The Quest for an *Optimal Balance* Civil Liberties in an era of Securitization: An Analysis of Canadian Anti-Terror Legislation

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ABSTRACT

Canada is a nation governed by principles such as the *rule of law* and is built on democratic values such as those expressed in its Charter rights. In the last two decades, the need for enhanced national security to combat terrorism has been manifested where, the *War on terror* has become the object of much public attention. There exists an obvious clash between the values of security and rights, where to ensure the safety of Canadians, legislation has impinged on civil liberties and freedoms. When enacting anti-terror laws, branches of government should be engaged in striking an *optimal balance* between freedom and security. Striking an optimal balance helps quash dissent towards limiting counterterrorist measures and legitimizes anti-terror legislation. To strike an optimal balance, it is suggested that legislation meets both a constitutional standard, but also an efficiency standard, measured by an innovative five-criterion examination mechanism. This thesis will demonstrate that Canada does not strike an optimal balance in its main anti-terror legislation (Bill C-51) and should thus heed to the recommendations that are advanced.

RÉSUMÉ DE THÈSE

Le Canada est une nation régie par des principes tels que la primauté du droit et repose sur des valeurs démocratiques telles que les droits garantis par la Charte. Au cours des deux dernières décennies, la nécessité de renforcer la sécurité nationale pour lutter contre le terrorisme s'est manifestée là où la *Guerre contre le terrorisme* est devenue un objet d'intérêt public. Il existe un conflit évident entre les valeurs de la sécurité et des droits, où en tentant d'assurer la sécurité des Canadiens, la législation porte atteinte aux libertés civiles de ces derniers. Lors de l'adoption de lois antiterroristes, le gouvernement doit s'efforcer de trouver un équilibre optimal entre la liberté et la sécurité. Trouver un équilibre optimal permet de réduire la dissidence envers les politiques antiterroristes qui peuvent porter atteinte aux droits, et peut légitimer la législation antiterroriste. Pour atteindre un équilibre optimal, il est suggéré que la législation respecte à la fois une norme constitutionnelle, mais également une norme d'efficacité, mesurée par un mécanisme novateur comportant cinq facteurs. Cette thèse démontrera que le Canada n'atteint pas un équilibre optimal dans sa principale législation antiterroriste et devrait donc considérer les recommandations qui sont avancées.

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LIST OF ABBREVIATIONS AND ACRONYMS

9/11	References to the September 11, 2011 attacks on the Pentagon and the World Trade Centre
AISO	Australia Security Intelligence Organization
AQI	al-Qaeda in Iraq (AQI).
CBSA	Canadian Border Services Agency
Ccr	Canadian criminal code
Charter	Canadian Charter of Rights and Freedoms
CSE	Communications Security Establishment
CSIS Act	*Canadian Security Intelligence Service Act*
CSIS	Canadian Security Intelligence Service
GIA	Armed Islamic Group
GWOT	Global War on Terrorism
HRW	Human Rights Watch
ISI	Islamic State in Iraq
ISIL	Islamic State of Iraq and the Levant
MI_5	Security Service (UK)
NZSIS	New Zealand Security Intelligence Service
ODAC	Operational Data Analysis Centre
RCMP	Royal Canadian Mounted Police
SIRC	Security Intelligence Review Committee, the Canadian Security Intelligence Service's review body
SoCIS Act	*Security of Canada Information Sharing Act,* part of Bill C-51
TPP	Terrorism Prevention Program (RCMP CVE program)
TSAS	Canadian Network for Research on Terrorism
WTC	World Trade Centre

PREFACE AND CONTRIBUTION OF AUTHOR

In Chapter 1, the author suggests that Canada should strike an optimal balance in its anti-terror legislation. This is a novel concept, where, to strike an optimal balance, legislation should be both constitutional and efficient.

In Chapter 3, the author explains the notion of "striking an optimal balance". The author brings forward the argument that striking an optimal balance helps protect a potentially questionable policy (and legislators) from unnecessary controversy as the legislative measure needs to meet an additional standard (on top of the Oakes' constitutional standard), to be considered efficient. This standard will be known as the *Ting test.*

The Ting test is explained thoroughly in Chapter 3. It is borrowed from a mechanism proposed by Jan C. Ting, in the United States. The five-factor test is used as a foundation but developed further by the author. To the criterion "historical precedent", the author adds that measures that are used in other jurisdictions, as well as measures that bear similarities with an examined measure, can be used to validate a disposition. To the criterion "revocability of the initiative", the author proposes that the use of the notwithstanding Charter clause (section 33), or sunset clause, is a component that can help justify a measure. The author also adds that the presence of adequate ministerial review mechanisms also helps validate a measure under this criterion. Under the "nature of the threat", the author expands as to what should be considered, that is, the actual nature, the gravity, probability and predictability of a threat. She adds that threats that are probable, predictable, and grave, are all factors that help justify a measure. Under the "likelihood of success in advancing its objective" criterion, the author establishes that this criterion is a pass or fail concept. It is of sorts, the sum of the previous four criteria. The disposition must pass this component of the *Ting test* to be considered efficient.

In Chapters 5 to 7, the author examines three different measures from Bill C-51, and performs an Oakes evaluation, as well as a Ting evaluation.

In Chapter 8, the author echoes some recommendations, to add that education should be the point where terrorism deterrence begins. She maintains that resources need to be directed to the prevention of radicalization.

In Chapter 9, the author presents research limitations pertaining to the absence of statistical evidence documenting the potential for radicalization in Canada. Should evidence demonstrate an increased risk of radicalization, the threshold for rights limiting justification could be decreased. Further, the author advances that when governments appear to act in ways that limit rights, this constitutes a desired end for terrorists and gives credence to terrorism.

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CHAPTER 1: INTRODUCTION

Terrorism is an enemy without a state and without a face; it is a term that has yet to be specifically and clearly defined[1] in any official international document yet remains one of the most newsworthy matters today. Difficult to define, since it is said that *one man's terrorist is another man's freedom fighter,* the US Council on Foreign Relations nevertheless suggests four main characteristics to describe this evil: it is premeditated in nature; political; carried out by sub-national groups and aims civilians. Albeit there is no internationally agreed-upon definition, the Supreme Court interpreted *terrorism* to mean "intentionally causing death or bodily harm to civilians outside of armed conflict", in *Suresh v Canada*[2] in 2001. No matter how it is defined, the impacts of terrorism on human rights are real and palpable. Acts of terror destabilize civil society, undermine governments, pose threat to human life and stunt social and economic development. In a nutshell, terrorism threatens Canadian values and interests. To address this, the government proposed measures that impact *Charter*[3] rights. Rights limited by counterterrorism include the right to life, liberty and security,[4] freedom of religion and expression[5] and the right to privacy,[6] to name but a few.

In matters of national security, values such as rights and security often clash. Governments enact laws that have for a common objective, the enhancement of the nation's security to protect its citizens against terrorist attacks. While enhancing the valid objective of securitization, these laws often also impinge on rights. This paper focuses on the balance attained between security

[1] Gilbert Ramsay, "Why Terrorism Can, but Should not be Defined" (2015) 8:2 Critical Studies on Terrorism 211, Sami Zeidan, "Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World" (2006) 29:2 Hastings International and Comparative Law Review 215.
[2] *Suresh v Canada* [2002] 1 SCR 3.
[3] *Canadian Charter of Rights and Freedoms, s 8, Part I of the Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[4] *Ibid*, s 7.
[5] *Ibid*, s 2.
[6] *Ibid*, s 8.

and rights within Canada's main anti-terror legislation. At its heart, is a dissatisfaction with the balance achieved as Canada does not strike an *optimal* balance between the values of rights and security within its main anti-terror legislation, as it does not, as a whole, meet constitutional and efficiency standards.

Mass movements of people, religious extremism and advancements in technology and communications have made terrorist campaigns easier to coordinate. With each terrorist attack, states vow to remain unbowed, but the glaring reality is different since in practice, freedoms have been diminished by institutions since 2001, when planes crashed into the Pentagon and the World Trade Centre (WTC). Since then, governments appear to be willing to limit, and people willing to forego some rights in exchange for better security. This trend does not go unchallenged, however. The conflict between rights and security within a democracy is nothing new as it can be traced back to the 18th century. For example, in 1755, U.S. President Benjamin Franklin advanced that "[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety".[7] John Stuart-Mill, a nineteenth-century English philosopher, counters that the limitation to rights is justified when it aims to prevent harm done to others.[8] From these prevalent opinions, it is evident that the rights and security narratives clash. Nevertheless, security is considered to be a basic human right[9] and governments have a responsibility to protect their nationals by thwarting terrorist threats. Paradoxically, however, to safeguard the ideal of security, counter-terrorist measures initiated by governments have become more intrusive and also infringe on some of the very rights limited by

[7] Quote first written by President Benjamin Franklin, for the Pennsylvania Assembly in its Reply to the Governor (11 Nov. 1755), printed in Votes and Proceedings of the House of Representatives, 1755-1756 (Philadelphia, 1756) at 19-21.
[8] John Stuart Mill, *On Liberty,* 2nd ed. (Toronto: John W. Parker & Son, 1859) at 14-15.
[9] *Universal Declaration of Human Right*s, *GA Res 217A* (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at 80, s 3.

terrorism and ultimately have a corrosive effect on the rule of law.[10] The exercise of balancing security and rights thus becomes one requiring an understanding of the larger picture. Consideration of the evidence of risk needs to be weighed against competing tensions in order to strike a proportional and **optimal balance,**[11] which is what policy makers should aim for.

Research Question

Throughout this thesis, the contrasting perspectives which exist between democratic values and national security agendas will be examined. The extent to which the Canadian government can justifiably limit certain rights when opposed to national security interests is the main theme which guides the research object of this thesis. It is accepted that the rights we take for granted, can at times be justifiably limited. To validate such limitations, a constitutional examination is performed. A law that passes this examination is deemed constitutional, or acceptable. I suggest that this is insufficient in matters of national security where laws can easily meet the constitutional standards established in Canada, potentially exposing citizens to increased risks of having their rights limited. For this reason, this project seeks to establish whether Canada not only strikes an acceptable balance or standard, but rather, whether it strikes an *optimal* balance between rights and security in some of its main anti-terror policies, namely, Canada's *Anti-terrorism Act, 2015*[12] (hereafter Bill C-51), and the *Canadian Security Intelligence Service Act (CSIS Act),*[13] amended by *An Act to amend the Canadian Security Intelligence Service Act and other Acts*[14] and the *Security of Canada Information Sharing Act (SoCIS Act).*[15]

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[10] UNHCHR Human Rights, "Terrorism and Counter-terrorism, Fact Sheet no 32" online: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.
[11] The concept of optimal balance is explained in detail in chapter 3. An optimal balance is attained when legislation meets both a constitutional standard and an efficiency standard. The efficiency standard is advanced in this thesis.
[12] *Anti-terrorism Act*, 2015, SC 2015, c 20 [Bill C-51].
[13] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [CSIS Act].
[14] *An Act to amend the Canadian Security Intelligence Service Act and other Acts,* SC 2015, c-9. [*Protection of Canada from Terrorists Act*].

It is important for Canada to strike an optimal balance between values such as security and rights because Canada prides itself as a nation that does not forsake one for the other, being built on a set of liberal and democratic values such as these. To strike an optimal balance therefore, this thesis advances that counterterrorist measures should meet constitutional standards but also be efficient. To meet constitutional standards, they must successfully pass an *Oakes*[16] examination; and to be efficient, they must pass a Ting examination.

Even though they are similar in some respects, it is pertinent to complete both an *Oakes* examination, and a Ting examination, as the first will verify whether the measures are proportional to the sought-after objective, while the latter seeks to qualify the measures as efficient by evaluating its chances of success. Passing a constitutional examination is the minimal acceptable standard. *Oakes*, identifies the reasonableness of a measure, by means of its proportionality examination. A measure of success is not part of the evaluation mechanism, however.[17] Ting, like *Oakes* also evaluates the proportionality between the rights impacted and the objective of the measure. Ting differs in that the chances of success of a measure is a requirement to successfully pass the examination. With the Ting analysis, the costs (limits on rights) are weighed against the end product's potential success. When a measure is both constitutional and efficient, a measure can then be said to be striking an optimal balance between security and rights. This should be the standard the government, policy makers and legislators aim for.

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[15] *Security of Canada Information Sharing Act*, SC 2015, c 20 [SoCIS Act].
[16] *R v Oakes* [1986] 1 SCR 103. The Oakes test consists of an analysis of the *Canadian Charter of Rights and Freedoms* section 1 limitations clause. It is used to determine whether limitations on rights and freedoms are reasonably justified in a free and democratic society. The test will be detailed in Chapter 3.
[17] *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR. 391. at para 148; *Little Sisters Book and Art Emporium v Canada* (Minister of Justice) [2000] 2 SCR 1120, 2000 SCC 69 at para 228; *Trociuk v British Columbia (Attorney General)*, [2003] 1 SCR. 835, at para 34; *Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 SCR 610, at para 40-41, H*utterian Brethren*, [2009] 2 SCR 567, at para 48, *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, at paras 143-144.

Following a review of some measures found within Canada's most important anti-terror legislation, it will be demonstrated that Canada does not strike this desired optimal balance between rights and security as these bodies of legislation as a whole, do not meet both constitutional and efficiency standards.

