extraordinary renditions (ERs). Section 3, named “The Future”, discusses proposed legislative amendments, still at the draft stage but very likely to become the new regime applicable in Canada in the struggle against terrorism. Ultimately, the conclusion of this work critically takes stock of the major developments of Canadian national security laws and policies and assesses the way in which they fit within the global and comparative approach to counter-terrorism.

## 1. The “Past”: Canada and National Security before 9/11

### 1.1. The 1970 “October Crisis”

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An important precedent that heralds some features of the current Canadian approach to preserve its own security is its reaction to the so-called October crisis, occurred in October 1970 and fed by Quebecois independentism. This crisis is considered as a fully-fledged manifestation of terrorism.<sup>1</sup>

The October 1970 events represent the culmination of a series of insurrections by the Front de liberation du Québec (FLQ) taking place from 1963.<sup>2</sup> Between 1963 and 1970, the FLQ engaged in violent activities such as bombings and dissemination of terror threatening forthcoming attacks, but also bank robberies and other relatively minor crimes. In October 1970, two cells of the FLQ kidnapped a British diplomat, James Cross, and the then Quebec Cabinet Minister, Pierre Laporte, who was found dead some days after his abduction.

As a response to such violence, the federal government – led by Pierre Trudeau – proclaimed martial law on the basis of the War Measures Act (WMA) 1914,<sup>3</sup> after having formally requested the assistance of the armed forces. The WMA contained emergency provisions that were designed to be used in wartime.

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± Arianna Vedaschi authored Section 2; Chiara Graziani authored Sections 1 and 3. The Introduction and Conclusion result from shared thoughts of both Authors.

<sup>1</sup> The crisis has been defined as “one of the most serious terrorist attacks carried out on Canadian soil”: D. Smith, *October Crisis*, in *The Canadian Encyclopaedia*, 13 August 2013, <<https://www.thecanadianencyclopedia.ca/en/article/october-crisis/>> accessed 10 January 2019.

<sup>2</sup> The year in which the FLQ emerged in order to pursue Quebec’s independence from Canada. See C.I. Crouch, *Managing Terrorism and Insurgency: Regeneration, Recruitment and Attrition*, London-New York, 2009, 29.

<sup>3</sup> *War Measures Act*, SC 1914, c 2. In 1985, three years after the adoption of the Canadian Charter of Rights and Freedoms, it was repealed and replaced by the *Emergencies Act* RSC 1985, c 22. On the use of emergency powers in Canada, also with reference to the October crisis, see extensively K.L. Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, in 4 *International Journal of Constitutional Law* 213, 230 (2006).

However, during the October crisis, they were resorted to in times of peace.<sup>4</sup> As is usual for emergency legislation, the WMA authorised the suspension of a number of rights and freedoms.<sup>5</sup> For example, it allowed warrantless arrest by the police and detention without charge, in blatant violation of due process rights; warrantless searches in the houses; and convictions decided by the executive, rather than by a court of law.<sup>6</sup>

Moreover, the activation of the WMA was accompanied by a series of regulations that specified details of measures to be implemented. In enacting such regulations, the government acknowledged that the FLQ and any other group or association “that advocate[d] the use of force or the commission of crime as a means of or an aid in accomplishing governmental change”<sup>7</sup> were unlawful. Moreover, abovementioned police powers of arrest and detention were applicable – without any difference – both to those who were suspected to be affiliated to terrorism, and to those who advocated their ideas or funded unlawful organisations. Therefore, scholars<sup>8</sup> argued that the reaction to the 1970 October crisis – in which Canada had to deal with a serious and pervasive threat to security – anticipated some feature of tools enacted to react to international terrorism from 2001 onwards. For example, the possibility to punish advocacy and support to ideas is considered to be the ancestor of Bill C-51’s speech crimes.<sup>9</sup>

### **1.2. The 1984 Setting Up of the Canadian Security Intelligence Service (CSIS)**

The murder of Pierre Laporte can be considered, together with the kidnap of James Cross, as the event that marked the outbreak of the October crisis. In the aftermath of the facts, the security services, which were then established as a division of the Royal Canadian Mounted Police (RCMP), were harshly criticised for not being able to prevent abductions and subsequent assassination. Consequently, the police started recruiting informers and carrying out illegal behaviours, often leading to flagrant breaches of individual rights, in an attempt to prevent any further terrorist actions. Behaving as if a lawful aim (i.e. avoiding damages to national security) justified any illegal means, the intelligence services engaged in any form of disruption and espionage, violated privacy, used questionable techniques of interrogation.<sup>10</sup>

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<sup>4</sup> On the invocation of WMA in peacetime and its repercussions on human rights, D. Clement, *The October Crisis of 1970: Human Rights Abuses under the War Measures Act*, in 42 *Journal of Canadian Studies* 160 (2008).

<sup>5</sup> Notably, the courts always refused to scrutinise the invocation of such emergency powers. See H. Marx, *The ‘Apprehended Insurrection of 1970’ and the Judicial Function*, in 7 *University of British Columbia Law Review* 55 (1972).

<sup>6</sup> For an overview of such measures, P. Peppin, *Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties*, in 18 *Queen’s Law Journal* 129 (1993).

<sup>7</sup> *Public Order Regulation*, SOR/70-444, S3 [POR].

<sup>8</sup> C. Forcese, K. Roach, *False Security. The Radicalization of Canadian Anti-terrorism*, Toronto, 2015, 31.

<sup>9</sup> See para 2.4.

<sup>10</sup> W. Tetley, *October Crisis 1970: An Insider’s View*, Montreal, 2007, 97.

Concerned about the high number of complaints regarding RCMP's wrongdoings, in 1977 the Trudeau government appointed the so-called MacDonald Commission, tasked with investigating alleged abuses. The Commission issued its report in 1981<sup>11</sup> and found that most of the allegations were true and the RCMP security service had effectively engaged in a series of illegal conducts, mining the trust of the public opinion in their actions and the relationship of confidence between public authorities and citizens. Consequently, the Commission suggested establishing a new security agency, detached from the police, civilian in nature and subject to a precise mandate, well-defined by law as well as to oversight and review by independent bodies.

As a result, in 1983, the government introduced a bill establishing the Canadian Security Intelligence Service (CSIS), replacing the RCMP security service. It is worth remembering that, only one year before, the Canadian Charter of Rights and Freedom, forming the first part of the Constitution Act 1982,<sup>12</sup> had been enacted.<sup>13</sup> In light of its provisions, many concerns were raised against such legislative proposal,<sup>14</sup> criticising lack of transparency and insufficient scrutiny, in spite of the original *rationale* behind the setting up of the body. Such criticism was addressed by parliamentary committees<sup>15</sup> and an amended version of the bill was presented in Parliament. It became law in 1984 as the CSIS Act.<sup>16</sup>

The main feature of CSIS, as originally framed by the 1984 Act, can be described as follows. CSIS is an agency of the Department of the Solicitor General, tasked with investigating within national borders to prevent “threats to the security of Canada”.<sup>17</sup> Its members are not police officers, but, in order to conduct operations as wiretapping and searches, they may obtain a judicial warrant (in the same way as members of the police). Two bodies are in charge of ensuring accountability, i.e. the Inspector General and the Security Intelligence Review Committee (SIRC). The former – abolished in 2012 for budgetary reasons<sup>18</sup> – exercised oversight over ongoing activities, while the latter – still existent – reviewed CSIS's operations and periodically reported to the Parliament.

With the establishment of CSIS, Canadian security services assumed their present shape, although, over the years, some changes were brought, not always improving accountability, as will be specified in following Sections of this Essay.

<sup>11</sup> Commission of Inquiry Concerning Certain Activities of the RCMP, *Freedom and Security Under the Law*, Privy Council Office, 1981.

<sup>12</sup> *Constitution Act* 1982, Schedule B to the Canada Act 1982 (UK), c 11. See generally R. Albert and D.R. Cameron (eds.), *Canada in the World. Comparative Perspective on the Canadian Constitution*, Cambridge, 2017.

<sup>13</sup> Before that moment, the Canadian Bill of Rights was in place. Nonetheless, it was a federal law, not having constitutional standing, as the Canadian Charter of Right and Freedoms has. See R.J. Sharpe, K. Roach, *The Charter of Rights and Freedoms*, Toronto, 2017.

<sup>14</sup> For example, by former members of the MacDonald commission. See R. Whitaker, G. Kealey, A. Parnaby, *Secret Service: Political Policing in Canada from the Fenians to Fortress America*, Toronto, 2012, 359.

<sup>15</sup> In particular, the Bill was referred to a Senate Committee chaired by Michael Pitfield, entrusted with the task of improving some features of the draft law.

<sup>16</sup> *CSIS Act*, RSC 1985, c 23.

<sup>17</sup> *Ibid.*, Part I, sec 12(1).

<sup>18</sup> *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19.

### 1.3. The 1985 Air India Bombings

In its response to the 1970 October crisis, the Canadian government was accused of overreaction, as commentators believe that activating the WMA was excessive.<sup>19</sup> Instead, when the Air India Bombings happened in 1985, the situation was quite the opposite, since Canadian authorities underreacted to the events.