The Importance of Striking an Optimal Balance Between Security and Rights in Anti-Terror Legislation

Rights and security are "values that pull us in opposite directions"[18], explains Jeremy Waldron, a law professor also interested in the notion of striking an optimal balance between the two values when enacting anti-terror policies. He explains that ideally, security and rights are balanced, but given changes, what he calls "new facts", the balance can skew in one direction. For example, an attack will activate the need for enhanced protection, therefore the balance will sway in favour of security, usually, limiting some rights. Without a proper balance, however, public dissent naturally rises. Because Canada is a country which identifies itself as one where individual rights prevail even while citizens and borders are being protected from harm, Canada should strike an optimal balance when legislating in areas of national security. The end goal, of course, is to reconcile these opposing values. The conflict between these two values and the importance of reconciling them is detailed in the next section.

Advocating for Rights: Dissent Towards Anti-Terror Legislation

Human rights groups[19] contend that security measures impose unreasonable limitations to rights. In response to the implementation of new anti-terror laws and policies, these groups suggest that branches of governments in countries such as Canada, are adopting a "tough on

[18] Jeremy Waldron, "Security and Liberty: The Image of Balance" (2003) 11 Journal of Political Philosophy 191.
[19] Human Rights Watch (HRW), "Opportunism in the Face of Tragedy" (2002) online: www.hrw.org/campaigns/september11.opportunismwatch.htm [Security and Liberty].

crime" doctrine, granting authorities such as the Canadian Security Intelligence Services (hereafter CSIS), increased surveillance powers,[20] and this without any adequate oversight process, to state just one example. They posit that the investigative powers attributed to the executive branches of governments, coupled with limited oversight, have snowballed to such an extent that fewer protection of the individual rights and freedoms people have come to expect are afforded. These human rights groups advance that the attribution of such powers necessarily lead to the curtailment of rights on which nations such as Canada were built, in the name of a national security agenda vis-à-vis the war on terror. Scholar, Lorne Sossin, from University of Toronto's Faculty of Law, considers the enhancement of investigative and detention powers to be a sacrifice of civil liberties and to be un-Canadian.[21] Paul Hoffman, describes the loss of rights as a casualty of the war on terrorism. He positions this statement against what transpired following the September 11 attacks. He argues against the idea that citizens must be willing to forego rights to enhance security. Examples that illustrate the violation of human rights in the name of security are the Guantanamo prison detentions, deportations and extraditions. [22] Hoffman contends that these arrests and detentions have not led to any evidence identifying the presence of terrorists.[23] In Canada, it is also apparent that trade-offs for enhanced security include restrictions on personal privacy, such as those imposed by the expanded information sharing regime contained in C-51. For instance, limits on freedom of expression are apparent with the criminalization of the *promoting or advocating of terrorism offences in general,* found in a disposition added to the Criminal code, and, there is no telling which rights can and will be limited with CSIS' new disruptive powers. The attribution of power, enabling authorities to impose such limitations with

[20] *CSIS Act*, *supra* note 13, s 12.
[21] Thomas Gabor, *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act* (31 March 2004), online: Department of Justice Canada, < http://www.justice.gc.ca/eng/rp-pr/cj-jp/antiter/rr05_1/rr05_1.pdf >, at 9.
[22] Paul Hoffman, "Human Rights and Terrorism" (2004) 26: Human Rights Quarterly 932 at 938.
[23] *Ibid* at 947.

limited oversight, is evident in contemporary legislation and policy initiatives such as the aforementioned *Anti-Terror Act (Bill C-51),*[24] *the CSIS Act,*[25] amended by the *Protection of Canada From Terrorist Act* (*Bill C-44),* among others. These laws may provide a sense of security but also demonstrate how nations have both under and overreacted to terrorist threats in the past. For instance, looking at Canada's actual anti-terror legislation,[26] Kent Roach and Craig Forcese[27] argue that Bill C-51 repeats past mistakes as it fails to take into account pertinent commission recommendations, namely, the Air India Commission recommendations.[28] This may be due to the speed at which anti-terror legislation is typically enacted, usually reactively to attacks. Forcese and Roach advance that because this bill appears incomplete, it may as a result weaken Canada's ability to defend itself against terrorism while certainly presenting challenges to rights and freedoms.[29] This highlights the concern that the laws in question impose limitations on rights, even though the objectives sought may appear unattainable. Moreover, this quick-paced, rights-limiting drafting current, perceptible in most modern anti-terror laws, marks a significant shift in the way we have traditionally regarded civil liberties and freedoms as sacred values to be protected under the umbrella of fundamental democratic rights in Canada.

Next, views favouring security measures despite limiting rights within anti-terror legislation and policies are introduced.

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[24] *Anti-Terrorism Act*, *supra* note 12.
[25] *CSIS Act, supra* note 13.
[26] It should be noted that the Canadian Government has put forward Bill C-59 a Bill to amend Bill C-51, creating a new body to assure greater oversight. This Bill is now being read by the Senate (summer 2018).
[27] Craig Forcese & Kent Roach, *False Security*: *The Radicalization of Canadian Anti-Terrorism,* (Toronto, Ontario: Irwin Law, 2015) print [*False Security*]. Roach and Forcese are experts in security and anti-terrorism law. Craig Forcese teaches national security law at the University of Ottawa's Law Faculty. Kent Roach teaches anti-terrorism law at the University of Toronto's Faculty of Law and acted as the director of research for the 2006-2010 Commission of Inquiry into the Investigation of the Bombings of Air India Flight 172.
[28] Canada, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Key Findings of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* (Ottawa: Public Works and Government Services Canada, 2010), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions /air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm> [Air India Inquiry].
[29] *False Security*, *supra* note 27.

Advocating for Anti-Terror Initiatives

On the other end of the spectrum, there lies the idea that national security is paramount to functioning in a successful democracy. Albeit security and rights are both deemed democratic values, advocates of securitization argue that security should have priority over rights, emphasizing the clashing nature of these two democratic values. In the same vein, Jeremy Waldron, who is not an advocate for anti-terror legislation which imposes limits on rights, nevertheless is of the opinion that "some adjustment in the scheme of civil liberties is inevitable"[30] when confronted to attacks, or risks of attacks. He considers this adjustment, in part, to be the product of "political defeatism", where, in theory, the state seeks to limit liberties, and a terrorist emergency is an opportunity to do just that. This is explained by the fact that society, in the wake of a terrorist emergency, is more deferential to state intervention and more reluctant to oppose their government, in fear of appearing unpatriotic.[31] Scholars such as Martin Rudner from the Paterson School of International Affairs at Carleton University, and Wesley K. Wark, from the Department of History/International Studies at the University of Toronto, also consider the deterrent effect of anti-terror legislation to be significant and beneficial. Rudner considers that anti-terror legislation enhances intelligence functions, resulting in the interception of terrorist activities.[32]

The fact of the matter is, globalization brings Canada to join the ranks of countries such as Britain, France and Germany as a state vulnerable to terrorism. Between 1960 and 2014 for instance, the Canadian Network for Research on Terrorism, Security and Society (TSAS)

[30] Jeremy Waldron, *Security and Liberty*, *supra* note 18, at 191.
[31] *Ibid*.
[32] *Supra* note 21, at 6.

recorded 1405 terror or extremist incidents, and 469 deaths.[33] Only, Canada, compared to other countries, is a latecomer when it comes to reacting to the potential dangers of terrorism and must equip itself with the right tools to combat violent extremism. Bill C-51 attempts to provide mechanisms to address this need, only this comes at a cost where individual rights can potentially be infringed. Nonetheless, the prevailing importance of collective security is advocated as justification for state infringement on individual rights. Advocates in favour of anti-terror policies and legislation, namely governments and policy makers, judge the measures as necessary to enhance public safety, even if by means of coercion. For instance, in 2015, the sitting RCMP Commissioner Bob Paulson, and then Public Safety Minister, Steven Blaney, both advocated strongly in favour of the adoption of Bill C-51. They claimed that anti-terror legislation ostensibly safeguards against new conceivable threats. To them, the curtailment of rights is justified on the premise of protecting borders and citizens since national security is also a prevailing democratic Canadian value.

The Price of Democracy: Importance of Striking an Optimal Balance

Canada should strive to strike an optimal balance between rights and security when enacting anti-terror legislation. There are a number of reasons, notably, because democratic nations such as Canada are built on liberal values, such as the rights afforded within the *Canadian Charter of Rights and Freedoms*,[34] and respect for the rule of law. Respect for individual rights is so entrenched in *the way Canadians function*, from the way society is governed, to how laws are enacted, that it has become part of our identity as a nation. When rights are limited, it can be considered as somewhat of an assault on this very identity we have

[33] Canada, Canadian Network for Research on Terrorism, Security and Society, Incident Database, Incident Details: 1980520090210001, citing A Keller et al, Terrorism in Canada 1960-1989, User Report No 1990-16, (Ottawa: Solicitor General Canada, National Security Coordination Centre, Police and Security Branch, 1991) at 416.
[34] *Charter*, *supra* note 3.

forged for ourselves. At times, however, this is inevitable. Rights must be limited to secure a valid objective. The quest for improved national security is one such objective since it can be considered to also be a Canadian value and a requirement to function in a democracy. Nevertheless, rights should only be reasonably limited, otherwise, measures that impose unreasonable limits can be considered to erode the rule of law.

Aharon Barak, president of the Israeli Supreme Court, advances that "human rights are not a stage for national destruction; they cannot justify undermining national security in every case and in all circumstances".[35] In the same breath, he adds that we should also "[…] consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights in every case, in all circumstances. National security does not grant an unlimited licence to harm the individual."[36] His statements on the subject illustrate the contrast between these two values and the need for a just balance. They suggest that rights cannot be impinged on in every circumstance where security is at risk, all the while, noting that freedoms and rights, cannot be adequately protected if we fail to consider the presence of terrorism. This balance and compromise- he calls, *the price of democracy*.

Democratic nations structure their governments in ways that uphold the rule of law.[37] The main idea behind this *rule of law* concept, is that all are equal before the law, or in other words, "every individual in a nation is subject to the same set of laws and constraints, regardless of how powerful or powerless the individual is".[38] This means, government actors, policy makers and legislators, cannot act outside of the law, even on the basis of "necessity, power, divine right, or

[35] Aharon Barack, "The Role of the Supreme Court in a Democracy and the Fight Against Terrorism" in Sudha Setty, ed., *Constitutions, Security and the Rule of* Law (New York, IDebate Press, 2014) at 76 [*Constitutions, Security and the Rule of Law*].
[36] *Ibid*.
[37] Sudha Setty, ed., *Constitutions*, *Security and the Rule of Law* (New York, IDebate Press, 2014) at 3.
[38] *Ibid*.

any other concept".[39] Sudha Setty, the editor of *Constitutions, Security and the Rule of Law,* contends that the rule of law requires transparency. Transparency means that "there are no secret laws […] the public has the right to understand the process of lawmaking […] and how the law changes, so there is a sense of certainty about what the law is at any given time.[40] These are some of the concepts that are weighed when analyzing the current state of Canadian anti-terror legislation.

To be justified therefore, limitations on rights should only be permitted via authorized legal mechanisms. If the government wishes to broadly exempt itself from the Charter, it must either use the notwithstanding clause provided at section 33 of the Charter or successfully pass a constitutional examination under section 1 of the Charter. If the government uses the notwithstanding mechanism, it needs to include a clause in its law which specifically details which dispositions infringe on which specific rights, and detail the duration, which cannot exceed five years[41] unless Parliament re-enacts it under section 33 (4). Alternatively, the disposition that limits a right, will have to be shown to be reasonable in a free and democratic society, and the measure will have to be proportionate to the sought-after objective. At current state, dispositions within our anti-terror legislation risk limiting rights, with dubious constitutionality, and without using the notwithstanding clause mechanism. This will be discussed in section 2.

In this paper, the need to enhance national security is not questioned. The fact is, the world has entered an era requiring counter-terrorist measures to protect borders and citizens. To underestimate potential threat, is to place nations at risk where measures to counter terrorism will

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[39] *Ibid.*
[40] *Ibid.*
[41] Tsvi Kahana "The Notwithstanding Mechanism and Public Discussion: Lessons From the Ignored Practice of Section 33 of the Charter" (2001) 44:3 Canadian Public Administration 255; *Charter, supra* note 3, s 33(3).

lag and preparedness stagger. At the same time, the fact that Canada considers democratic values, namely, the respect for individual fundamental rights and freedoms as engrained in our genetic makeup, makes the challenge of finding the optimal balance between security and these values that much more complex, and is thus a valid theme to elucidate.

Utility of Research

Conducting research in order to evaluate whether Canada has struck an optimal balance in its anti-terror legislative efforts is pertinent as the debate is ongoing and constructive criticism on current legislation can lead to possible policy and legislative improvements. Also, because the controversial aspects within Canada's anti-terror legislation can impact the country's identity, discussions surrounding recommendations in order to strike this optimal balance are desired, to preserve this very identity. Finally, evaluating whether anti-terror laws strike this balance by ensuring that policies meet constitutional standards, as well as efficiency standards, helps protect governments against avoidable controversy when enacting laws that can be considered controversial. This is not to say that legitimate public scrutiny is undesired, but rather, that it should not arise because legislators deliberately bypass the rule of law.

To begin, counterterrorism is a live issue. Considering that legislators are attempting to improve on the contents of our anti-terror laws, intellectual discussions on how to go about improving them should be welcomed. On October 20th, 2014, an aspiring ISIL recruit, Martin Couture-Rouleau, drove his car into two members of the Canadian Forces in Saint-Jean-sur-Richelieu, consequently killing Warrant Officer Vincent. Two days later, Corporal Cirillo was shot and killed at Ottawa's War Memorial. In the aftermath, Bill C-51,[42] Canada's *Anti-Terrorism Act,* was drafted by Parliament. This bill is considered to be one of the most radical

[42] *Anti-terrorism Act, supra* note 12.

and controversial security laws enacted in decades, and most certainly since the adoption of the *Canadian Charter of Rights and Freedoms*.[43] According to Roach and Forcese, it imposes limitations on rights without being as effective as it could be.[44] Consequently, these concerns have provoked debates regarding the improvements that should be considered. Recommendations include, for instance, that legislators consider recommendations made in the *Air India Commission* report.

During the Federal government electoral campaign in 2015, the Liberal Party of Canada promised to reform parts of Bill C-51, if elected. Recently, Bill C-59, *An Act Respecting Security Matters,*[45] was introduced and it has since undergone its third reading at the House of Commons in June 2018 and is currently undergoing its first reading at the Senate. One of the purposes of this bill is to reform problematic areas identified in Bill C-51. Preliminary remarks on the contents of Bill C-59 tend to consider the proposed amendments as insufficient. For Instance, Dr. Brenda McPhail esteems that "C-59 does not go far enough in addressing the egregious issues created by Bill C-51", she adds that "[a]ll Canadian laws must be Charter-compliant, including national security laws, and the tweaks in C-59 that only partially improve Charter compliance of the items identified in CCLA's constitutional challenge are simply insufficient".[46] She criticizes the fact that the law does not go far enough in protecting political advocacy and dissent. She also esteems that a special advocate should be assigned to individuals added to no-fly lists seeing that appeals occur in secret hearings, using secret evidence. The act does not address this. Roach and

[43] *Charter, supra* note 3.
[44] *False Security*, supra note 27.
[45] Canada *Bill c-59*, *Act Respecting Security Matters*, 1st Sess, 42nd Parl 2017 [Bill C-59].
[46] Brenda McPhail, "McPhail: There are still profound problems with federal anti-terror legislation", *Ottawa Citizen* (15 Sept 2017) online: Ottawa Citizen <http://ottawacitizen.com/opinion/columnists/mcphail-there-are-still-profound-problems-with-federal-anti-terror-legislation>.

Forcese do consider that C-59 "gets a lot of things right",[47] however, there remains room for improvement. For instance, proposed amendments do not address the no-fly list false positives problem. They advance that the Bill does address privacy and accountability concerns, but perhaps not sufficiently, where, the information sharing extent is perhaps too broad.

Bearing in mind the controversial nature of Canada's new anti-terror law and its upcoming potential reform, it becomes apparent that the contest between rights and security is still very present today and as such, warrants academic attention. Laws are always assessed for potential constitutional challenges prior to their adoption. Despite this, Bill C-51 was adopted, but not without contest. It is debatable whether C-51 actually passed this constitutional assessment, but supposing it did, it likely would not satisfy the Ting assessment. Based on the amount of ink that has flowed relating to C-51, passing a constitutional assessment is insufficient to adequately answer the criticism the legislation faced. For this reason, the added standard of efficiency becomes useful. When a law is both constitutional and efficient, it should become trickier to challenge.

Secondly, the unreasonable limitation on rights in order to advance the security agenda of a nation, can hinder that nation's identity as one proud of the status it assigns to civil rights and liberties. For this reason, I believe that academic discussions promoting the ideal of striking an optimal balance can be of use. There is no arguing that national security is of the utmost importance; however, it can be provided without unduly overshadowing rights. To address contested dispositions or mechanisms, lawmakers should for example, again, take into

[47] Craig Forcese and Kent Roach, "The Roses and Thorns of Canada's new National Security Bill", MACLEANS (20 June 2017), online : MACLEANS < http://www.macleans.ca/politics/ottawa/the-roses-and-thorns-of-canadas-new-national-security-bill/>.

consideration recommendations from previous commissions,[48] as well as better assure the protection of rights, as promoted by the United Nations.[49] Taking into account such recommendations is a step towards striking an optimal balance between rights and security, where one value does not supersede the other, but rather, both are reconciled, conforming to Canada's identity as a nation that upholds the rule of law and the protection of civil liberties and freedoms ,while protecting its borders and citizens.

Finally, the effectiveness of the above-mentioned counterterrorism legislation warrants constructive criticism as well. Government policies should be scrutinized to ensure that if rights are to be limited, at the very least, the policies should be as effective as is reasonably possible. This translates to finding an optimal balance. Proposing that government's aim to strike an optimal balance between rights and security when enacting anti-terror policies, helps protect the government against justifiably strident public scrutiny, which may result in hindering the policies effectiveness in countering terrorism. Certainly, enacted laws should conform to established constitutional standards. A constitutional examination does not, however, require that the government prove the success of its measure, but rather, that the legislative objective, for one, is pressing and that the measure imposing a limitation can help advance the objective.[50] Conforming to constitutional standards is the minimal requirement for a law to be deemed acceptable, however, it becomes insufficient when the laws deemed constitutional, are considered exceedingly controversial in the extent to which they limit rights. To counter this, as mentioned, the laws should also be efficient.

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[48] Canada, Commission 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), online: <http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf> [Arar Commission of Inquiry]; [Air India Inquiry] *supra* note 28.

[49] *Ministerial-level Security Council meeting calls for urgent action to prevent, suppress all support for terrorism*, SC Res 1456, UNSCOR, 2003, annex, UN Doc S/RES/1456 (2003), at para 6, *Global Counter-Terrorism Strategy*, GA Res 288, UNGAOR, 2006,UN Doc A/Res/60/288, Alex Neve, secretary general of Amnesty International Canada, in "12 threats to Vip: Parliament Hill Security Incidents Few And Tame Before Oct. 22 Shooting", *The Huffington Post* : "It is absolutely vital that terrorist threats be addressed through measures that are in keeping with international human rights obligations".

[50] *Supra* note 17.

To summarize, at current state, Canadian anti-terror legislation has serious flaws relating to its constitutionality and its public perception. This thesis addresses policy makers because the security agenda, to date, has not been successful since it has not proven to be efficient. Democratic and liberal nations are willing to forego some of their rights in the name security, but unless it can be objectively demonstrated that anti-terror legislation is or can be efficient in attaining its objectives, criticism towards governments will and should stay front and centre in this debate. This project will hopefully contribute objectively to such a larger debate on the balance legislators should strive to attain when rights and security clash, as a consensus has yet to be reached.

Chapter Outline (Map of Development)

This thesis is organized in nine chapters. **Chapter 1** introduces the subject where the ideal of finding an optimal balance when enacting anti-terror legislation is suggested. The clash between rights and security is exposed. The research methodology and theoretical orientation employed throughout this project are then presented in **Chapter 2**. The main claim advanced is that governments should aim at striking an optimal balance between rights and security when enacting laws relating to national security. To achieve such an optional balance, I suggest that dispositions meet both a constitutional standard, as well as an efficiency standard, evaluated via a proposed test (Ting). **Chapter 3** then expounds the notion of an optimal balance. It introduces and explains a set of criteria (Ting Test) to evaluate the efficiency of security related dispositions. It also describes the constitutional mechanism (*Oakes* Test) employed to measure the constitutionality of dispositions and the balance attained. **Chapter 4** briefly describes the context that led to the current status of Canada's anti-terror legislation. **Section 2** will present an analysis of some of the problematic areas within the selected bodies of legislation. **Chapters 5 to**

7 will present three distinct issues subject to constitutional challenge. Specifically, **chapter 5** addresses the *criminalization of advocating or Promoting Terrorism Offences in General***. C**hapter 6** focuses on CSIS' disruptive powers. **Chapter 7** is concerned with the right to privacy. In each of these chapters, a traditional constitutional examination alongside the Ting Test will be performed to determine the constitutional justifiability of the limitations imposed, as well as the efficiency of the measures considered. The findings following the *Oakes* and Ting tests will be critically assessed, demonstrating the lack of justifiability or optimal balance between security and freedom. In **Chapter 8,** officially proposed recommendations (Bill C-59)[51] and personal suggestions regarding current policies as well as future legislative initiatives are discussed. Finally, concluding remarks are offered in **Chapter 9**.

[51] *Bill C-59*, *supra* note 45.

CHAPTER 2: METHODOLOGY

Arguments

As mentioned in the introduction, the main argument advanced in this thesis is that Canada's main anti-terror legislation does not strike an optimal balance between security and rights. To support this claim, two additional arguments are proposed. The first is that the chosen bodies of legislation are not as effective as they ought to be. The next, is that the limitations embodied in these legislative sources overreach on rights. In order to conduct this research in the most efficacious way, this paper focuses on Canada's main anti-terror laws, the aforementioned *Anti-terrorism Act* (hereafter Bill C-51), and the *Canadian Security Intelligence Service Act (CSIS Act),*[52] amended by *An Act to amend the Canadian Security Intelligence Service Act and other Acts*.

This chapter outlines the methodology employed to tackle the problem at hand, the sources consulted, the way the selected theoretical framework can apply to the studied legislation and the reasons for focusing on Canadian anti-terror legislation.

Ontology and Epistemology

Ontology

According to N. Blaikie, ontology refers to "the science or study of being".[53] Its object of study is the nature of reality. It is concerned with two varying perceptions, objectivism, and constructionism. The former is concerned with whether social entities, such as governments, exist outside the constructs of external or social actors independently; the latter examines

[52] *CSIS Act*, *supra* note 13.
[53] Normand Blaikie, *Approaches to Social Enquiry*,2nd Ed (Oxford, Polity Press 1993).

whether these entities are constructed based on the perceptions, interactions and actions of these actors and other systems.[54] This paper employs a constructionist view seeing that governments are not stable, unchanging and objective entities. Governments are constructed and influenced by the interactions of individuals. Laws enacted by entities such as governments, are also the result of such interactions by various actors. A constructionist view is best suited for this paper, seeing that the nature of policies is focal to this research, and government and legislators are the primary actors behind the enactment of the studied policies.

Epistemology

According to A. Bryman, epistemology is concerned with what is considered as acceptable knowledge within a field of discipline.[55] Epistemology studies the nature of knowledge, its source and how it is derived. It can be considered as the relationship between the researcher and or the reality.[56] It is often associated with ontology, which as previously noted, is concerned with the study of being or reality.

Interpretivism, as it relates to ontology and epistemology, suggests that reality is multiple and even relative. Interpretivists view entities and social phenomena similarly to the way constructivists view them, as influenced by the interactions of systems and actors. As such, this paper can also be considered to take on an interpretivist epistemological approach where, the nature of the policies studied, can be qualified under varying viewpoints. For instance, for some, security supersedes rights, while for others, it's the other way around, rights are superior to

[54] A. Bryman, *Social Research Methods*, 5th Ed, (Oxford: University Press, 2015).
[55] *Ibid*.
[56] Carson, D., Gilmore, A., Perry, C., & Gronhaug, K., *Qualitative Marketing Research* (2001).

security.[57] For some, the laws studied, as they stand, do strike an *appropriate* balance, but this thesis argues rather, that they do not strike an *optimal* balance.

Methodological Approach

Deductive Methodological Approach

To prove the aforementioned arguments, this paper uses a deductive methodological approach. Deductive research starts from a theoretical framework and attempts to derive truth from a broad proposition. Bryman states that deductive approaches attempt to substantiate a theory with evidence.[58] The starting point of this thesis is the assumption that anti-terror policies have an impact on rights and as such, that anti-terror laws do not strike an optimal balance between the values of security and rights. The approach therefore, is to examine Canada's main anti-terror laws and policies, where observations are drawn and connected to the original assumption.

Data Collection

To reach the conclusions this thesis advances, a qualitative content analysis of the aforementioned legislation will be performed. E. Babbie defines a qualitative analysis as the "nonnumeric examination and interpretation of observations, for the purpose of discovering underlying meanings".[59] A qualitative content analysis appears to be the best suited method to explore counterterrorist policies, their effects (limitations on rights), and whether they are justifiable and efficient. Through a critical analysis of Canada's main anti-terror legislation, I seek to encompass and comprehend the scope of the impacts and evaluate the balance between

[57] *Supra,* notes 19, 21, 22.
[58] A. Bryman, *supra* note 54 at 10.
[59] E. Babbie, *The Practice of Social Research*, 14th ed, (Wadsworth Publishing, 2014) at 382.

the protection of civil liberties and national security such legislation achieves. In regard to its counterterrorism policies, it will be shown that Canada does not strike an optimal balance between securing rights and security since the main anti-terror policies overreach on the rights they limit and are not as efficient as they can be. The objective is to present a well-rounded doctrinal account of the issue, contributing to a larger debate regarding anti-terror legislation. To date, the ongoing debate has largely been partisan and in response, I seek to present findings that are more objective. To achieve this, I have chosen to read several texts individually to later analyze them intertextually.