In June 1985, a Toronto-New Delhi flight, operated by Air India, was destroyed by a bomb and crashed into the Ocean, provoking the death of more than 300 people. Investigations on the matter were astonishingly slow. The main suspects were members of a Sikh group, seeking revenge against the Indian government's operations aimed at fighting Sikh separatism. Nevertheless, after almost 20 years of inquiries and trials, only one person was convicted while everyone else was acquitted. In particular, CSIS appeared reluctant to collect evidence, perhaps in order to avoid those charges of wrongdoings during investigations that led the RCMP security service to dissolution. In addition, CSIS often destroyed collected material, even when it could have evidential value in a trial.<sup>20</sup>

In 2006 the Harper government appointed a Commission of inquiry, headed by former Supreme Court judge John C Major. In its final report, issued in 2010,<sup>21</sup> the Commission revealed that CSIS did not carry out its role thoroughly and correctly, as something in the process aimed at converting intelligence into evidence went wrong. Some years before, judicial decisions on the matter had found "unacceptable negligence" of the CSIS in managing the investigation as well.<sup>22</sup>

Although when Canada had to face international terrorism, after the 9/11 attacks, the nature<sup>23</sup> and the scale of the threat was different from both the 1970 and the 1985 events, two reasons justify a preliminary focus on these events. On the one side, as hinted before, some elements of the 1970 approach can be identified in post-9/11 measures. On the other side, in order to overcome its previous inefficiencies, post 9/11 laws vested CSIS with stronger powers, which resulted in reduced accountability. These and other aspects will be taken into account by the following paragraphs, focusing on how Canada responded to the attacks perpetrated by Al-Qaeda on September 11, 2001 in the US.

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<sup>19</sup> C. Forcese, K. Roach, *False Security* (n 8) 45; R. Whitaker, *Keeping Up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context*, in 41 *Osgoode Hall Law Journal* 241, 251 (2003).

<sup>20</sup> C. Forcese, K. Roach, *False Security* (n 8) 46.

<sup>21</sup> Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Research Papers* (Privy Council 2010).

<sup>22</sup> *R v Malik and Bagri* [2005] BCSC 350.

<sup>23</sup> On the nature of jihadist terrorist organisations and their evolution from 2001 onwards, A. Vidaschi, *Da al-Qā'ida all'IS: il terrorismo internazionale si è fatto Stato?*, in *Rivista Trimestrale di Diritto Pubblico*, 2016, 41.

## 2. The “Present”: From the Reaction to the 9/11 Attacks to Bill C-51

### 2.1. The 2001 Anti-terrorism Act (ATA) and the Controversial Definition of “Terrorist Activity”

According to some concerns spread in the aftermath of 9/11, the hijackers had reached the United States from Canada.<sup>24</sup> Hence, in the Canadian context, a quick response not only to the new threat, but also to allegations of poor border security was perceived as a particularly urgent need. Additionally, like all other countries, Canada needed to comply with UN’s resolutions, urging states to criminalise international terrorism.<sup>25</sup>

Against this background, the first Canadian legislative reaction to the 9/11 attacks was the Anti-terrorism Act (ATA) 2001.<sup>26</sup> Introduced on October 15, 2001, as Bill C-36, this Act was assented on December 18, 2001. Therefore, the whole process took place and ended within a few months from the events in New York and Washington DC. Rather than a self-contained act, the ATA is a law amending other statutes, including the Criminal Code.<sup>27</sup> It is not limited to specific issues related to the fight against terrorism, but covers a wide range of national security matters. The “*omnibus*” nature of the ATA has been criticised by scholars, maintaining that legislating on so many aspects of counter-terrorism in a short time implied some of them were not debated in Parliament as thoroughly as they deserved.<sup>28</sup>

One of the outstanding features of the ATA is the (broad) definition of “terrorist activity”<sup>29</sup> it provided, which was missing from the Canadian Criminal Code until that moment. Not only does “terrorist activity” cover any act or omission, inside or outside Canada, falling within a series of offences punished by Canadian criminal law,<sup>30</sup> but it also includes conducts committed “in whole or in part for a political, religious or ideological purpose, objective or cause” as long as they aim at intimidating the public “with regard to its security, including its

<sup>24</sup> On suspects about the entry of terrorists from Canadian borders, see National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004) <<https://www.9-11commission.gov/report/>> accessed 10 January 2019. Due to these concerns, the US sought a common security perimeter with Canada. See K. Roach, *September 11: Consequences for Canada*, Toronto, 2003, 133.

<sup>25</sup> In particular, UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373. UN law is considered one of the most influential sources for Canadian approach to terrorism after 9/11. K. Roach, *Sources and Trends in Post 9/11 Anti-Terrorism Laws*, in L. Lazarus and B. Goold (eds.), *Human Rights and Security*, Oxford-Portland, 2007, 227; K. Roach (ed.), *The 9/11 Effect: Comparative Counter-Terrorism Law*, Cambridge, 2011, 362.

<sup>26</sup> *Anti-terrorism Act*, SC 2001, c 41. On the impact of this Act on the Canadian form of government, see P. Petrillo, *Forma di governo e legislazione anti-terrorismo in Canada. Spunti di riflessione comparata sul ruolo dei Parlamenti al tempo dell'emergenza permanente*, in T. Groppi (ed.), *Democrazia e terrorismo. Lezioni volterrane*, Napoli, 2006, 381.

<sup>27</sup> Specifically, a new Chapter dealing with terrorism was created.

<sup>28</sup> Force and Roach (n 8) 56. Nonetheless, they maintain that, at least, the ATA debate was not as partisan as the debate on Bill C-51 was.

<sup>29</sup> *Criminal Code*, RSC 1985, C-46, sec 83.01(1), as amended by the *Anti-terrorism Act*.

<sup>30</sup> For example, hijacking, bombing and, in general, offences under major international treaties dealing with terrorism and ratified by Canada.

economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act". The reference to "political, religious or ideological purpose" (so called motive clause) has been severely criticised by both Canadian scholars<sup>31</sup> and civil society groups.<sup>32</sup> The strongest critique raised by them is that the motive clause legitimates the state to label protests, dissent and strikes as acts of terrorism and punish them accordingly.<sup>33</sup> Nonetheless, in 2012 the Canadian Supreme Court, in the *Khawaja* decision,<sup>34</sup> upheld the constitutionality of such a disputed definition, maintaining that it does not violate freedom of expression. The main ground on which the Supreme Court based its ruling is that the ATA only punishes "serious forms of violence" as terrorist activities, and not "the legitimate expression of a political, religious or ideological thought".<sup>35</sup>

Besides a broad definition of "terrorist activity" and a series of terrorism-related offences drawing upon such definition,<sup>36</sup> the ATA contains further features that contributed to harshen Canadian approach to terrorism. At least five macro-areas of issues falling within the scope of the ATA can be detected: investigative measures; surveillance; hate crimes; provisions against the financing of terrorism; amendments to the use of secret information and the activity of intelligence services. A brief analysis of their key features is necessary.

First, the ATA enhanced investigative powers through the enactment of two new tools: investigative hearings and recognizance with conditions. Investigative hearings are aimed at facilitating information gathering. They consist of orders, issued by courts on request of a law enforcement officer and with prior consent of the Attorney General, compelling individuals to attend a hearing before a judge and answer any questions. Specifically, judges are empowered to order persons to

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<sup>31</sup> See, among others, R. Daniels, P. Macklem, K. Roach, *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, Toronto, 2001; A. Carver, *Parliamentary Attempts to Define Terrorism in Canada and Australia*, in 11 *Journal of Applied Security Research* 124 (2016).

<sup>32</sup> See, e.g., Canadian Journalists for Free Expression, Submission on Bill C-36 (Anti-terrorism Act) delivered to the House of Commons Standing Committee on Justice and Human Rights <[https://www.cjfe.org/cjfe\\_submission\\_on\\_bill\\_c\\_36\\_anti\\_terrorism\\_act\\_delivered\\_to\\_the\\_house\\_of\\_commons\\_standing\\_committee\\_on\\_justice\\_and\\_human\\_rights](https://www.cjfe.org/cjfe_submission_on_bill_c_36_anti_terrorism_act_delivered_to_the_house_of_commons_standing_committee_on_justice_and_human_rights)> accessed 10 January.

<sup>33</sup> Although recognising that this definition of "terrorist activities" may pose problems and is not completely satisfactory, some scholars noted that, at the time in which it was enacted, it was not dissimilar to the definition given by countries as the United Kingdom. See E.P. Mendes, *Between Crime and War: Terrorism, Democracy and the Constitution*, in E.P. Mendes et al. (eds.), *Between Crimes and War: Terrorism, Democracy and the Constitution*, Toronto, 2002, 250. For further criticism on the ATA, see T. Groppi, *Dopo l'11 settembre: la "via canadese" per conciliare sicurezza e diritti*, in *Quad. Cost.*, 2005, 594.