Sources

The assumption that Canada does not strike an optimal balance between rights and security in its anti-terror legislation will be verified using primarily qualitative empirical data. The primary sources I have chosen to focus on are mainly legislative texts. I focus on the most important and controversial policies in the field of anti-terrorism in Canada, namely the *Anti-Terror Act (Bill C-51)*[60] and the *Canadian Security Intelligence Service Act (CSIS Act),*[61] amended by *An Act to amend the Canadian Security Intelligence Service Act and other Acts (Bill C-44)*, [62] as well as the *Security of Canada Information Sharing Act (SoCIS Act)*. These sources were consulted on the Department of Justice website and are thus considered official, meaning that their content is authentic and reliable. As a complement, some additional bodies of legislation serve to support various arguments. Furthermore, public police documents prepared by the Royal Canadian Mounted Police (hereafter RCMP) and the Canadian Security Intelligence Service (CSIS), have been assessed as secondary sources. Public statements and reports issued

[60] *Anti-terrorism Act, supra* note 12.
[61] *CSIS Act*, *supra* note 13.
[62] *An Act to amend the Canadian Security Intelligence Service Act and other Acts, SC 2015*, c-9. [*Protection of Canada from Terrorists Act*].

by interested groups and government officials have also been consulted, along with parliamentary debates and journals, deepening the understanding of the politics at play within the country. Finally, newspaper articles were also consulted, which served to establish the reserves the public had towards the law.

These primary and secondary sources constitute the main materials utilized in this research. The intertextual and critical analysis of the material should provide a deeper understanding of the scope of the legislation and its impacts, leading to a discussion considering possible recommendations for future legislative efforts.

Constitutional Challenge

Two groups, the Canadian Civil Liberties Association and the Canadian Journalists for free expression have launched a constitutional challenge on the merits of bill C-51. They challenge the constitutionality of five components of the bill. In this thesis, I will focus on three: the criminalization of the promotion or advocacy of terrorism offences in general, CSIS' disruptive powers and the information-sharing regime now permitted. To achieve what this paper sets out to demonstrate, a constitutional examination (Oakes test), as well as a proposed examination (Ting test) to evaluate the efficiency of the dispositions relating to these measures will be performed. Borrowed from an analysis method proposed in the United States, I build on what I call the *Ting* test analysis method and appropriate it so that it applies to a Canadian legal security context. Based on the results of the constitutional and effectiveness analysis, it will be shown that Canada does not strike an optimal balance in its implementation of counterterrorism measures. Considering the latter, a critical commentary will set the tone for concrete recommendations to be considered. It is to be noted that a new bill (Bill C-59)[63] proposing amendments to address

[63] *Bill C-59, supra* note 45.

problematic areas within Bill C-51is currently being debated by Parliament. My commentary will evaluate whether the proposed amendments satisfactorily address the problematic areas in Bill C-51 and finally, personal suggestions for improvement will be provided.

Why Focus on Canadian Anti-Terror Legislation?

The reasons why I have chosen to focus mainly on Canadian anti-terror legislation despite there being dynamic changes occurring in the field in other countries such as the United States,[64] France and Britain, are presented in this next section.

First, because respective codes and bodies of law in Canada have traditionally developed following a liberal democratic consensus where (1) individuals were to be protected against state intervention,[65] it is of interest to verify whether the intervention of the state is justified when lawmakers enact legislation imposing certain limitations on rights. Going against this liberal, democratic consensus could impact Canada's identity as a nation which upholds the rule of law, as mentioned earlier. Secondly, (2) Canadian anti-terror legislation is of interest because it is a live issue, also previously noted. Proposed amendments to the controversial *Anti-Terror Act* are currently being debated in Parliament and so, critical commentary is pertinent. Hopefully, this project can bring valid constructive comments to the table, to be considered for future amendments to anti-terror laws and policies, which in turn can help Canada strike an optimal balance. Finally, (3) Canada has made the top five in the "name-and-shame" list published by several non-governmental organizations that are interested in the protection of human rights.[66] Many would consider that this tarnishes Canadas image, which prides itself on the rights and

[64] For example, under the Trump Administration, an executive order commonly referred to as the Trump Travel-Ban limits entry into the country for eight countries (Syria, Chad, Yemen, Somalia, Iran, Libya, North-Korea, and Venezuela).
[65] Dirk Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) 38:1 Government and Opposition, at 5.
[66] *Ibid.*

freedoms it offers its citizens. Consequently, this thesis promotes changes in response to charges that Canadian anti-terror policies have overreached on rights. It advances solutions to improve the measures that exist so that at the very least, increased *review*[67] in areas where rights can potentially be limited is afforded. To put it simply, the ultimate purpose of this thesis is to propose changes that could render policies more efficient and less rights-limiting. As a result, Canadian anti-terror legislation could be deemed to strike an optimal balance where security and rights are reconciled to coexist.

These three reasons are briefly discussed in the following section.

State v Individuals

To begin, because respective codes and bodies of law in Canada developed following a liberal democratic consensus protecting individuals against state intervention,[68] this section examines whether the intervention of the state is justified in the name of the security agenda when lawmakers enact legislation imposing certain limitations on rights. The distinction between the individual and the state was an important consideration for enlightenment thinkers and their contributions are evident in respective codes. For example, in France, intellectuals such as Voltaire, Rousseau and Diderot, all developed the idea that the free individual was to rid itself of political authority. On the side of Britain, John Locke advanced the ideal of inalienable individual rights and Mills depicted the autonomous man capable of "self-directed choice free from internal and external constraints".[69] The idealistic theories developed by such thinkers promoted the idea that there naturally exists opposition between individuals and states, and this is a desired phenomenon. These French and English thinkers have contributed to the inclusion of

[67] *False Security, supra* note 27, at 399: Review and oversight are distinct concepts. To have review, is not to have oversight and vice versa. Review is the consideration given to a matter after a situation has passed. Oversight concerns ongoing events, controlled by a third party, which can execute a "command and control function".
[68] Haubrich, *supra* note 65.
[69] Mill, *supra* note 8.

some of the democratic values we know today, into bodies or codes of law. Such values include freedom of speech,[70] the right to privacy,[71] protection from illegal detention[72] and the right to security of the person.[73] The Canadian system inherits from both the French and English legal traditions the basic principle that individual rights and freedoms generally take precedence over state intervention. This idea is enshrined within our Constitution and forms part of Canada's identity. The Charter protects citizens against state intervention that may infringe on protected rights because Canada adheres to the idea that laws are not to limit Charter rights, unless it is demonstrably justified in a free and democratic society.[74] Because our new anti-terror policies are controversial and pose limits on rights, limits that some would claim to be excessive, it is of interest to bring a voice to this debate.

Now, bearing in mind its controversial nature, amendments have been proposed to address problematic areas of Bill C-51. The next section addresses this.

Bill C-59: Parliamentary Amendments to C-51

This section reiterates that because Canadian anti-terror legislation is a live issue, it is of interest to study it critically. On June 20th, 2015, Ralph Goodale, Canada's Minister to Public Safety, tabled Bill C-59 which proposes amendments to Bill C-51. The Bill resurfaced in 2017 and having now passed the House of Common's third reading and undergoing its first reading at the Senate this summer (2018), proposed amendments are being debated. As such, critical commentary is pertinent. Hopefully, this project can contribute valid constructive comments, to be considered for future amendments to anti-terror laws and policies, which in turn can help Canada strike an optimal balance.

[70] *Charter*, *supra* note 3, s 2.
[71] *Ibid*, s 8.
[72] *Ibid*, s 9
[73] *Ibid*, s 7.
[74] *Ibid*, s 1.

Bill C-59 addresses problematic areas in Bill C-51. For instance, the threshold for disclosing information between agencies and the requirement for agencies to maintain records to be submitted to a newly proposed National Security and Intelligence Agency, are suggested efforts to address the problem of oversight, the lack thereof being severely criticized in Bill C-51. In this section, the proposed amendments are not detailed, but rather, the argument that the fact that Bill C-51 is under review confirms its controversial nature and makes it an interesting area to research is brought forward.

It is one thing to impose limits on rights for valid purposes, however, review mechanisms are usually provided in such contexts, where, individuals who feel their rights are being unjustly limited, can appeal to some form of review agency in hope of obtaining some kind of redress. The lack of review when limiting rights in a context of counterterrorism is glaringly problematic and has won Canada a place on the "name-and-shame" list published by non-governmental organizations.

Canada: Top Contender on the Name and Shame List

The final reason why this thesis focuses on Canadian anti-terror legislation is because Canada has made the top three in the "name-and-shame" list published by several non-governmental organizations interested in the protection of human rights. For instance, Human Rights Watch (HRW), the International Federation of Human Rights (IFHR) and Reporters Without Borders (RSF) all consider that the anti-terror laws of the United States, Britain and Canada, are the most restrictive in the curtailment of rights and civil liberties.[75] Inclusion on such a list should be a source of shame for a country like Canada. By being on such a list, Canada loses part of its identity as a champion of individual rights. To address this, loud and clear

[75] Haubrich, *supra* note 65.

criticism promoting changes in our anti-terrorist mechanisms needs to be expressed. Better oversight and review mechanisms must be provided, and thresholds to limit rights must be raised.

CHAPTER 3: THEORETICAL FRAMEWORK: STRIKING AN OPTIMAL BALANCE

The main claim advanced in this thesis is that Canada has not struck an optimal balance between rights and security when enacting anti-terror legislation. When enacting anti-terror laws, branches of government should be engaged in finding an optimal balance between freedom and security. Attaining an optimal balance is desired in a country like Canada as Canada prides itself in its liberal traditions of upholding rights and the rule of law, whilst protecting its borders and citizens. Striking an optimal balance helps quash vehement dissent towards right-limiting counterterrorist measures and legitimizes anti-terror legislation. Understanding what is meant when claims suggest that legislation should strike an "optimal balance" between rights and security thus warrants special attention. Because the objective of attaining an *optimal balance* is central to this thesis, what is actually meant by the notion of an optimal balance is first introduced and explained in this chapter. To strike an optimal balance, it is suggested that legislation meets both a constitutional standard, but also an efficiency standard.

Evaluating Optimal Balance

When a law is considered constitutional, it in fact meets the minimal standard to be considered acceptable. I suggest in this thesis that meeting an added standard of efficiency raises the threshold where the law is not only deemed acceptable, but rather, it is also desirable. For the purposes of this project, an optimal balance is then considered achieved when legislation not only meets constitutional standards, but also an efficiency standard, that is to say, when a law is both acceptable and desirable.

Introducing the Conformity to an Efficiency Standard

When enacted laws potentially impinge on rights in Canada, the *Oakes* test is the usual constitutional mechanism employed to validate whether the rights violations are justified. A controversial law can be considered constitutional if the limits it imposes are justified in a free and democratic society. Whether this constitutional standard is sufficient in matters of national security warrants addressing. As previously noted, passing the *Oakes* test means that a law meets a minimal standard to be considered acceptable. I advance that in matters of national security, where it is expected that rights will be justifiably limited since the objective of enhancing overall national security is immensely important, that to be considered acceptable is insufficient. Because such laws most often spur controversy, the threshold of *being acceptable* is insufficient to adequately address potential criticism that can arise. Combined with a standard of efficiency, however, much of the criticism and dissent can be satisfactorily addressed. Consequently, it is appropriate for counter-terrorist measures to meet an additional standard which can help legitimize the content of the legislation concerned, increasing the threshold where the law is not just deemed acceptable, but perhaps even desirable, or good. For this reason, I advance that a controversial legislation can be more easily accepted by Canadians, if it meets not one, but two standards. An additional test measuring efficiency can help defend this position. Further, a legislation that passes the efficiency standard, may be less likely to be struck down following a constitutional challenge. This thesis proposes that the additional standard legislation should meet to be considered as striking an optimal balance between rights and security is *efficiency*.

Efficiency

To begin, it is important to understand what a standard of efficiency is and why it is so important.

Efficiency is the state of being efficient. According to the Merriam-Webster dictionary, *efficient* means for something to be "productive of desired effects; especially; productive without waste". [76] We can consider this to mean maximum achievement at the lowest cost. Applied to legislation, efficiency could then mean a law or disposition that has chances of being successful in attaining its objective, at the lowest cost possible. The cost in this instance is the limitation of rights. Therefore, an anti-terror policy will be efficient if it has high chances of preventing or deterring terrorism, while limiting rights minimally and with the lowest impact on the legitimacy of state action.

The proportionality component found within the efficiency examination differs from the proportionality component in the *Oakes* examination where, the chances of success of a measure must also be attained to be deemed efficient.[77] Consequently, an efficient law is one that has chances of attaining its objective without unduly limiting rights. The mechanism to evaluate the additional proposed efficiency standard which will ensure that the necessary checks and balances against unjustified state intervention are provided for consists of a five-factor test first proposed in the United States by Jan C. Ting, a law professor at Temple University. This thesis advances that successfully passing the test, implies that a measure is efficient. My adaptations of the factors proposed by Ting can be separated into two categories. Some aspects of the test verify the chances of success of a measure, while others validate the cost, or limitations on rights. The

[76] Merriam-Webster Dictionary, online : Merriam Webster <https://www.merriam-webster.com/dictionary/efficient>.
[77] *Supra* note 17.

latter validate whether a measure meets the standard of limiting rights at "the lowest cost possible", or as impinging on rights as minimally as possible.

This added standard of efficiency, again, can help defend policies that may generally be regarded as controversial in reason of the limits they impose and the unsatisfactory level of review and judicial scrutiny they afford. This evaluation mechanism serves to address strong criticism directed towards disputed counterterrorist measures and can potentially legitimize the contents of such policies. I propose implementing the criteria within a Canadian context when treating on legislation having to do with national security. This efficiency evaluation metric could be performed prior to a law's Royal Assent. It would act of sorts, as a *a priori* examination of the constitutionality/ efficiency of the law in question.

Ting's Test to Measure the Efficiency of Anti-Terror Legislation

To evaluate whether a law meets the proposed standard of efficiency, this thesis builds on the criteria suggested by Jan C. Ting, which was suggested to help validate counter-terrorist measures in the United States.[78] The following set of criteria will be used to evaluate the efficiency of a law or its dispositions in Canada. Throughout this thesis, reference to the criteria will be done using the terminology *Ting test.* The criteria suggested by Ting to validate a law's legitimacy are the: 1) historical precedent of the provision; 2) revocability of the initiative; 3) location; 4) nature of the threat, which incorporates the gravity, probability and predictability of a perceived threat; and 5) likelihood of success in advancing its objective.[79] For instance, a law that sets justifiable limits on rights for security purposes will not be considered as having

[78] Jan C. Ting, "The need to Balance Liberty and Security" in Alexander Moens & Martin Collacot, eds, *Immigration Policy and the Terrorist Threat in Canada and the United States* (Toronto: Fraser Institute, 2008) online: <https://www.fraserinstitute.org/sites/default/files/ImmigrationPolicyTerroristThreatCanadaUS.pdf>, at 113 ss.
[79] Ibid.

attained an optimal balance if it has little chance of success in attaining its objective, or if the perceivable threat is unlikely to ever occur.

Why Ting?

The Ting Test has been chosen as the preferred evaluative metric to validate the efficiency of dispositions, because, unlike other mechanisms, it goes beyond evaluating only the importance of the objective and the proportionality of the examined measures, which is what *Oakes* does.

In order to validate a law or a disposition that may be unconstitutional or that may infringe on rights, most democracies elect a method that weighs the proportionality of a measure, where the limits it imposes, are balanced against the desired objectives. For instance, the *European Convention on Human Rights* provides a mechanism where the means to reach an objective are weighed against the necessity of the measure and potential alternatives, in order to verify whether the measure disproportionately impinges on rights.[80] It asks whether an alternative is less harmful to the enjoyment of protected freedoms. In Australia, where there is no actual constitutional mechanism to evaluate the infringement of rights and proportionality, there exists a common law test, which also relies on a proportionality analysis. It evaluates whether the limiting measure is the least restrictive means to achieving a relevant purpose. Because alternatives all bear similitudes with *Oakes*, I wanted to find a test that measures something more than the importance of the objective within the proportionality criteria, as a complement, as again, I advance that meeting an *Oakes* standard, is the lowest acceptable standard permissible. It must be noted that some elements of the Ting test and *Oakes* test overlap. For example, the

[80] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, sections 8-11, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 27 July 2018].

revocability of an initiative in *Ting*, can at times overlap with the *minimal impairment* criteria in *Oakes*, or, the nature of the threat in Ting, can overlap with the importance of the measure in *Oakes*. It must be remembered that although some elements of the tests do overlap, Ting brings fresh criticism with regards to the chances of success of a measure, which is a standard that is not evaluated in *Oakes*. By measuring a new standard in addition to the *Oakes* standard, the value of the outcome in terms of validity, becomes more important. When a measure meets not one, but two different standards, it increases its legitimacy in the view of the public.

The Components of Ting's Test

Ting's set of criteria is further explained in the section which follows. Adaptations to what Ting proposes are suggested as well, appropriating the test to make it fit a legal, Canadian national security framework.

i. Historical Precedent

To determine whether a disposition is justified, the common practices of the past should be considered. An analysis of what is usually done can help determine whether a measure is justifiable. For instance, if a practice has been rampant in the past, in a given context, it may be easier to justify its use today in a similar context. This factor helps identify the overall chances of success of a measure. Looking at precedents helps identify what works and what does not. For example, the application of martial law in the context of security can be justified. The *Wars Measures Act,*[81] replaced by the *Emergencies Act*[82] in 1988, authorizes the implementation of martial law in response to a temporary emergency, such as a major disaster, an invasion or even a major terror attack. The acts have been invoked three times, once during World War I, another

[81] *War Measures Ac*t, 5 George V, Chap. 2.
[82] *Emergencies Measures Act*, RSC, 1985, c 22 (4th supp.).

time during World War II, and a third time during the October 1970 crisis. In the event of a similar occurrence or context, the application of martial law (military law) on citizens, where curfews would be imposed, and civil rights suspended, would likely be justified based on the precedent component. [83]

Also, dispositions similar in nature to the one being examined can also be considered under this portion of the test, as can precedents from other jurisdictions. A measure applied in another country which proves to be successful, can help justify the implementation of a measure domestically. Likewise, a measure which has proven to be useful which bears similarity with the one evaluated, can also help speculate on the projective chances of success of the measure. For instance, in *Khawaj,* the court explains that threats of violence are excluded from expression covered by constitutional protection because threats "take away free choice and undermine freedom of action".[84] In this light, dispositions relating to activities that do not "take away free choice and undermine freedom of action", should still be covered by constitutional protection.

The historical precedent criterion must nevertheless be considered carefully and conservatively. One cannot claim that a measure is inefficient if there is no historical precedent. If this were the case, any measure having to do with technology today would likely fail this component of the test, considering the advancements made in communications and technology over the last two decades. In the same vein, we cannot rely solely on the premise that a measure has been applied in the past to justify a measure today.[85] A measure being implemented in the past does not justify its implementation today. Doing so would be to engage on a slippery slope. For instance, between 1941 and 1949, as a precautionary security measure during war time, Canadians of Japanese heritage were sent to internment camps in British Columbia and to

[83] Ting, *supra* note 78.
[84] *R v Khawaja,* [2012] 3 SCR 555, at para 32.
[85] Ting, *supra* note 78.

internment farms across Canada. During this period, Canadians of Japanese descent were subject to government enforced curfews, interrogations, property losses and for some, repatriation to Japan, a land unknown to many targeted.[85] Their property was sold to finance internment camps. Unlike prisoners of war who are protected under the Geneva Convention,[86] Canadian Japanese did not benefit from such protections since they were not considered *prisoners of war*. As such, financing their internment was "permissible". In the event of a war where Canada and Japan would stand on opposite sides today, implementing similar measures would be downright unconstitutional, as it was later found that these policies were abusive, and Canada has since issued formal apologies and compensation.[87] As demonstrated, relying solely on the *historical precedent* criteria to justify the validity of a measure would constitute an incomplete analysis since a measure implemented in the past, could now be considered unconstitutional. This criterion can be useful in presenting what did work, and what did not. Using this criterion can help articulate that discriminatory factors, such as religion, race, colour and ethnicity, are not to be elements considered in security screening processes. [88]

ii. Revocability of the Initiative

When contemplating new national security or anti-terror laws and policies, the revocability of the initiatives must be considered. A measure that can be easily amended or revoked, is more likely to be justified. The use of a sunset clause or the absence of one can provide indications as to whether a measure is overbroad. The government's use of the *Charter* section 33 notwithstanding clause can provide insight on the government's intentions.

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[85] Ann, Gomer Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians during the Second World War* (Ottawa, Ann Sunahara, 2005), at 66, 76; *Ting, ibid*.
[86] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: http://www.refworld.org/docid/3ae6b36c8.html [accessed 4 July 2018].
[87] "1988: Government Apologizes to Japanese Canadians" *CBC Digital Archives* online: CBC <http://www.cbc.ca/archives/entry/1988-government-apologizes-to-japanese-canadians>
[88] Ting, *supra* note 78.

Section 33 reads:

> 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

By using this mechanism, the government declares its intention to limit certain rights. One can infer it would be for an important cause. The government indicates in a provision which impinges on a right included in section 2 or sections 7-15, the specific right being limited, and the duration, which cannot exceed five years. Using the notwithstanding clause tends to convey the government's desire to remain transparent. The brevity of the indicated period of limitation can also favour justification. The revocability of the initiative, for the purposes of the Ting test, helps identify whether a measure is limiting rights as little as possible, or whether, the cost is as minimal as it could be. Even if *Oakes* considers this standard in its *minimal impairment* analysis, the Ting Test measures it alongside the *chances of success* factor. Ting explains that the ease at which a measure can be changed or reformed when a threat recedes, helps determine whether a measure is justifiable. To this, I add that the **possibility of cancelling a measure should a mistake be recognized, also be part of the evaluation**. This entails that proper *review* be provided and that at the very least, an appeal mechanism of sorts is implemented. Granted, any disposition can be repealed or can be subject to a constitutional examination, however, for the

Ting analysis, dispositions within the law pertaining to a specified timeframe or formal review mechanism are elements that are evaluated.

Grossly speaking, measures that may have a lasting impact on the rights of those affected will be harder to justify and to be qualified as efficient. For instance, when considering the war against ISIL, one would ask whether the increased surveillance, information gathering, and pre-emptive detentions can impact the rights of those affected once the threat of ISIL recedes.[88] To this criterion, I suggest that an initiative that is intrusive and limiting can be justified with greater ease if dispositions refer to the temporality of a measure, for instance, by way of a sunset clause. Understandably, society may be more willing to forego civil rights if the disposition permitting the measures indicate a limited timeframe for the validity of the measure, or a given context, for instance, the end of a war.

To this criterion, a second aspect that must be considered as mentioned, is the possibility for review. I advance that proper *review mechanisms* or ministerial reviews should be afforded when these measures impose limitations on rights. A law that is not subject to judicial scrutiny, or at least to some form of official review process has a greater chance of overreaching. Inherently, society may be willing to forego some rights temporarily if a review agency is made available in cases of abuse or potential error.

iii. Location

A third criterion to be considered when attempting to balance national security and rights is the location where a measure is being applied. This factor provides indications on whether a measure has a chance of fulfilling its objective. For instance, some measures applied at an airport or a port of entry into the country, may be more tolerable than when applied on a highway into a

[88] Ting, *supra* note 78, at 120.

metropolitan city. To illustrate, after having received intelligence on a potential threat to be perpetrated by individuals with certain personal characteristics, authorities stopping drivers with those characteristics, for questioning, on a highway would be difficult to justify, considering the low probability of a positive "hit".[89] Yet, performing this same action at a border or port of entry would be considered a more defensible action considering that the area is confined and the probability of a "positive hit" is higher.

iv. Nature of the Threat

The evaluation of the **nature**, **gravity, predictability and probability of** a threat is central in the examination of a measure when establishing the justifiability of the limits it imposes on rights. For the purposes of this paper, these four elements all fall under what will be called the "nature of the threat". The 1) *nature*, relates to the type of threat or, the ease at which it can be perpetrated (think chemical weapons). The 2) *gravity* relates to the level of harm that may result from a threat. The 3) *probability* of a threat relates to the likelihood that a threat will be perpetrated. Finally, the 4) *predictability* relates to the chances of identifying and confining a threat to a given time and space. This *Nature of the Threat* portion of the Ting Test measures both the cost and chances of success of a measure. In *Oakes*, the proportionality component weighs the importance of the initiative, against the extent of the limit. The Ting *nature of the threat factor* consists of a proportionality analysis, which is then completed with as assessment of the chances of success of a measure. Whether a threat has **a high probability** of occurring, whether it is **grave**, whether it can be identified as **predictable** and whether it can **easily be perpetuated** are all factors that individually (or jointly), help justify a measure that may limit rights.

[89] *Ibid.*

GRAVITY ↑ = JUSTIFIABILITY ↑	**PROBABILITY ↑ = JUSTIFIABILITY ↑**	**NATURE (EASE) ↑= JUSTIFIABILITY ↑**
PREDICTABILITY ↑ = JUSTIFIABILITY ↑		

For example, a threat that is **unpredictable**, that is, one that cannot be confined in time or space, attenuates the chances of success of a measure, making it harder to be justified. Said differently, a threat that is probable will usually justify a measure that will help prevent it. However, if the threat it is also unpredictable, the chances of success of the measure may be affected and the gravity of the threat and its nature will determine whether the threat is justified on a case-per-case basis. Predictability counterbalances the other components of the *nature of the threat*. For example, if it is known (probable) that an attack will occur using chemical weapons (nature, gravity), exceptional measures to counter it will be necessary and justified even if the predictability (time and space), is uncertain. Canada's Integrated Terrorism Assessment Centre (ITAC), calculates that the threat level at the present time, is "medium".[90] This means that a violent act of terrorism "could occur" [**see image 1**] and consequently additional measures can be put in place to keep Canadians safe.[91] Some such measures could conceivably impinge on Charter rights but would arguably be justified in the context of the current threat level.

[90] Government of Canada, "Canada's National Terrorism Threat Level, online : Canada.ca <https://www.canada.ca/en/services/defence/nationalsecurity/terrorism-threat-level.html>.
[91] Ibid.

Image 1:

Canada's National Terrorism Threat Levels and the security response

Very Low	Low	Medium	High	Critical
A violent act of terrorism is highly unlikely	A violent act of terrorism is possible but unlikely	A violent act of terrorism could occur	A violent act of terrorism is likely	A violent act of terrorism is highly likely and could occur imminently
Measures are in place to keep Canadians safe.	Measures are in place to keep Canadians safe.	Additional measures are in place to keep Canadians safe.	Heightened measures are in place to keep Canadians safe. Canadians are informed what action to take.	Exceptional measures are in place to keep Canadians safe. Canadians are informed what action to take.