<sup>34</sup> *R v Khawaja*, 2012 SCC 69. See R. Diab, *R v Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing*, in 39 *Queen's Law Journal* 587 (2014).

<sup>35</sup> *R v Khawaja* (n 34) [82].

<sup>36</sup> Such as participating, facilitating and instructing terrorism. For an overview of such offences, R. Diab, *Sentencing of Terrorism Offences After 9/11: A Comparative Review of Early Case Law*, in C. Forcese and F. Crépau (eds.), *Terrorism, Law and Democracy: 10 Years After 9/11*, Canadian Institute for the Administration of Justice, 2012.

provide information over a terrorist offence, even if they are reluctant to do so, as long as attempts to obtain information through other means failed. Such information cannot be used against the person who provided it. The constitutionality of this new judicial power was challenged in 2004,<sup>37</sup> but the Supreme Court refused to declare it unconstitutional. Nonetheless, two dissenting opinions maintained that the provision allowing investigative hearings is unconstitutional, since it undermines the independence of the judiciary. Recognizance with condition is similar to UK control orders<sup>38</sup> and can be defined as courts' power to order a person to enter into a recognizance – meaning a conditional obligation, e.g. to wear an electronic monitoring device – if there is a reasonable suspicion that he might commit a terrorist offence. Such measures may even include preventive detention.

Second, surveillance powers were enhanced by the ATA. Before the enactment of this law, the use of electronic surveillance in investigations was considered as a last resort tool in Canadian criminal law. Differently, the ATA removed this last resort requirement and extended the wiretapping authorisation up to one year, allowing notification to the person under surveillance to be delayed up to three years after the use of his data. Furthermore, the use of DNA technology in relation to investigation and prosecution of terrorist offences was authorised.

Third, the ATA introduced some changes to the Criminal Code and to the Canadian Human Rights Act<sup>39</sup> as to hate crimes.<sup>40</sup> Specifically, it vested courts with the power of ordering the deletion of online hate speech and terrorist propaganda, if such material is hosted on a server that is located within the court's jurisdiction.

Fourth, in compliance with the requirements set by UNSC Resolution 1373/2001,<sup>41</sup> the ATA criminalised the financing of terrorism and increased the powers of a specific intelligence unit aimed at dealing with financial crime<sup>42</sup>.

Fifth, the use of intelligence information – i.e., secret material – and the activity of intelligence services were deeply reformed. These changes were enacted through amendments of a number of existing statutes.<sup>43</sup> On the one hand, the government was granted stronger assurances as to the confidentiality of its information and evidence. On the other hand, the Communication Security Establishment (CSE) – i.e. Canada's national cryptologic agency – was afforded

<sup>37</sup> *Re Section 83.28 of the Criminal Code*, 2004 SCC 42. See F. Iacobucci, *Canada's Responses to Terrorism*, in 15 *Review of Constitutional Studies* 187, 193 (2011).

<sup>38</sup> Control orders are restrictive measures imposed by the executive and introduced in the UK by the Prevention of Terrorism Act 2005. See C. Walker, *Blackstone's Guide to the Anti-terrorism Legislation*, Oxford, 2014, 35.

<sup>39</sup> *Canadian Human Rights Act* RSC 1985, c H-6.

<sup>40</sup> Specifically, the offence – punished by sec 430(4.1) of the Canadian Criminal Code – of mischief motivated by bias, prejudice or hate based on grounds such as religion, race, colour or origin.

<sup>41</sup> See n 25.

<sup>42</sup> Through an amendment of the *Proceeds of Crime (Money Laundering) Act*, SC 2000, c 17.

<sup>43</sup> Specifically, the *Canada Evidence Act*, the *Personal Information Protection and Electronic Documents Act*, the *Access to Information Act*, the *Privacy Act*, the *CSIS Act* and the *National Defence Act*. Moreover, the ATA transformed the *Official Secrets Act* into the *Security of Information Act*.



broader powers of intelligence gathering and sharing and was tasked with advisory functions in relation to the protection of critical infrastructures. Importantly, CSIS was not conferred new powers and scholars noted that prosecutions for terrorist offences tend not to be based on CSIS information as primary evidence, but they more often rely on police investigation drawing from CSIS intelligence.<sup>44</sup>

Ultimately, some of the ATA provisions – in particular, investigative hearings and preventive detention – were subject to a sunset clause and were due to expire in 2007. Nonetheless, in 2013 they were re-enacted,<sup>45</sup> thus confirming a common trend consisting of the repeated use of temporary provisions in order to “normalise” exceptional circumstances,<sup>46</sup> often opposed by academics.<sup>47</sup>

## ***2.2. The Overlap between Immigration Law and Counter-Terrorism Law: Special Advocates and Security Certificates***

The ATA was not the only Canadian reaction to the 9/11 attacks, since a mixed set of measures aimed at enhancing security were passed from 2001 onwards and one of their common features is the use of immigration law as an anti-terrorism tool.<sup>48</sup> Such overlap between immigration measures and counter-terrorism laws is common in the history of UK anti-terrorism as well.<sup>49</sup> The preference for immigration control tools in the fight against terrorism depends, among other things, on the strong powers that the executive is granted, combined with a low standard of proof required for their application and the possibility to resort to secret evidence.<sup>50</sup>

The outstanding point of intersection between immigration law and counter-terrorism measures in the Canadian legal system is represented by security certificates, which are regulated by the Immigration and Refugee Protection Act (IRPA) 2001.<sup>51</sup> The Minister of Immigration and Public Safety can authorise (through the signing of a “certificate”, hence the name) the arrest and detention of non-citizens with a view to deportation, if there are reasonable

<sup>44</sup> R. Diab, *Canada*, in K. Roach (ed.), *Comparative Counter-Terrorism Law* (n 25) 78.

<sup>45</sup> *Combating Terrorism Act* SC 2013, c 9. The same Act also created new terrorist offences, such as travelling for terrorist purposes.

<sup>46</sup> For a study and categorisation of “exceptional” measures and their use in times of threats to national security, A. Vedaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, Turin, 2007, 343. On the relationship between the “norm” and the “exception”, see D. Dyzenhaus, *The State of Emergency in Legal Theory*, in V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge, 2005, 65.

<sup>47</sup> On sunset clauses in anti-terrorism legislation, see A.E. Kouroutakis, *The Constitutional Value of Sunset Clauses. An Historical and Normative Analysis*, London-New York, 2017, 138; J. Ip, *Sunset Clauses and Antiterrorism Legislation*, in *Public Law* 74 (2013); J.E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, in 48 *Columbia Journal of Transnational Law* 442 (2010).

<sup>48</sup> Diab (n 44) 97; Forcese and Roach (n 8) 69.

<sup>49</sup> On the interface between immigration and anti-terrorism measures in the UK, K. Syrett, *The United Kingdom*, in Roach (ed.) (n 25) 167, 185.

<sup>50</sup> Diab (n 44) 97.

<sup>51</sup> *Immigration and Refugee Protection Act* 2001, SC 27.

grounds to believe that they represent “a danger to the security of Canada”.<sup>52</sup> A federal court has jurisdiction to review the certificate ruling whether (or not) the Minister had “reasonable grounds” to issue it. If the reasonableness of the certificate is upheld, the latter is turned into a deportation order. The court can decide on grounds that are only synthetically disclosed to the detainee, without any need to balance between the government’s interest in confidentiality due to national security reasons and the individual’s interest in transparency and procedural fairness.<sup>53</sup>

The regime of security certificate was ruled unconstitutional by the Canadian Supreme Court in the 2007 *Charkaoui* judgment.<sup>54</sup> The Court declared that no person can be deprived of liberty and security – as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms – if basic elements of fair hearing are not respected. According to the Court, a framework providing for hearings held *in absentia* of the detainee and of his counsel, relying on undisclosed evidence, is not fair. Therefore, a “substantial substitute”<sup>55</sup> of the full disclosure of evidence had to be found and the Court suggested a system of special advocates, allowing some transparency and openness, as mitigation of such overt violations of the Charter’s rights. Indeed, some years before, Canadian lower courts reviewing security certificates had refused to appoint special advocates in these proceedings.<sup>56</sup> Special advocates are security-cleared counsels to whom secret evidence is disclosed. As known, special advocates are tasked with representing the detainee’s interest in relation to such material. At the time of the *Charkaoui* judgment, special advocates were not a novelty in Canadian law, since they were already used in the oversight of CSIS’s activities.<sup>57</sup> As a consequence, in 2008 the Canadian Parliament amended the IRPA<sup>58</sup> and authorised security-cleared

<sup>52</sup> IRPA, s 34.

<sup>53</sup> K. Roach, *Secret Evidence and its Alternatives*, in A. Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, Heidelberg-New York-London, 2011, 184. The person is only given a summary of allegations against him and evidence is discussed in *in camera* hearings, i.e. in the absence of the detainee and his lawyer. See also C. Forcese, *Canada’s National Security ‘Complex’ – Assessing the Secrecy Rules*, in 15 *Choices* 3 (2009).