[92]

To summarize, the degree of the limitation permitted is directly linked to the chances of success of a measure, which is weighed against the probability, predictability, nature and gravity of a threat. The chances of success of a measure render a measure not only acceptable, but desirable as it is considered efficient, building towards an optimal balance.

It is to be noted that other factors complicate this portion of the analysis. Deterrence, for example, alters the Ting examination where it affects the predictability and probability of an attack. Increasingly, terrorists target areas that are difficult to protect, indicating that security precautions are in fact a deterring factor for terrorists. Prominent places such as government buildings, high-profile events, etc., are statistically, less likely (improbable) to be the target of attacks since they are highly secured. This being said, since attacks are less likely to occur in such protected environments, attacks become less predictable and as a consequence, public places that are difficult to secure, face greater risk of an attack. The predictability and probability of attacks decreases when environments are secure, which would in theory, affect the justifiability of a measure. From this, it can be said that even the appearance of enhanced

[92] *Ibid*

security becomes increasingly important. An apparent secured environment can deter a threat. At present state, our legislation focuses on prevention and detection, greater attention to measures of deterrence should be considered.

v. Likelihood of Success

To justify a limiting measure, ideally it should have good chances of succeeding in attaining its objective. The likelihood of success of a measure is a factor that must be carefully considered while weighing rights against security. This component of the Ting Test is of sorts, the sum of all parts; it is the cumulative outcome from the analysis of the preceding four factors. To validate a measure, this final component asks whether a measure will likely attain its objective. The previously detailed four components can help answer this question. To complete the analysis, we can also ask whether retroactively, a proposed measure, could have been useful in securing an objective. In other words, to evaluate the chances of success of a measure, we can ask whether a proposed disposition or measure, applied to a case study or past scenario, would have helped prevent the situation in the first place, or help deter it, or at least limit its impact. For instance, it is said that a "cascading series of errors"[92] committed by the RCMP, the government and CSIS, along with regulatory flaws, are responsible for the Air India Flight 182 attack, where a flight departing from Vancouver was bombed, killing 329 passengers, 268 of which were Canadian. Looking back, we can ask whether the inter-agency information sharing now permitted by some of our anti-terror laws and policies could have prevented this attack back in 1985? The answer may never be clear, but the exercise can provide an indication as to the chances of success of a given measure.

[92] "Air India case marred by 'inexcusable' errors" CBC NEWS (17 June 2010) online : CBC News <https://web.archive.org/web/20100619234239/http://www.cbc.ca/canada/story/2010/06/17/air-india017.html>

The likelihood of success criterion is probably the most important criterion to consider in the Ting analysis. The full set of criteria is nevertheless necessary to evaluate the efficiency of a measure. Cumulatively, they help assess the cost that may result from the application of a measure, as well as the chances of success of a measure. Because this latter portion of the analysis is so important, it also acts as a distinct criterion, on its own merit, even if it can be considered to be the "sum of all parts". The likelihood of success criterion, in its wording, seeks to evaluate whether a measure has chances of succeeding in fulfilling its objective. In other words, the goal of this criterion in and out of itself seeks to evaluate the overall efficiency of a measure. Evidently, to qualify a measure as truly efficient, the other 4 criteria must be considered in parallel as they can increase the extent of the efficiency. This said, if a measure does not meet this specific criterion, it would be impossible to qualify the measure as efficient. On the contrary, a measure not meeting another criterion, for example, a disposition that does not have any historical precedent, can still qualify as efficient. To put it differently, this criterion, is the resulting outcome arrived at following an analysis of the previous four criteria. It is, however, to be assessed on its own merit by answering whether, objectively, following the Ting analysis, a measure will likely be successful in attaining its objective.

After careful analysis following a *Ting Test,* if a law is deemed efficient, it must then conform to a constitutional standard in order to achieve an optimal balance. These two standards complement each other. One measures the importance of an objective and the proportionality between the limits imposed and the sought-after objective, while the other also measures this, as well as the chances of success of a measure. Successfully meeting both standards increases the legitimacy of a measure in the eyes of the public.

Introducing the Conformity to a Constitutional Standard

To be deemed as striking an optimal balance, once a law is considered efficient, it should also be deemed constitutional. Canadian Legislation should always be in conformity with the Constitution and the rights it offers. These rights can nevertheless be limited under certain conditions. When the conditions are met, the limits are said to be justified. The constitutional standard a law should meet is discussed in this section. Historically, Canada generally navigates cautiously when legislating in order to respect certain rights such as the rights to privacy,[93] equality,[94] life, liberty and security[95], etc., on the one hand, and government interests (or objectives), on the other. Albeit we consider the aforementioned rights as democratic values, we do so within limits that we've come to consider as reasonable.

To be qualified as reasonable, an impingement on rights must meet the constitutional standard developed in "*Oakes*".[96] *Oakes* sets out the analysis pattern that establishes whether the limitations to rights can be justified in a democratic society.

Oakes

Dispositions that impose limits on rights should meet the constitutional challenge standard, that is, the limits imposed should be reasonable, prescribed by law and "demonstrably justified in a free and democratic society". The test developed in *Oakes*, a framework for the limitations clause, is used to assess this. It has been restated by the Supreme Court in *R v Chaulk*[97] in a convenient checklist format:

[93] *Supra* note 3, s 8.
[94] *Supra* note 3, s 15.
[95] *Supra* note 3, s 7.
[96] *R v Oakes,* [1986] 1 SCR 103.
[97] *R v Chaulk,* [1990] 3 SCR 1303.

1. The objective of the impugned **provision** must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are **pressing and substantial** in a free and democratic society before it can be characterized as sufficiently important. [emphasis added]

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right or freedom in question as "little as possible";* and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

*It is to be noted that the standard has been modified to "as little as is reasonably possible" in *R v Edwards* 1986] 2 SCR 713.

The *Oakes* test is further explained in the section which follows.

Prescribed by law

To meet the first *Oakes* standard, the inquiry into whether a limitation was 'prescribed by law' requires that the limit be the result of actions perpetrated by the government or its actors and should be authorized by an existing law. It may be expressed or implied in a statute or regulation,[98], or even in a policy.[99] A *prescribed by law* limit can also be derived from common

[98] *R v Therens*, [1985] 1 SCR 613, *R* v *Thomsen*, [1988] 1 SCR 640, *R v Elias,* [2005] 2 SCR 30.
[99] *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, [2009] 2 SCR.

law, as long as there is sufficient government action.[100] Also, discretionary administrative decisions limiting a right was also considered to be "prescribed by law.[101] Where there exists no legal basis for the conduct of the government or its actors, the justification of the limit would undoubtedly fail.

In *Irwin Toy v Quebec,* the court found that limitations provided in a law would fail to be justified when, "there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances".[102] This means, overly vague permissions would fail this portion of an *Oakes* examination.[103]

Pressing and Substantial Objective

To meet the next standard, the legislation or dispositions must have an objective. In *Vriend v Alberta*[104], it was concluded that a law can be invalidated if it has no valid objective. After, the objective must be weighed against the values of a free and democratic society and be found to be pressing and substantial.[105] This criterion is usually the easiest to pass, as long as a law's objective is not "discriminatory or antagonistic to fundamental freedoms or inconsistent with the proper division of powers" as established in *Big M Drugmart Ltd.*[106] Also, the objective measured, is not necessarily the objective of the law or the disposition as a whole, but rather, the

[100] *Ibid [Therens]; RWDSU v Dolphin Delivery*, [1986] 2 SCR 573; *R v Swain*, [1991] 1 SCR 933; *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835); *R v N.S.*, [2012] 3 SCR 726.
[101] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038; *Ross v New Brunswick School Board No.* 15, [1996] 1 SCR 825; *Wynberg v Ontario*, [2006] 82 O.R. (3d) 561 (C.A.), at para 150ff.
[102] *Irwin Toy Ltd v Quebec* (AG), [1989] 1 SCR 927,
[103] *Ibid*, *Luscher v Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85). *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606; The test is whether the provision is so vague that it fails to provide an intelligible legal standard,
[104] *Vriend v Alberta,* [1998] 1 SCR 493.
[105] *R v Big M Drug Mart Ltd,* [1985] 1 SCR 295, *Egan v Canada*, [1995] 2 SCR. 513, *Vriend v Alberta*, [1998] 1 SCR 493, at para 108; *Canada (Attorney General) v Hislop*, [2007] 1 SCR. 429, at para 44;
[106] *Ibid [R v Big M Drug Mart Ltd*].

objective of the specific infringement,[107] with regard to the factual and social context of each case.[108]

Proportionality and Rational Connection

Next, the limitation imposed by a disposition must have a rational connection to the objective sought by Parliament. To achieve the objective of the legislation, the measures cannot be *arbitrary or based on irrational considerations.*[109]

In *R v Morgentaler* [110] *and R v Rodriguez,*[111] the court defines an arbitrary law as "one bearing no relation to, or being inconsistent with, the objective that lies behind it". In *Chaoulli v Quebec,* the test to measure arbitrariness used the criteria of "unnecessary" instead of "inconsistent", lowering the threshold.[112] Future decisions did not follow, the court considering itself bound to the criteria set in *Rodriguez.*[113]

Justice McLachlin (as she then was) further explains that a real connection to a given situation and its facts is required, over a theoretical connection to the state objectives. She explains that the more important the impingement on rights, the clearer the connection to the goal the measure must be. Specifically, in relation to the arbitrariness test, she observes "[...] whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair… The more serious the impingement on the person's liberty and security, the more clear must be the connection."[114] The objective stated, should also be the real objective. [115]

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[107] T*oronto Star Newspapers Ltd v Canada*, 2010 SCC 21 (CanLII) at para 20.
[108] *Carter v Canada (Attorney General)*, [2015] 1 SCR 331, at para 102; citing *Hutterian Brethren*, [2009] 2 SCR 567, at para 55.
[109] *Ibid*, *R v Oakes* [1986] 1 SCR 103, at 70.
[110] *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 at para 147.
[111] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 at para 203.
[112] *Chaoulli v Quebec (Attorney-General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*] at paras 233-234.
[113] *Bedford v Canada (Attorney General)*, 2012 ONCA 186, 109 OR (3d) 1 at paras 146-47.
[114] *Chaouilli, supra* note 112*,* at para 131.
[115] T*etreault-Gadoury* v. *Canada (Employment and Immigration Commission*, [1991] 2 SCR 22.

The case law cited, when describing the measures prescribed by law, explain that they must be constructed in a way to accomplish the stated objective. There is no success metric in this scheme, but rather, only a rational connection requirement. The government must demonstrate, on the balance of probabilities, that there exists a causal link between the impinged right, and the sought-after objective.[116] The Supreme Court describes the *rational connection* component as "not particularly onerous".[117] The government simply must demonstrate that it is "reasonable to suppose" that the limit "may further the goal, not that it will do so".[118][underline added].

Proportionality (ii) Minimal Impairment

A measure should limit rights as little as is reasonably possible. One will look at whether a limitation imposes total or partial bans, or whether a measure is part of a spectrum of reasonable measures. Originally, the minimal impairment criterion was worded to mean that a measure should impose as little as possible a limit to rights. With time, this criterion has been modified. It was changed to mean "as little as is reasonably possible" in *R v Edwards Books and Art Ltd,*[119] seeing that this portion of the test was the most difficult to pass and presented the greatest challenge to parliament. Changing the wording provided a little more flexibility for Parliament to navigate through constitutional challenges. Courts will consider two factors to evaluate whether a measure impinges "as little as is reasonably possible". Whether a measure is overbroad, and

[116] *R v Butler*, [1992] 1 SCR. 452, *Thomson Newspapers Co. v Canada (A.G.)*, [1998] 1 SCR 877.
[117] *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR. 391. at para 148; *Little Sisters Book and Art Emporium v Canada* (Minister of Justice), [2000] 2 SCR 1120, 2000 SCC 69 at para 228; *Trociuk v British Columbia (Attorney General)*, [2003] 1 SCR. 835, at para 34; *Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 SCR 610, at para 40-41.
[118] H*utterian Brethren*, [2009] 2 SCR 567, at para 48, *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, at paras 143-144; *supra* note 17.
[119] R v Edwards Books and Art Ltd, [1986] 2 SCR 713.

whether alternative solutions are available are two factors that will be assessed.[120] Courts will consider whether the chosen measure falls within the range of reasonable alternatives.[121] The test requires that the government demonstrates that among the range of reasonable alternatives available, there exists no other option that is less rights-limiting which can achieve the desired objective of the law, in real and substantial manner.[122]

Proportionality Between the Infringement and the Objective

The curtailment of rights should be proportional to the objective sought by the measure. The question asked to evaluate the proportionality between the infringement and the objective criteria is whether the measures that curtail Charter rights are proportional to the objectives sought. This is what we call a cost-benefit evaluation. In other words, to be justified, the limit imposed by a disposition should not outweigh its benefits.[123] The more serious the limit on a right, the more important the objective must be.[124]

To be considered as striking an optimal balance between rights and security, a law or disposition that passes this constitutional standard is insufficient. It must also prove to be efficient.