<sup>54</sup> *Charkaoui v Canada*, 2007 SCC 9. Indeed, the Court suspended the effect of the judgment for a year and did not concretely quashed security certificates at issue.

<sup>55</sup> *Ibid.* para 6.

<sup>56</sup> *Re Harkat*, 2004 FC 1716. See K. Roach, *Must We Trade Rights for Security – The Choice between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, in 27 *Cardozo Law Review* 2151, 2191 (2006).

<sup>57</sup> In particular, pursuant to the *Immigration Act*, RSC 1985, c I-2 (which was repealed by the IRPA) provided that the Security Intelligence Review Committee (SIRC) could review deportation orders grounded on national security reasons deriving from CSIS evidence. In this context, a special counsel was in charge of accessing the secret material on which the government relied and that was not disclosed to the target of deportation. See further D. Jenkins, *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, in 42 *Columbia Human Rights Law Review* 279, 299 (2011); M. Rankin, *The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness*, in 3 *Canadian Journal of Administrative Law and Practice* 173 (1990).

<sup>58</sup> *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, SC 2008, c 3.

lawyers to access secret material, challenging it on behalf of the detainee before the competent court during *in camera* hearings.<sup>59</sup> Notably, in Canada, security-cleared counsels were disclosed not only secret evidence, but also the whole government case file, contrary to what happened in other countries, such as the UK. However, as following paragraphs will show, Bill C-51 changed this rule.

In sum, the use of immigration law as a counter-terrorism tool is a recurring feature in the Canadian approach to terrorism and this trend emerges from other elements as well, such as citizenship law. In 2014 Bill C-24<sup>60</sup> was assented: it allowed the government to revoke Canadian citizenship from people convicted for terrorist crimes, as long as they had dual nationality.<sup>61</sup> After many objections by scholars and civil society,<sup>62</sup> in 2017 this provision was repealed.<sup>63</sup>

### 2.3. Torture and Extraordinary Renditions

The interplay between immigration law and counter-terrorism law in Canada also implied a lively debate on the use of torture. According to the IRPA, foreign people suspected of being a threat to national security cannot be expelled – for example, through security certificates – to a country in which they might be tortured.<sup>64</sup> Therefore, the IRPA confirms the general prohibition of *refoulement* – recognised as a *jus cogens* principle under international law – towards countries where the person may suffer torture or mistreatment. Nonetheless, Canadian judges, differently from courts of the European area,<sup>65</sup> did not always take a firm stance in favour of the absolute nature of this ban. Rather, in the *Suresh* case<sup>66</sup> the Supreme Court held that the risk that a person to be deported is subjected to torture in the country of destination has to be balanced with the danger that such individual may pose to Canadian security. In other words, national security may constitute an “exception” to the prohibition of *refoulement*, even in case of risk of torture. On the one hand, this decision of the Supreme Court has been –

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<sup>59</sup> D. Cole and S.I. Vladeck, *Comparative Advantages: Secret Evidence and ‘Cleared Counsel’ in the United States, the United Kingdom and Canada*, in D. Cole, F. Fabbrini, A. Vedaschi (eds.), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham-Northampton, 2013, 173, 178.

<sup>60</sup> *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, SC 2014, c 22. See C. Forcese, *A Tale of Two Citizenships: Citizenship Revocation for “Traitors and Terrorists”*, in 39 *Queen’s Law Journal* 551 (2014).

<sup>61</sup> Stripping citizenship as a counter-terrorism measure has been common in recent years. In the UK, the *Immigration Act 2014* even allowed the revocation of citizenship if naturalised British citizens not having double nationality commit terrorist crimes. Recently, Italy introduced a specific case of citizenship revocation as well, even if it only applies to naturalised dual nationals who are convicted on terrorism charges; therefore, it is most similar to repealed Canadian legislation. See Decree Law 113/2018, reforming several areas of Italian immigration and security law.

<sup>62</sup> Forcese and Roach (n 8) 512.

<sup>63</sup> *An Act to amend the Citizenship Act and make consequential amendments to another Act*, SC 2017, c 14.

<sup>64</sup> *IRPA*, sec 85.4(2).

<sup>65</sup> The most evident example is the European Court of Human Rights, which, since its first rulings, affirmed an absolute ban on torture.

<sup>66</sup> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

understandably – criticised by scholars, maintaining that the so-called *Suresh* exception is no longer tenable in a context in which courts and legislation have been prohibiting torture in absolute terms.<sup>67</sup> In fact, Canadian courts generally avoid to apply the exception, finding other grounds to cancel the security certificate or release the detainee on condition if they perceive that the risk of torture is concrete.<sup>68</sup>

The issue of torture in counter-terrorism measures appears to be much more complex if one considers the role of Canada in extraordinary renditions. This practice consists of the secret abduction of people suspected to have a link with terrorism in order to transfer them to a third country with very low – if not absent – human rights standards, where they are detained and interrogated.<sup>69</sup> Clearly, in such countries torture and degrading treatment are used as techniques of interrogation, commonly applied during *incommunicado* detention. These controversial operations are usually carried out by the US in cooperation with intelligence agencies of other democratic countries, having a strong interest in deporting the target outside of their own jurisdictions with a view to gathering as much information as possible, through the so-called enhanced interrogation techniques, without facing constraints posed by democratic constitutional guarantees.<sup>70</sup>

Canada was involved in some extraordinary rendition operations and the most known case is that of Maher Arar. He was a Canadian citizen born in Syria and in 2002, during a journey from Tunisia to Canada, he was stopped at passport controls in New York and transferred to Syria after facing enhanced interrogation. In Syria, he was subjected to torture in order to urge him to confess his alleged links with terrorist cells. He was released without any charge in January 2003. Mr. Arar brought proceedings before US courts, but his judiciary path, characterised by the instrumental use of state secrecy by the US government, deferentially confirmed by lower courts,<sup>71</sup> ended with a denial of *certiorari* when the case reached the US Supreme Court.<sup>72</sup>

<sup>67</sup> D. Jenkins, *Rethinking Suresh: Refoulement to Torture Under Canada's Charter of Rights and Freedoms*, in 47 *Alberta Law Review* 125 (2009).

<sup>68</sup> Diab (n 44) 100.

<sup>69</sup> See A. Vidaschi, *Extraordinary Renditions. A Practice Beyond Traditional Justice*, in E. Guild, D. Bigo, M. Gibney (eds.), *Extraordinary Renditions. Addressing the Challenges of Accountability*, London-New York, 2018, 89, 92.

<sup>70</sup> Two emblematic cases before US courts were *El-Masri* and *Jeppesen*. *Mohamed v Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1108 (9th Cir. 2009), *aff'd* 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 563 U.S. 1002(2011); *Mohamed v Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1108 (9th Cir. 2009), *aff'd* 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 563 U.S. 1002(2011). On US courts' deferential attitude in extraordinary rendition cases – resorting to the instrumental use of state secrecy to hide state officials' responsibilities – see extensively A. Vidaschi, *The Dark Side of Counter-Terrorism: Arcana Imperii and Salus Rei Publicae*, in 66 *American Journal of Comparative Law*, 2018.

<sup>71</sup> *Arar v Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

<sup>72</sup> *Arar v Ashcroft*, *cert. denied*, 560 U.S. 978 (2010).

In the meanwhile, Canadian authority investigated on the case, even appointing a public inquiry on the facts.<sup>73</sup> Investigations led to acknowledge Canadian officials' responsibility for not having prevented the transfer of a person in a country where torture is a real risk. Even worse, the inquiry found out that an embarrassing mistake had been committed as Mr. Arar had no links with terrorism.<sup>74</sup> Therefore, the Canadian government publicly apologised to Mr. Arar and his family for wrongdoings suffered and granted him compensation of approximately 10 million dollars.<sup>75</sup>

Canada was also involved in the renditions of Abdullah Almalki, Ahmed El-Maati and Muayyed Nureddin. All of them were illegally transferred and tortured in Middle East prisons. The so-called Iacobucci Commission – led by the former justice of the Canadian Supreme Court, Frank Iacobucci, and appointed to investigate on these operations – disclosed Canada's responsibility.<sup>76</sup> While the lawsuit they brought remained stuck in court for years, in 2017 the government apologised to them and granted compensation. In the same year, the government also paid compensation and presented public apologies to Omar Khadr for its role in the man's detention and torture at Guantánamo Bay.<sup>77</sup>

#### **2.4. Bill C-51: Main Features and Human Rights Concerns**

In 2015, under the Harper government, the Parliament passed Bill C-51. At that time, UN Resolution 2178/2014<sup>78</sup> had just come into effect, recognising terrorist foreign fighters as a threat to the international peace. Additionally, the "lone wolf" 2014 attacks in Quebec and Ottawa, as well as the events of Paris and Copenhagen – whose echoes Canada was suffering – had just taken place in January and February 2015. Moreover, Al-Shabaab, a Somali terrorist group linked to Al-

<sup>73</sup> Notably, such inquiry entailed the need to carefully balance the confidentiality of reviewed material with the essential aim of the Commission's activity, i.e. transparency and disclosure to the public opinion. See K. Roach, *Review and Oversight of National Security Activities and Some Reflection on Canada's Arar Inquiry*, in 29 *Cardozo Law Review* 53 (2007).

<sup>74</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report on the Events Relating to Maher Arar: Analysis and Recommendations* (2006) <<http://publications.gc.ca/site/eng/295791/publication.html>> accessed 27 July 2018. On mistakes made by the CSIS in the Arar case, C. Forcese, *National Security Law: Canadian Practice in International Perspective*, Toronto, 2008, 477.

<sup>75</sup> Public apologies in this context appear to be a common trend, if one considers that very recently, in May 2018, the British government apologised to Mr. Belhaj, also a victim of an extraordinary rendition in which the UK had responsibility. On the British government's involvement in illegal abductions and torture, see Parliamentary Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: 2001-2010* (28 June 2018 HC 1113); id., *Detainee Mistreatment and Rendition: Current Issues* (28 June 2018 HC 1114).

<sup>76</sup> Frank Iacobucci QC, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin* (2008) <[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal\\_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm)> accessed 10 January 2019.

<sup>77</sup> There were no commissions of inquiry investigating on the Khadr case, but the Canadian Supreme Court ruled in his favour, finding that his basic rights had been violated. *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44. On the Khadr case, see M. Duffy, *Detention of Terrorism Suspects: Political Discourses and Fragmented Practices*, Oxford-Portland, 2018, 256.

<sup>78</sup> UNSC Res 2178 (24 September 2014) UNDOC S/RES/2178.

Qaeda, posed various threats to Canadian shopping centres, spreading fear among civil society that was immediately mirrored at the institutional level. This situation, combined with a burning political situation in Canada,<sup>79</sup> accelerated the parliamentary stages and the Act received royal assent on June 18, 2015, as the Anti-terrorism Act 2015.<sup>80</sup> It was immediately branded as a “restructuring”<sup>81</sup> act of Canadian national security law.

Bill C-51 amended a number of acts, including the Criminal Code, the ATA and the IRPA. Like the ATA, Bill C-51 is an “*omnibus*” piece of legislation, covering several areas of counter-terrorism law. They can be enumerated as follows: information sharing; air travel and no-fly lists; amendments to the Criminal Code as to terrorist offences; disruption activities; and amendments to the security certificate regime.

It is worth analysing the most important innovations in relation to each of these aspects, in order to take stock of how they influenced the Canadian approach to the challenging balance between rights and security.

First, with regard to information sharing, the main change brought by Bill C-51 is the enactment of the Security of Canada Information Sharing Act (SoCIS Act), which enables multi-institutional information sharing. Although governed by an apparently well-balanced set of principles,<sup>82</sup> the new information sharing system is rather complex and puzzled. Above all, it allows Canadian authorities to share information about “activities that undermine the security of Canada”. This is a new and quite vague concept, potentially including any activities undermining life and security of any Canadian citizen in the world. In this way, “security” becomes an “umbrella” notion, implying the high risk that any kind of information is shared, with negative repercussions’ on individuals’ privacy. From an operative point of view, the SoCIS Act empowers more than 100 government institutions to disclose information, gathered through a very broad set of activities, including “detection, identification, analysis, prevention, investigation or disruption”,<sup>83</sup> to 17 federal institutions. The deriving framework lacks precision and foreseeability and, according to commentators,<sup>84</sup> does not settle the lack of transparency proper of the previous regime.<sup>85</sup>

Second, Bill C-51 enacts the Secure Air Travel Act, which enables the Minister of Public Safety and Emergency Preparedness to establish a list – to be

<sup>79</sup> In his election rally, Harper’s campaign strongly relied on the fight against violent jihadist extremism.

<sup>80</sup> *Anti-terrorism Act*, SC 2015, c 20. This Essay will refer to it always as “Bill C-51” in order to avoid confusion with the 2001 Anti-terrorism Act.

<sup>81</sup> C. Forcese, K. Roach, Bill C-51: The Good, the Bad and... the Truly Ugly, *The Walrus* (13 February 2015) <<http://www.sfu.ca/~palys/Forcese&Kent-BillC-51-TheGoodBad&TrulyUgly.pdf>> accessed 10 January 2019.

<sup>82</sup> For example, effective and responsible sharing; regular feedback on the usefulness of share information; disclosure of information only to those within an institution exercising jurisdiction or carrying out activities and responsibilities in relation to the security of Canada.

<sup>83</sup> *SoCIS Act*, sec 2.

<sup>84</sup> Forcese and Roach (n 8) 157.

<sup>85</sup> As underlined by the above-mentioned reports on extraordinary renditions, such lack of transparency led to misconduct and responsibilities of government’s officials.

reviewed every 90 days – of persons suspected to threaten transportation security or to travel by air for the specific purpose of committing a terrorist offence or engage in terrorist activities. These lists are laid down on the basis of secret information and persons included therein can be denied transportation. This decision can be challenged before the Minister of Public Safety. The Minister's verdict can be appealed before federal courts. However, in this procedure, usual rules of evidence do not apply, since the court can decide on the basis of hearsay evidence (i.e. evidence that is generally not admissible in a court of law).<sup>86</sup>

Third, and very importantly, Bill C-51 made a number of amendments to the Criminal Code. Being impossible to analyse all of them specifically,<sup>87</sup> the following lines will focus on the so-called glorification of terrorism. This choice is due to the broad comparative analysis that can be made in this regard. Starting from the Canadian context, Bill C-51 created a new offence consisting of advocating or promoting the commission of terrorist offences “in general”.<sup>88</sup> The required *mens rea* is that the person knows that any of these offences will be committed or is reckless as to whether the offence will be committed. Additionally, it is possible to obtain a court warrant – without any need for any criminal charge – for the seizure of publications considered as “terrorist propaganda” or their deletion from computer systems.<sup>89</sup> Terrorist propaganda is defined as “any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general – other than an offence under s. 83.221(1) [glorification of terrorism] – or counsels the commission of a terrorism offence”.<sup>90</sup> Law enforcement agencies may also place under electronic surveillance activities suspected of consisting of terrorist advocacy or promotion as well as of dissemination of terrorist propaganda. Thus, although Bill C-51 is not a surveillance law, it has strong surveillance implications, since this provision opens the door to invasive controls, for example, on metadata generated by online searches. Shifting the analysis to a comparative perspective, in framing such offence, the Canadian legislator followed a trend that, after the outbreak of the terrorist threat, has been very common in Europe and Australia.<sup>91</sup> As a matter of fact, fear for infiltration of “radicalised messages” – enhanced, in recent years, by

<sup>86</sup> *Secure Air Travel Act*, sec 16(6)(e).

<sup>87</sup> But see further J. Bécharde et al, *Legislative Summary of Bill C-51*, Parliament of Canada, Library of Parliament Research Publications (19 June 2015) <[https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=c51&Parl=41&Ses=2&Language=E#a5](https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c51&Parl=41&Ses=2&Language=E#a5)> accessed 10 January 2019. Three main areas can be detected: provisions on the glorification of terrorism, recognizance with conditions and preventive arrest, measures for the security of witnesses.

<sup>88</sup> *Criminal Code*, sec 83.221.

<sup>89</sup> *Ibid.*, sec 83.222.

<sup>90</sup> *Criminal Code*, sec 83.222.

<sup>91</sup> Where “advocacy of terrorism” is punished by sec 80.2C of the Criminal Code as amended by Counter-Terrorism Legislation Amendment (Foreign Fighters) Act, 2014 No 116. Nevertheless, “advocacy” in Australia is interpreted in a less overbroad way than “glorification” in the UK. K. Roach and C. Forcese, *Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence* (February 3, 2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2560006](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560006)> accessed 10 January 2019.

the development of technology – led lawmakers to enact pieces of legislation containing very worrying features in relation to the constitutionally protected right to free speech. This tendency against freedom of expression even increased after 2014–15, when investigations on terrorist attacks in Europe shed light on the fact that some of the perpetrators were members of online networks of extremists and organised their action on the web. Consequently, over the years, legislators often criminalised speech with very broadly and vaguely-drafted criminal law provisions, not requiring evidence of a serious risk to harm national security. While the UK is one of the first examples of criminal repression of mere glorification,<sup>92</sup> similar provisions were adopted in France<sup>93</sup> and Spanish courts interpreted the offence of *enaltecimiento* (literally translated as “exaltation” or “glorification”) of terrorism as requiring no causal link between words and (at least a risk of) commission of a terrorist offence.<sup>94</sup> Undoubtedly, the Canadian provision criminalising advocacy or promotion of terrorist offences follows this trend, insofar as it does not require evidence of a causal link,<sup>95</sup> is overbroad and does not include any good faith defence.<sup>96</sup> Although the Canadian glorification offence faced constitutional challenge before the Superior Court of Ontario,<sup>97</sup> the case has not been heard yet.