Chapter Conclusions

Scrutiny and controversy are no enemies to anti-terror laws. To help legitimize national security policies, laws should aim at striking an optimal balance between rights and security. This chapter explained that to strike an optimal balance, laws need to be both constitutional and

[120] *R v KRJ,* 2016 SCC 31 (CanLII), at para 70, *Chaoulli v Quebec (Attorney-General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*] at 111.
[121] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.
[122] *Hutterian Brethrenm, supra* note 118, at para 55, *Carter, supra* note 108, at paras 102, 118.
[123] *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, *KRJ, supra,* note 120, *Butler, supra* note 116; *Morgentaler, supra* note 110; *RJR-MacDonald Inc, supra* note 121, at para 45.
[124] Ibid; *Oakes*, supra note 96 at 136; Hutterian Brethren, supra note 118.

efficient. When deemed constitutional, a law meets the minimal standard to be considered acceptable. Once a law is both constitutional and efficient, a law becomes desirable, and good. In other words, when measures authorized by anti-terror legislation are efficient in deterring terrorist threat, we can advance that the limitation of rights resulting from the application of these measures is useful and truly justifiable, on the premise that securing national security is paramount. On the contrary, however, if these measures prove to be inefficient in deterring terrorist threat, it then becomes difficult to conclude that the limit on rights is ever truly justified, even if constitutionally acceptable.

CHAPTER 4: TOWARDS THE WAR ON TERROR

Now that the theoretical framework has been set out, the next step will be to apply the proposed framework to the chosen bodies of legislation. To better understand the context which led to overhauls of anti-terror laws and policies, this chapter will first provide a brief historical overview of the events that took place paving the may to such legislative reforms.

Section 1: The Launch of the *War on Terror* Put into Context

9/11

To begin, a return to 2001. The terrorist attacks that took place on US soil on September 11, 2001, when 767s crashed into the Pentagon and the World Trade Centre, led to important changes in many nation's national security policies and have made the security agenda a priority. These attacks shattered the order of things, they instilled fear and epitomized the vulnerability of states. Many contended that if America could be hit the way it was, no other nation was truly safe.

Looking south of the Canadian border following these events, the budget paints a dire picture. The United States has spent well over $7.6 trillion[125] USD dollars on homeland security and defence, spending over $600 billion USD annually.[126] In this light, it is clear that our neighbours' government shifted from a peace-time to a war-time footing. In fact, this footing was noted to change so rapidly that by 11:00 am on September 11th, the U.S. government had announced that Al Qaeda, a militant Islamist terrorist organization founded by Osama Bin Laden

[125] "National Priorities Project, "US Security Spending Since 9/11" (May 26, 2011), online: <https://www.nationalpriorities.org/analysis/2011/us-security-spending-since-911/>.
[126] The budget on defense only significantly decreased as of 2013 where military spending decreased from 671$ billion to $619 billion in the 2013 calendar year. Dinah Walker, "Trends in U.S. Military Spending", Council on Foreign Relations, online: <http://www.cfr.org/defense-budget/trends-us-military-spending/p28855>:

in the later 1980s, was responsible for the attacks on the Pentagon and the World Trade Centre, and by 9:30 pm that night, the *Global War on Terrorism* (GWOT) to dispose of the Taliban[127] regime was officially launched and led by the United States.[128] In a televised message aired at 9:00 pm that night, President George W. Bush sent a clear and coherent message to the world that watched aghast, stating that America would "[…] make no distinction between the terrorists who committed these acts and those who harbor them."[129] From the Oval Office, the president declared that "[t]errorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America. These acts shatter steel, but they cannot dent the steel of American resolve."[130] America thus vowed to never be victim of such attacks again, and to bring the perpetrators of these heinous crimes to justice. The wheels leading to an era of securitization were subsequently set into motion.

Anti-Terror Legislative and Policy Movement

Despite the narrative of American bravery expressed in President Bush's statement following the attacks of 9/11, these attacks shook fundamental societal positions on matters relating to domestic security and endangered the sentiment of safety here at home, and with good reason.

In the section which follows, the movement towards anti-terror laws is presented. It will be shown that the potentiality of attack awoke the need for many nations to offer better security precautions.

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[127] The Taliban provided safe haven to Al Qaeda following the attacks of 9/11 but is distinct from them. The Taliban regime played no direct role in the 9/11 attacks, was unaware of them and publicly condemned them.
[128] *Attack on America, 2009, This day in History*, Online: History <http://www.history.com/this-day-in-history/attack-on-america>.
[129] *Ibid*.
[130] *Ibid*.

The fear of terror galvanized public opinion in support of the anti-terror agenda.[131] For instance, less than five weeks after the 9/11 attacks, almost in retribution it seemed, Afghanistan was invaded and bombed.[132] The 9/11 attacks may have provided justification and endorsement by the international community for America to pursue its war, and in this instance, the *jus ad bellum* doctrine[133] was recognized as being warranted. Military deployment was considered as a just intervention by the international community and the United Nations.[134] It follows, to implement the changes the government felt were required for its citizens to feel safe, legislators and parliamentarians were called upon to become primary actors. New robust legislation was to offer better protection against terrorism. After the 9/11 attacks, individuals more than ever were willing to forego some of their rights and freedoms, in the name of security.[135] This current was not limited to America alone. Other nations such as Columbia, India, Indonesia, Israel, Russia, the U.K and Thailand were also the target of large-scale terrorist attacks. In each of these nations, the reaction following these attacks was to grant increased powers to the executive branch, law enforcement authorities and intelligence services. For other nations that had witnessed the United States at its nadir, the fear of new attacks spurred the implementation of new anti-terror legislation and counterterrorist mechanisms across the board.

The measures adopted in Canada post 9/11 are presented in the next section.

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[131] John Mueller and Mark G. Stewart, *Public Opinion and Counterterrorism Policy*, Washington DC, (20 February 2018), Cato Institute White Paper, online: CATO <https://www.cato.org/publications/white- paper/public-opinion-counterterrorism-policy>.
[132] Michel Chossudovsky "9/11 and America's War on Terrorism" (26 May 2011), online : Global Research <http://www.globalresearch.ca/9-11-and-america-s-war-on-terrorism/24975>.
[133] Karma Nabulsi, "Jus Ad Bellum Jus In Bello", online: Crimes of War <*http://www.crimesofwar.org/a-z-guide/jus-ad-bellum-jus-in-bello/*>. "The principal modern legal source of jus ad bellum derives from the Charter of the United Nations, which declares in Article 2: "All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations"; and in Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."
[134] *Supra* note 132 [Chossudovsky].
[135] *Supra* note 131 [Mueller Stewart].

Measures Adopted in Canada

To illustrate how the 9/11 attacks spurred the implementation of security measures outside of the United States, some of the first measures adopted in Canada post 9/11 are presented. Before 9/11, Canada actually did not have any anti-terror laws, so to speak. Terrorism, simply was not *a Canadian thing.* This changed after the WTC attacks. In response, the Air and Transport Security Authority, responsible for screening passengers, baggage and airport employees in order to enhance security was implemented,[136] along with the Canada Border Services Agency (CBSA),[137] which provides integrated border services to support the promotion of national security. The CBSA is also responsible for immigration enforcement and customs services. Next, Canada Command, a national security headquarters centre, was also created.[138] This agency improves the coordination of military logistics should national security be at risk. More importantly, the level of information sharing between agencies responsible for detecting terrorist activity financing and the investigation of terrorism was broadened.[139] Finally, the *Anti-terrorism Act* (Bill C-36),[140] which targets terrorists and terrorist groups, received Royal Assent on December 18, 2001, just three months after the 9/11 attacks. Considered an omnibus bill, the purpose of this law, it was said, was to protect the security and in parallel, fundamental rights of Canadians by extending the powers of the government and agencies dealing with national security. It legalized 'secret trials', expanded situations where pre-emptive detention was allowed and broadened surveillance powers. It led to the creation of a listing process which

[136] Public Safety Canada, "The Government of Canada's response to the terrorist attacks of 9/11" online : <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/sptmbr-11th/gvrnmnt-rspns-en.aspx>.
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] *Anti-Terrorism Act*, supra note 12.

publicly identifies individuals and groups associated with terrorism. This listing tool was to be an important asset in deterring the financing of terrorist groups.[141]

The fact is, the face of terrorism is constantly changing and requires adapted sets of tools to address it on a global level. Today, not a single day passes where the term "terrorism" is not mentioned in some shape or form in the media. Since 2011, the threat the world is facing is new and global: the Islamic State of Iraq and the Levant (ISIL), unequivocally recognized by the United Nation's Security Council as one of the world's most brutal terrorist organizations which constitutes "a global and unprecedented threat to international peace and security".[142] ISIL menaces national security on a global scale and all countries have a part to play in eradicating this threat. It goes without saying, counter-terrorist measures are a necessary means. Sometimes, these measures must limit rights to fulfill their objective, but only reasonably so. As mentioned earlier, the potentiality of threat and the perceivable gravity of such threats need to be accounted for when determining whether the limitations on rights are justified, in the context of security.

In the next chapter, the main anti-terror legislation will be examined more closely in order to determine whether an optimal balance between rights and security is attained in Canada. Through an analysis of certain provisions that limit rights, it will next be shown that the new measures adopted in Canada, are not both efficient and constitutional and as such, do not strike an optimal balance.

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[141] Public Safety Canada, *Supra* note 136.

[142] *On terrorist attacks perpetrated by ISIL also known as Da'esh,* UNSC Res 2249, UNSCOR 2015, UN Doc 12917 (2015), online: <http://www.refworld.org/docid/5656a4654.html>.

Section 2: Analysis of Canadian Anti-Terror Policies

Problematic Measures

Bill C-51 received Royal Assent on June 18, 2015, despite opposition from law experts, academics, former Supreme Court justices, former prime ministers and society. Two groups, the Canadian Civil Liberties Association and the Canadian Journalists for free expression launched the constitutional challenge[143] soon after the adoption of bill C-51 in 2015. It identifies five components of the bill as unjustifiable violations of Charter rights. For instance, the banning of terrorism promotion or advocacy (s *83.221 Ccr*) is too broad and limits freedom of expression. Also, the active-disruptive powers given to CSIS, which allow it to request a mandate where a judge can authorize Charter violations (ss 12.1 (3), 21.1(1) *CSIS Act*), is an inversion of the judiciary's role to uphold the rule of law and protect constitutional rights. Next, C-51 creates an expanded peace-bond system (810.011 *Ccr)* potentially limiting the liberty of those monitored. The incorporated *Secure Air Travel Act* and the *Prevention of Terrorist Travel Act*[143] make it easier to place individuals on "no-fly" lists. Finally, the capacity for agencies to share large bodies of information is facilitated by bill C-51(ss 3, 5 *CSIS Act)*, limiting the right to privacy. Each provision denies due process to those whose rights are being limited and judicial oversight may be circumvented. This thesis will focus on three of these measures, namely, those criminalizing the advocacy of terrorism offences in general, those relating to CSIS's active disruption of threat, and those pertaining to expanded information sharing. The objective of the measures, as well as the limitations the measures impose will be expounded. To measure whether

[143] Ontario Superior Court of Justice : *Notice of Application,* (21 July 2015), online: CCLA < https://ccla.org/cclanewsite/wp-content/uploads/2015/08/Issued-Notice-of-Application-Bill-C-51-C1383715xA0E3A.pdf>.
[143] *Secure Air Travel Act,* SC 2015, C 20, section 2, ss 8.1; *Prevention of Terrorist Travel Act,* SC 2015, c 36, section 42.

the measures strike an optimal balance between the values of security and rights, a classic *Oakes* test, as well as a Ting test, will be performed.

CHAPTER 5: ADVOCATING OR PROMOTING TERRORISM OFFENCES IN GENERAL

Introductory remarks

Section 2 b) of the Charter enshrines freedom of expression as a protected right where all non-violent activity intended to convey a message is to be protected. Bill C-51 introduced a provision that criminalizes speech that "advocates or promotes the commission of terrorism offences in general". It offers no legal defence provisions, nor does it provide for any exceptions (such as private conversations). The scope of the law is vast as it is vaguely worded. The terminology "terrorism offences in general" opens the gateway to an infinite number of potential offences, seeing it's overly broad characterization. The government's national security consultation Green Paper suggests interpretations for "terrorism offences in general", however, there is no agreement within the legal community as to how courts will interpret this terminology.[144] Essentially, the law makes "criminals of people who have neither committed, nor plan to commit, any criminal or violent act".[145] For instance, a student may want to share a post on Facebook that relates to an ISIL call for recruitment. He or she may intend on sharing such a post for educational purposes, or as a statement of his or her shock and indignation, but at face value, he or she would be committing a crime, based on this new overbroad infraction.

[144] Michael Von, *Terrorism Speech Offences Will Undermine Radicalization Prevention Efforts*, British Columbia Civil Liberties Association (27 Sept 2016) online: BCLA <https://bccla.org/2016/09/terrorism-speech-offences-will-undermine-radicalization-prevention-efforts/>.
[145] *Ibid*.

Advocating or Promoting Terrorism Offences in General: *Oakes* Constitutional Standard Analysis

The *Oakes* test will be applied to measure the constitutionality of the disposition criminalizing the promotion of terrorism offences in general. It will be shown that this measure unjustifiably limits freedom of expression and is unnecessary.

Is the limit prescribed by law?