Fourth, Bill C-51 amended the CSIS Act in order to enhance disruption activities. Quite controversially, the law authorises the CSIS to engage in disruption – provided it previously obtained a judicial warrant from the Federal Court – even when such operations violate the Charter or other Canadian laws.<sup>98</sup> This provision raised major criticism, as the core function of judicial warrants should be to *prevent*, and not to *authorise*, violations of the Charter.<sup>99</sup> In addition, there might be no coincidence between what the court authorises and what the

<sup>92</sup> Terrorism Act 2006. C. Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation*, Oxford, 2014, 35.

<sup>93</sup> *Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme*.

<sup>94</sup> On *enaltecimiento* in Spain, M. Llobet-Anglí, A. Masferrer, *Counter-terrorism, emergencies and national laws*, in G. Lennon, C. Walker (eds.), *Routledge Handbook on Law and Terrorism*, London-New York, 2015, 38, 44.

<sup>95</sup> As happens, for example, in Italy, where the Constitutional Court, as well as the Supreme Court of Cassation, remarked that the offence punishing “apology of terrorism” (art. 414.3 of the Italian Criminal Code) can be applied only if there is demonstrated link between the manifestation of thought and the actual risk that an act endangering national security takes place. See, among recent judgments, Corte di Cassazione, sez. I pen, sent. 1-12-2015, n. 47489.

<sup>96</sup> D. Schneidermann, *What Lessons Have We Learned about Speech in the Aftermath of the Paris Attacks?*, in E.M. Iacobucci and S.J. Toope (eds.), *After the Paris Attacks. Responses in Canada, Europe and around the Globe*, Toronto, 2015, 159, 160.

<sup>97</sup> See J. Barber, *Canada’s Anti-terror Legislation Faces Legal Challenge by Free Speech Advocates*, *The Guardian* (21 July 2015) <<https://www.theguardian.com/world/2015/jul/21/canada-anti-terror-lawsuit-bill-c51>> accessed 10 January 2019.

<sup>98</sup> *CSIS Act*, sec 12.1(3).

<sup>99</sup> C. Forcese and K. Roach, *Bill C-51 Background #2: The Canadian Security Intelligence Service’s Proposed Power to “Reduce” Security Threats through Conduct that May Violate the Law and the Charter* (12 February 2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2564272](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564272)> accessed 10 January 2019.



CSIS concretely does. It is also necessary to remind that another anti-terrorism law of 2015, Bill C-44,<sup>100</sup> assented a few months before Bill C-51, had reformed some aspects related to CSIS. For example, it granted CSIS the power to collect information abroad and, in such context, it may even violate the Charter, as well as the foreign state's law. It had also reduced the transparency of CSIS's activity by forbidding the disclosure of identity of CSIS's officials (except in some specific cases). Therefore, it could be said that Bill C-44, albeit it is not as sweeping as Bill C-51, paved the way for it. This is also demonstrated by the short lapse of time between the entry into force of the two acts.

Fifth, the security certificate regime was amended through changes to the *IRPA*. On the one hand, as already hinted above,<sup>101</sup> Bill C-51 eliminated the possibility for the special advocate to access the entire file of the government. Only pieces of evidence that are relevant to challenge the removal order can be revealed. Neither can the whole file be disclosed to the judge. On the other hand, the new law changed the appeal procedure, making it easier for the government, due to an extension of the grounds of appeal on which only the Minister can rely. In doing so, Bill C-51 eliminated some of the “comparative advantages” that the Canadian special advocate regime presented in respect of other common law countries relying on this mechanism. From a comparative perspective, the Canadian approach to secret evidence is getting very close to that of the United Kingdom, where special advocates and the so-called closed material procedure are used in a wide set of proceedings and with very few guarantees of fairness.<sup>102</sup> The circulation of the special advocate system deserves particular attention, considered through the “lenses” of comparative law scholars. Specifically, it can be regarded as an example of a “reverse” trend, in which the less right-oriented model (the UK) influenced the originally more protective one (Canada).

### ***2.5. The Exchange of PNR Data: Potential Effects of ECJ's Opinion 1/15 on EU-Canada Relations***

In addressing the Canadian approach to security, one cannot omit to consider a recent Opinion of the European Court of Justice (ECJ), potentially impacting on EU-Canada relations. On the one side, the commercial and strategic perspective is affected. On the other side, “global” standards of human rights protection, to be balanced with security needs, are emerging.

On July 26, 2017, the Grand Chamber of the ECJ issued an Opinion declaring some provisions of the draft agreement for the exchange of PNR (Passenger Name Record) data between Canada and the EU incompatible with the Charter of Fundamental Rights of the European Union (hereinafter, the

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<sup>100</sup> *An Act to Amend the Canadian Security Intelligence Service Act and other Acts*, SC 2015, c 9.

<sup>101</sup> See paras 2.2 and 2.4.

<sup>102</sup> On the special advocates system in the UK, see A. Tomkins, *Justice and Security in the United Kingdom*, in 47 *Israel Law Review* 305 (2014).

Charter).<sup>103</sup> PNR data is information concerning passenger's identification, travel details, preferences of different kinds (food, means of payment etc.).

Whilst before 9/11 PNR data used to be collected only for commercial purposes and then immediately deleted, after 9/11 many countries passed laws allowing public authorities to access, retain and use it in order to prevent terrorism. The US was the first to do so,<sup>104</sup> but Canada did the same very soon. In particular, a provision of the ATA 2001, discussed above, introduced the PAXIS system, i.e. automated analysis of data received from air carriers. PAXIS is able to perform risk assessment over such data and, if potential threats are detected, they are communicated to the Canada Border Service Agency.<sup>105</sup>

Against this background, the European Union had to reach agreements with countries imposing the collection and analysis of PNR for criminal prevention purposes, as the US and Canada. As a matter of fact, also air carriers flying from the EU to these countries had to let domestic authorities access PNR data of their passengers. With a view to avoiding that these practices violated EU law guarantees on privacy and data protection, the EU had to enter into international agreements – based on a Commission adequacy decision<sup>106</sup> – with such countries in order to regulate the matter.

The first EU-Canada agreement was signed in 2005, entered into force in 2006 and was in place until 2009, when it expired and renegotiations for a new one opened. This first deal presented some flaws in terms of human rights.<sup>107</sup> However, it was never challenged before the ECJ through applicable procedures. In 2014 renegotiations brought to a new text, which was instead submitted to the ECJ by the European Parliament (EP) according to Article 218 TFEU procedure.<sup>108</sup> The EP raised doubts on its compatibility with some provisions of the Charter, in particular Articles 7 (right to privacy), 8 (right to data protection), 52 (principle of proportionality) and asked the ECJ to rule on the issue.

<sup>103</sup> ECJ, Opinion 1/16, July 26, 2017. For an analysis, A. Vedaschi, *The European Court of Justice on the EU-Canada Passenger Name Record Agreement: ECJ, 26 July 2017, Opinion 1/15*, in 14 *European Constitutional Law Review* 410 (2018).

<sup>104</sup> US Aviation and Transportation Security Act 2001, Pub L 107-71.

<sup>105</sup> A. Vedaschi, G. Marino Noberasco, *From DRD to PNR: Looking for a New Balance between Privacy and Security*, in D. Cole, F. Fabbrini, S. Schulhofer (eds.), *Surveillance, Privacy and Transatlantic Relations*, Oxford-Portland, 2017, 67, 75.

<sup>106</sup> According to art 25 of the old Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data), recently replaced by art 45 of the General Data Protection regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC), the EU may transfer data to third countries only if such country ensures an adequate level of protection. Adequacy must be assessed by a Commission decision taking into consideration various factors.

<sup>107</sup> For example, complex administrative procedures to file complaints, no mention of the possibility to rectify data, quite vague references to the independence of oversight bodies.

<sup>108</sup> According to which the EP, before ratifying an international agreement between the EU and third countries and determining its definitive entry into force, can ask the ECJ an opinion on the text's compatibility with EU law (specifically, the Treaties and acts having the same legal value, such as the Charter).

Without going into the details of the ECJ's Opinion,<sup>109</sup> it is enough to say that, although limitations to privacy and data protection were necessary to achieve a legitimate objective (protecting public security), the Court found some of them not proportional to the aim and, consequently, in breach of EU law. In its decision, the Court set the balance between rights and security in a particularly refined and careful way. Notably, the main practical effect of a “negative” opinion of the ECJ – as in this case – on a draft international agreement between the EU and third countries is that the text cannot enter into force in its current form.

There are two major implications – interrelated between them – for EU-Canada relations. First, EU and Canadian institutions have now to renegotiate the agreement<sup>110</sup> and, until that moment, despite its expiry, the old agreement will continue to apply. Nevertheless, stages of the renegotiation process are progressing slowly, and a new version of the agreement has not been signed yet.<sup>111</sup> This delay is quite worrying, because it implies that data of passengers travelling from the EU to Canada are managed according to an old, not updated framework. Moreover, it could hide substantial divergences on the political scene. Second, with its Opinion 1/15, the ECJ *de facto* imposed that, when EU and Canadian institutions renegotiate the agreement, they will have to comply with EU law standards in relation to privacy and data protection and their limits. In this way, the Court indirectly made an extra-jurisdictional extension of EU law, in particular of the Charter. This is significant for EU-Canada relations. On the one hand, the EU is trying to establish a leadership at the global level in terms of data protection and its balance with security. On the other hand, this attempt may have strong political repercussions, insofar as a third country – Canada – may feel unduly and unreasonably compelled to apply standards coming from outside its own legal and jurisdictional framework. At any event, the ECJ's effort in establishing such a “global” set of standards on privacy and data protection appears to be commendable, and it will perhaps play a role in the achievement of a better balance between rights and security, even on a global scale.<sup>112</sup>

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<sup>109</sup> On which see extensively A. Vidaschi, *Privacy and Data Protection versus National Security in Transnational Flights: The EU-Canada PNR Agreement*, in 8 *International Data Privacy Law* 124 (2018).

<sup>110</sup> European Commission, Recommendation for a Council Decision authorising the opening of negotiations on an Agreement between the European Union and Canada for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime, COM(2017) 605 final. Indeed, they could also decide not to renegotiate any agreement, but this would prove unfeasible under the perspective of economic and commercial relations.

<sup>111</sup> As the Article 29 Working Party recently remarked in a recent letter to the Commission (April 11, 2018) <[http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc\\_id=51023](http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=51023)> accessed 10 January 2019.

<sup>112</sup> See, against the “creative” role of courts, O. Pfersmann, *Contre le néo-réalisme juridique. Pour un débat sur l'interprétation*, in *Revue française de droit constitutionnel* 790 (2002).

### 3. The “Future”: Bill C-59

#### 3.1. *Bill C-59: Political Context, Parliamentary Stages and Main Features*

As said in Section 2 of this Essay, Bill C-51 presents a number of flaws in terms of human rights that make it quite security-oriented, to the detriment of individual rights. Due also to vigorous opposition by civil society groups, engaging in strong lobbying activity,<sup>113</sup> Bill C-59, aimed at amending relevant parts of Bill C-51, was introduced in the House of Commons on June 20, 2017.<sup>114</sup> After first reading, the Bill was referred to the Standing Committee on Public Safety and National Security, which reported it with some amendments. Then, after second reading in the House of Commons, it was introduced in the Senate on June 20, 2018. When the Senate finished second reading, it was referred to the Standing Senate Committee on National Security and Defence on December 11, 2018. Therefore, while this Essay is being written, Bill C-59 is not yet law; nonetheless, it may represent the legislative framework of the (potentially, near) future in relation to Canadian national security law and tries to address some of Bill C-51’s drawbacks. Hence, it deserves analysis, with specific focus on the way in which it modifies Bill C-51’s most worrying provisions.

Before examining Bill 59’s main features, it is important to remark that it was introduced in a political context that is significantly different from Bill C-51’s background. As a matter of fact, in the elections held in October 2015 – only a few months after the enactment of Bill C-51 – the Liberal Party won the majority of seats in Parliament and its leader, Justin Trudeau, who is the son of Pierre Trudeau,<sup>115</sup> the Prime Minister who had to deal with the October crisis, formed a new government, replacing the conservative Harper Cabinet that had sponsored Bill C-51. After the Trudeau government took office, the terrorist threat continued to be present in Canada,<sup>116</sup> both in terms of perpetrated attacks<sup>117</sup> and spread of radical ideas leaning towards extremism and, in many cases, bringing to the phenomenon of foreign fighters.<sup>118</sup> This was perceived as evidence of Bill C-51

<sup>113</sup> J. Murphy, Canadian Campaigners to Demand Public Debate on Controversial Anti-Terror Law, *The Guardian* (13 January 2016) <<https://www.theguardian.com/world/2016/jan/13/canada-anti-terror-law-public-consultation-campaign>> accessed 10 January 2019.

<sup>114</sup> From September 8, 2016 to December 15, 2016, a public consultation was held on national security matters. See relevant documents and reports <<https://www.canada.ca/en/services/defence/nationalsecurity/consultation-national-security.html>> accessed 10 January 2019.

<sup>115</sup> See para 1.1.

<sup>116</sup> As showed by Government of Canada, Department of Public Safety and Emergency Preparedness, *2017 Public Report on the Terrorist Threat to Canada* <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblc-rprt-trrrst-thrt-cnd-2017/index-en.aspx>> accessed 10 January 2019.

<sup>117</sup> The Edmonton events are emblematic.

<sup>118</sup> For a study on the phenomenon of foreign fighters in Canada, CSIS, *The Foreign Fighters Phenomenon and Related Security Trends in the Middle East* (January 2016) <<https://www.canada.ca/content/dam/isis-scrs/documents/publications/20160129-en.pdf>> accessed 10 January 2019.

“failure”. As a result, the need to modernise and enhance some of its features, trying to “fix” its negative issues, turned out.

Bill C-59, divided into several Parts and sharing the “omnibus” nature of *ATA* and Bill C-51, addresses three key macro-areas: enhanced oversight mechanisms over the activities of security agencies, in order to ensure better accountability; changes to the no-fly list regime; and amendments to the Criminal Code as modified by Bill C-51. Ultimately, it also contains a clause, in Part 9, providing for periodic review of the law starting six years after its entry into force.

Provisions dealing with the first set of issues, to which Parts 1-5 of Bill C-59 are dedicated, concern both oversight (performed over ongoing activities and during preparatory stages) and review (*ex post* scrutiny over what has been done). With regard to review, the Bill replaces SIRC with the National Security and Intelligence Review Agency (NSIRA), which have the power to review not only CSIS’s activities, but also what is carried out by CSE and by the RCMP. NSIRA also have investigative powers over complaints made against these bodies. Moreover, CSIS’s disruption activities, which represented one of the most debatable issues of Bill C-51, are subjected to detailed reporting requirements. In relation to oversight, Bill C-59 sets up an Intelligence Commissioner, tasked with approving authorisations, amendments and determinations of CSIS and CSE. More generally on the issue of accountability, Bill C-59 lists clarity and compliance as guiding principles for the activities of CSE, whose mandate is also made much more specific through detailed provisions. Importantly, in November 2017 – thus, a few months after Bill-59’s presentation in Parliament – another law, Bill C-22,<sup>119</sup> was passed, establishing a Parliamentary National Security Oversight Committee. Therefore, an effort towards improved oversight, both through parliamentary and independent administrative bodies, emerges patently. Heading back to Bill C-59’s approach to accountability, it tries to guarantee it also by amending Bill C-51’s information sharing regime. In particular, information is no longer “shared”, but it is “disclosed” – with explicit reference to necessary respect for privacy rights – and must be supported by statements on its reliability and methods through which it has been obtained.

The second set of provisions amended by Bill C-59 relates to the no-fly list regime. On the one hand, there is the possibility to use more advanced tools – such as biometric information – in order to identify people to be subscribed to the lists. The use of techniques that are more sophisticated than the old ones reduces the risks of error in identifying individuals. On the other hand, some improvements to the mechanism to challenge the inclusion in the lists can be detected. Specifically, Bill C-59 reverses the presumption – embodied in Bill C-51 – of appeal’s denial when there is no reply to a lodged application. It also extends the period available to individuals to file complaints.

The third macro-area addressed by Bill C-59 is criminal law. As said before, one of the most troublesome criminal law features introduced by Bill C-51 is the provision punishing advocacy or promotion of “terrorism offences in general”, due

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<sup>119</sup> *An Act to Establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts* 2017, c 15.

to its overbroad nature, potentially encompassing messages that do not even imply a mere risk of convincing others to commit terrorist acts. Bill C-59 – in addition to some further changes to the Criminal Code<sup>120</sup> – repeals this provision and replaces it with the much narrower and less vague offence of “counselling” others to commit terrorism offences. Counselling automatically implies a much higher standard of evidence, since prosecutors have to prove the perpetrator’s intent to urge the listener to engage in terrorist activities.<sup>121</sup>

### **3.2. Bill C-59: A Real Solution to Bill C-51’s Drawbacks?**

As remarked, Bill C-59 is the result of a changed political situation – the shift from a Conservative to a Liberal government – as well as of strong protests by the civil society against Bill C-51 and its harsh provisions. Yet to what extent does Bill C-59 represent a substantial improvement of the 2015 regime? Undoubtedly, as observed in the previous paragraph, the 2017 Bill shows, at least in a theoretical view, an evident attempt to improve accountability by providing both stronger oversight and stricter review mechanisms. Hence, Bill C-59 is a remarkable and praiseworthy effort by the Canadian legislator to better frame the balance between rights and security. However, there are still some “grey areas” that may need refinement, as early comments to this draft law recently underlined.<sup>122</sup>

First, the paragraph above showed that Bill C-59 tried to improve accountability and to reduce the gap between the (very extensive) powers of security agencies and the (quite weak) impact of bodies tasked with oversight and review of their activities.<sup>123</sup> Undoubtedly, it made some progress to this end. Nonetheless, some scholars<sup>124</sup> argued that security services – CSE in particular – keep being vested with intrusive powers, which are not outweighed by oversight and review mechanisms. Specifically, reference is to CSE’s actions consisting of “acquiring, using, analysing, retaining or disclosing publicly available information”.<sup>125</sup> Such collection power may result in “incidental” information

<sup>120</sup> For example, the preventive arrest and investigative hearing regimes are repealed.

<sup>121</sup> As held by extensive case law dealing with the general offence of “counselling”. See, among others, *R v Hamilton* [2005] 2 SCR 432. K. Roach, *Counselling Murder and the Problems Presented by Hamilton*, in 51 *Criminal Law Quarterly* 265 (2006). On the differences between counselling and advocacy, see also Canadian Bar Association, *Bill C-59 – National Security Act, 2017* (January 2018) <<https://www.cba.org/CMSPages/GetFile.aspx?guid=af8ac20b-0d2a-4249-a743-0ba351012c54>> accessed 10 January 2019.

<sup>122</sup> Since Bill C-59’s introduction in the House of Commons, scholars have talked about its “roses and thorns”. See C. Forcese, K. Roach, *The Roses and the Thorns of Canada’s New National Security Bill*, *Macleans*, 20 June 2017 <<https://www.macleans.ca/politics/ottawa/the-roses-and-thorns-of-canadas-new-national-security-bill/>> accessed 10 January 2019.

<sup>123</sup> *Ibid.*

<sup>124</sup> See S. Newark, ‘C-59: Building on C-51 Towards a Modern Canadian National Security Regime’, Macdonald Laurier Institute Publication (October 2017) <[https://macdonaldlaurier.ca/files/pdf/MLICommentaryNewark1017F\\_Web.pdf](https://macdonaldlaurier.ca/files/pdf/MLICommentaryNewark1017F_Web.pdf)> accessed 27 July 2018.

<sup>125</sup> Bill C-59, sec 24. See also C. Parsons et al., *Analysis of the Communication Security Establishment Act and Related Provisions of Bill C-59 (An Act Respecting National Security Matters)*, First Reading (December 18, 2017) (December 2018) <<https://citizenlab.ca/wp->

gathering activity, meaning the possibility to obtain and share information on people who are not targeted by a specific surveillance measure. If this provision is interpreted in this way, the Canadian approach to surveillance might get alarmingly close to the one of the US, where the “incidental overhear rule” has become an established doctrine among courts.<sup>126</sup> In the US, incidental overhear means that persons in contact with the target of surveillance are intercepted as well and enjoy no better guarantees than the target himself does. For example, in the US context, if the target of surveillance is a foreigner, thus not entitled to Fourth Amendment protection, his interlocutor will not be recognised Fourth Amendment rights, even though he is a US citizen. Similarly, in Canada, the “incidental” target, although not being totally stripped of Charter rights, would be subject to diminished protection without being the object of a specific surveillance measure.

A second debatable point is the fact that Bill C-59 does little to improve disruption regime designed by Bill C-51. In particular, CSIS’s powers in this regard are not reduced. The only improvement one can detect is that the draft law explicitly provides for consideration of privacy impact in framing such measures.<sup>127</sup> Nonetheless, opponents argued that this additional guarantee will not be effective as long as CSIS’s power to engage in actions the violate Charter rights is not overturned.<sup>128</sup> And Bill C-59 does nothing in this regard, since it still enables CSIS to infringe the Charter, even though under certain conditions.

Still on the activity of security services – and this is a third criticality of Bill C-59 – change of terminology from information “sharing” to information “disclosure” has been perceived as a merely “symbolic”<sup>129</sup> amendment.

A fourth weakness<sup>130</sup> is that Bill C-51’s no-fly list rules – and concerns they pose in terms of fundamental rights – are not substantively changed. Bill C-59 only addressed some secondary issues of the topic, without going into the core problems connected to no-fly lists. In other words, focusing on the mechanism of identification and on the presumption of appeal’s denial, Bill C-51 bypasses the most troublesome feature of no-fly listing in Canada, i.e. secrecy of the information on which lists are based. Such material cannot be disclosed to people included in the no-fly list, even when they challenge the Minister’s decision to enter their name. Actually, no special advocate system is provided in such circumstances, and the whole process continues to be characterised by lack of transparency.

These are just some of the points that raised criticism against Bill C-59.<sup>131</sup> The only aspect that seemed to receive quite a high rate of consensus is the choice

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content/uploads/2017/12/C-59-Analysis-1.0.pdf> accessed 10 January 2019 (criticising the broad definition of “publicly available information”).

<sup>126</sup> E. Goitein, *Another Bite Out of Katz: Foreign Intelligence Surveillance and the Incidental Overhear Doctrine*, in *55 American Criminal Law Review* 105 (2017).

<sup>127</sup> Bill C-59, sec 12.

<sup>128</sup> Canadian Bar Association (n 121).

<sup>129</sup> Newark (n 124).

<sup>130</sup> Identified, among others, by the Canadian Civil Liberties Association, ‘Ten Things You Need to Know About Bill C-59’ (12 September 2017) <<https://ccla.org/ten-things-need-know-bill-c-59/>> accessed 10 January 2019.

<sup>131</sup> For a more in-depth analysis, Canadian Bar Association (n 121).

to replace the “advocacy” with the “counselling” offence. This amendment may allay concerns related to freedom of expression. In general, as commentators noted, this Bill is “far from perfect”.<sup>132</sup> Nevertheless, it may represent a remarkable effort towards a better way of weighing up rights with security.

#### 4. Conclusion

This Essay has demonstrated that the Canadian approach to national security matters has varied as to its features and intensity according to factual and political circumstances.

Section 1 has shown a dichotomy between the (over)reaction to the 1970 “October crisis” and the (weak) response to the 1982 Air India bombing. In the former case, the invocation of the WMA and the use of military force was too strong a reaction and had to be scaled down. In the latter situation, instead, there was indifference and inaction, although it represents one of the major air attacks before the one to the Twin Towers and the World Trade Center.

Perhaps it was exactly the lack of a compromise between a disproportionate action and an excessively negligent attitude that has caused the absence, in the Canadian legal context, of a well-structured, reliable and abiding legislative background to fight terrorism from 2001 onwards. More specifically, had Canada reacted through *ad hoc* legislation, rather than through military provisions as in 1970, or indifference as in 1985, it would not have been unprepared, from a legislative point of view, to face the aftermath of 9/11. For example, in the UK the need to fight IRA terrorism, in the years before 2001, brought to the enactment of a significant body of laws and regulations dealing with the protection of national security. They were strengthened and refined after 2001, but they undoubtedly constituted a pivotal – although not free from important human rights concerns – starting point. In this regard, Section 2 has shed light on how the response to the 9/11 was particularly – if not, as to certain aspects, uncritically – inspired to UN guidelines. At that time, Canada was also anxiously eager to demonstrate to be a country with strong safeguards for security and not a safe harbour for potential attackers, as alleged by the US. Such an *omnibus* piece of legislation, as the ATA is, closely resembles the US response, with the 2001 Patriot Act.

Additionally, Canada’s involvement in extraordinary rendition programmes, hiding the use of torture (or, at least, its outsourcing), is not dissimilar from what happens in other “mature” democracies. In this respect, Canada fits into a widespread trend heading towards a loss of accountability and transparency.<sup>133</sup>

In any event, whilst in 2001 and in the following years Canada had not been directly affected by international terrorism, at least substantially, things changed in 2014 with the attacks occurred in Quebec and in Ottawa. The following legislation, Bill C-51, is a particularly stark and tough reaction. Yet, as seen, also in this case there is no big divergence between the Canadian and other countries’ approach to new threats, specifically if one considers the criminalisation of the

<sup>132</sup> Forcese and Roach (n 8).

<sup>133</sup> Italy is a landmark example, with the *Abu Omar* case. See A. Vendaschi (n 70).



terrorist message and the increasingly harsh surveillance measures. Then, again from a comparative perspective, Canada seems to fit well into a common tendency.

Indeed, surveillance issues, implying the limitation of the rights to privacy and data protection, should be now seen in light of the above-mentioned 2017 PNR Opinion, through which the Court of Justice openly showed its “cross-border” ambitions. As remarked in the previous paragraphs, the need that Canada conforms at least to the core of EU law guarantees on the matter represents an evident trend towards the “globalisation” of standards.

Ultimately, the concrete application and functioning of Bill C-59 – discussed in Section 3 and whose provisions may partially depend on a strong will of the new government to mark the difference with the previous one – has still to be assessed, once it would become law. Undoubtedly, there are improvements to Bill C-51 as to human rights protection. It will be interesting to see how they work in practice.

In conclusion, Canada, whose counter-terrorism action is characterised by a certain rate of fragmentation and, at times, legislative “indecision”, has not departed from the most diffused patterns in the comparative context. Most probably, such developments, substantively revising the balance between national security and fundamental rights, are re-framing the concept of security itself.<sup>134</sup>

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<sup>134</sup> A. Vidaschi, *L'Accordo internazionale sui dati dei passeggeri aviotrasportati (PNR) alla luce delle indicazioni della Corte di giustizia dell'Unione europea*, in *Giur. Cost.*, 2017, 1913 ff.