The limit on freedom of expression may be prescribed by law where it is publicly accessible as Bill C-51 is included in a law. It amends the Criminal code to criminalize the promotion of terrorism offences in general. It reads as follows:

> **83.221 (1)** Every person who, by communicating statements, knowingly **advocates** or **promotes** the commission of terrorism **offences in general** — other than an offence under this section — while **knowing** that any of those offences will be committed or being **reckless** as to whether any of those offences **may** be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years. [my annotations]

As it is written, however, the disposition may be considered overbroad in that there are no details or explanations as to what the nature of "terrorism offences in general" entails specifically. Further, the differences between "counselling, advocating and promoting" remain unclear, and as such, courts may find the disposition overly vague, and thus not be prescribed by law. The doctrine against vagueness requires that laws be sufficiently precise to limit law enforcement discretion.[146] In any event, courts do not systematically strike down all imprecise laws, having recognized that precise technical definitions may not always be possible. Courts thus interpret vague terms or dispositions based on Parliamentary intent.[147] Also, courts could

[146] *R v Levkovic*, 2013 SCC 25,[2013] 2 SCR 204,[2013] SCJ No. 25 (QL); 2012 SCC 47 [*Levkovic*], at para 2, citing *Reference re* ss. 193 and 195.1(1)(c) of the *Criminal Code* (Man.), [1990] 1 SCR 1123.
[147] *R v But*ler, [1992] 1 SCR 452; [1992] SCJ No 15 (QL) [*Butler*], at para 32.

consider that the disposition meets the *low vagueness threshold* as it did in *R v Zundel*[148], in order to assess the matter on its merits. For this purpose, the constitutional analysis will be continued.

Is the Measure Pressing and Substantial?

The Department of Justice site explains that "the offence does not criminalize the glorification or praising of terrorism. It is directed at prohibiting the active encouragement of the commission of terrorism offences and not mere expressions of opinion about the acceptability of terrorism[…]. It extended the concept of counselling to cases where no specific terrorism offence is being counselled, but it is evident nonetheless that terrorism offences are being counselled."[149]

The measure is pressing and substantial. Hon. Peter MacKay, the Minister of Justice and Attorney General of Canada at the time, reminded the House of Commons parliamentarians during the first reading of the bill, its objective, "namely, the imposition of reasonable conditions on persons by the courts with a view to preventing terrorism activity and the commission of terrorism offences".[150] He emphasized that the "government takes the position that these measures are necessary to protect public safety. They are not to be used arbitrarily, and they are based on genuine concerns that put the public at risk".[151] He concluded his statement by saying that "the second area of the Criminal Code reform contained in Bill C-51, which would indicate a new indictable offence for advocating or promoting the commission of terrorism offences in general, is again an area of the law we think is necessary".[152] Aligned with the Government's counter-terrorism strategy, then Public Safety Minister, Steven Blaney, compared terrorism to the Holocaust, claiming that "[violence begins with words. Hatred begins with words […]

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[148] *R v Zundel* [1992] 2 SCR 731; [1992] SCJ No 70 (QL) [*Zundel*].
[149] *About the Anti-terrorism Act 2015* (20 June 2016) online: Department of Justice <http://www.justice.gc.ca/eng/cj-jp/ns-sn/ata15-lat15.html?wbdisable=true>.
[150] Canada, House of Commons, Hansard, 41st Parl, 2nd sess, No 174 (18 February 2015) (Peter Mackay) online: <http://www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-174/hansard#8583504>, at 1720.
[151] *Ibid*.
[152] *Ibid*.

extremist speeches, the language that undermines Canadian values, basically hate propaganda has no place in Canada […] we must not tolerate incitement to violence".[153] The government's stated objective is thus to prohibit the active encouragement of terrorism offences. It seeks to limit influencing individuals from committing terrorism offences. In a modern democracy, this purpose is commendable. The objective of protecting society from grave dangers such as terrorist threat is self-evident and so is the limitation of the promotion of such offences. Consequently, this measure meets the pressing and substantial standard.

Is the Measure Proportional?

The next step to validate the constitutionality of a measure is to assess whether it meets the proportionality standard. To do this, the measures must "be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to the objective".[154] It must also "impair the right in question as little as reasonably possible"[155], and finally, there should exist a proportionality between the effects of the limiting effects and the objective.

i) Is the Measure Fair and not Arbitrary? Is it Connected to the Objective and Designed to Achieve the Objective?

The measure in question is not adopted based on irrational considerations. The goal is to prevent the promotion of terrorist offences, which in turn, helps deter the potentiality of radicalization of certain individuals. This is a fair objective and is not arbitrary. It appears that the disposition is internally rational. It is reasonable to infer that the promotion of terrorist acts, can appeal to the most vulnerable and encourage radicalization. The promotion or advocating of terrorist offences must be halted in its early stages. Criminalizing activity seeks to deter. The risk

[153] Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 2nd Sess, No 053 (10 March 2015) at 1000. (Hon Steven Blaney).
[154] *Oakes, supra* note 96, at para 10.
[155] *R v Edwards Books and Art Ltd, supra* note 119.

of being accused and convicted of a criminal offence will make those not seeking to promote terrorism in a straightforward way, think twice before performing activities that could be considered as the promotion or advocating of terrorism offences in general. The measure criminalizing the promotion or advocacy of terrorism offences in general, can certainly be considered to be connected and designed to meet the objective set forth, which is to deter terrorist offences, and interest towards radicalization. The measure seems to pass this first component of the proportionality constitutional standard.

ii) Does the Measure Impair the Rights as Minimally as is Reasonably Possible?

The minimal impairment standard is where things get more complicated. As noted in *Butler,*[156] the measure need not be the least restrictive, but it must not impinge on a right more than what is reasonably necessary in order to be rationally aligned with the Parliament's objective. Courts consider overbreadth and alternative solutions to arrive at the stated objective. Here, we ask whether the criminalization of the promotion or advocacy of terrorism offences in general imposes limitations that disrupt society as little as is reasonably possible? I believe it does not. At present, there are 14 existing terrorist offences within the Criminal code,[157] some of which already apply to terrorist-related speech. Some address the incitement, instruction and facilitation of terrorist offences. These are capable of criminalizing the speech the government seeks to limit with the proposed amendments found in Bill-C-51, without limiting activity that perhaps should not be criminalized. Of course, the existence of other alternatives does not make this component of the test fail, but it must be factored in.

[156] *Supra* note 116.
[157] *Criminal Code*, RSC 1985, c-C-46, ss 83.01, 83.02,83.03 83.04, 83.05, 83.08, 83.09, 83.1, 83.14, 83.18, 83.19, 83.20 83.21, 83.23[Ccr].

Additionally, as previously mentioned, the measure, as it is written, is overbroad in that there are no details or explanations as to what "terrorism offences in general" entail specifically. The disposition is also overbroad in that it also applies to all forms of statements, be they written or gestural. For instance, a sign in support of a disputed terrorist organization could be grounds for prosecution. In other words, *terrorism offences* expand beyond what one usually understands as terrorist activity. As such, the disposition may also be considered to violate the doctrine of vagueness[158] where, it does not "limit enforcement discretion"[159] as the Supreme Court observed to be a requirement in *R v Levkovic.* In this case, the minimum standard of precision required by the Charter, as well as the notion of vagueness are expounded. The Supreme Court confirms in *Levkovic,* that in criminal law, "the prohibited conduct must be fixed and knowable in advance"[160], which would not be the case under the offence as it stands. The terms *terrorism offences in general*, can rather, capture a spectrum of activity beyond those intended.

In *Holder v Humanitarian Law Project,* a U.S. landmark case, when assessing a "participation in terrorist activity" disposition, the court determined that a doctor could be "guilty of providing material support of terrorism, even if they only provided support with the intent to assist the humanitarian efforts of a listed terrorist group" .[161] The Supreme Court of Canada rejected this view as our own section 83.18 Ccr "participation in terrorist activity" disposition requires a "**purpose** to assist a terrorist" element. This element of purpose, however, is nowhere to be found in the section 83.221 Ccr being examined here. The requirements are that a person **knowingly** advocates or promotes and is **reckless,** or **aware of the possibility** that as a result of this promotion or advocacy, a person **may** commit a terrorism offence. The term "may"

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[158] *R v Levkovic,* 2013 SCC 25.
[159] *Ibid*, at para. 32.
[160] *Ibid*, at para. 33.
[161] *Holder v Humanitarian Law Project 130, S.Ct.* 2705, 2717 (2010).

sets a rather low standard. If the accused is subjectively aware that someone could commit a terrorism offence as a result to his or her communication, the *mens rea* requirement will be satisfied.[162] The use of the word "may" does not minimally impair the rights of an individual as it allows capturing activity performed without any criminal intent, which denotes a complete ban on some forms of expression. Use of the words *may* and *possibility* and *terrorism offences in general* in the disposition can thus allow interference with activities that have no connection to the stated objective of the law.

As a matter of fact, the disposition does not provide any exceptions that could excuse the lack of precision. In *Keegstra,*[163] statutory exceptions demonstrated that the government tried to limit the extent to which it impinged on rights. Here, the government makes no such attempt. For instance, the disposition does not exempt private speech, as does the section 319 (2) hate speech provision. Roach and Forcese agree that it "is capable of chilling constitutionally protected speech".[164] They contend that the disposition was adopted with the idea of warding off ISIL and Al Qaeda extremism and that the disposition, if applied straightforwardly to such cases could be useful. However, if applied to other agents, such as pipeline contesters, the justification of it is less clear, and questionably legitimate. For instance, posting a documentary on social media platforms about ISIL, according to the wording of the disposition, could potentially be considered as the promotion of terrorist activity. Writing an article about acts of terror perpetuated by al-Qaeda could also potentially constitute promoting terrorist activity. The line is not clearly defined and as a result, the lack of precision risks placing a chill on freedom of expression. It is hoped that academics, or journalists would not be charged under this offence,

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[162] Kent Roach, Craig Forcese, "Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence" (February 3, 2015), online : SSRN <https://ssrn.com/abstract=2560006 or http://dx.doi.org/10.2139/ssrn.2560006>, at 9, 17, 112.
[163] *R v Keegstra*, [1990] 3 SCR 697, at para 107.
[164] *Supra* note 162.

but it must be considered that law enforcement authorities are granted with substantial discretionary and invasive powers when it comes to threats of terrorism. Consequently, journalists may feel the need to exercise excess caution and censor their opinions in fear of being charged as a result. Individuals may feel that they should not be sharing videos they find to be educational on social media, out of caution. Charges may not be brought forward, but the offence will nevertheless impact behaviours. The impact is an assault on free speech, which seems out of proportion to the objective. The lack of clarity and specificity of the disposition limits the freedom of expression guaranteed by the Charter in a way that would harm the democratic order of Canada.

It is to be noted that Attorney General consent is required to prosecute this offence. This is how the government has offered to ensure appropriate oversight. Nevertheless, this safeguard remains subjective as to which actions will be subject to charges. The required consent does not compensate for the lack of precision of the disposition, which goes against the principle in criminal law, requiring that an offence be fixed and knowable.[165]

For these reasons, it is esteemed that the measure does not minimally impair the rights of Canadians. This component is not considered as fulfilled.

iii) Proportionate Effect

Because the measure does not impair the rights of Canadians as minimally as is reasonably possible, it is unnecessary to complete this portion of the test. Nevertheless, it can be said that although the objective of the measure is commendable (to deter the promotion of terrorism offences), the limits it would impose on free speech, are unreasonable. Canada is a nation that prides itself on its democratic values, values which include freedom of expression. When a

[165] *R v Levkovic,* supra note 146.

disposition makes criminals of individuals who have absolutely no intention of committing or actively promoting an offence, and this, by means of expression, it becomes a grave attack on democracy, and this cannot be permitted. The sought-after objective albeit commendable, does not justify such a limitation. The cost-benefit evaluation would not justify this measure in a free and democratic society.

As demonstrated, the measure examined does not pass the constitutional test and would not be considered as justified in a free and democratic society. To help demonstrate that the measure does not strike an optimal balance, the Ting test will demonstrate that the measure is also, inefficient.

Advocating or Promoting Terrorism in General: Ting Efficiency Analysis

The proposed Ting test will be applied to measure the efficiency of the disposition criminalizing the promotion of terrorism offences in general. It will be shown that this measure is inefficient.

Historical Precedent of the Provision

The existence of a historical precedent does not justify the measure assessed. The first step of the Ting test is to determine whether there exists a historical precedent as a basis to justify a given measure. As previously noted, there are 14 dispositions in the Criminal code that already threat on terrorist offences. For instance, sections 83.21 and 83.22 of the Criminal code, criminalize the "instruction of carrying out terrorist activity" in general and for terrorist groups. These measures could be used to silence expressions that seek to encourage acts of terror. The term "instruction" is large enough to encompass the "promotion and advocacy" aspects of the disposition, yet, it is precise enough not to cast a shadow on freedom of expression where, for

instance, a journalist would not be wary about stating an opinion that could be interpreted as the promotion of terrorism-related offences. Here, although there exists a precedent where dispositions seek to limit the promotion of terrorism, this precedent serves not to justify the validity of the bill C-51 measure, but rather, to question its necessity, seeing that the new measure duplicates what is already available.

Dispositions with similar objectives can also be examined to see if they could help validate a questionable measure. In *Khawaj,* again, the court articulates that threats of violence are excluded from expression covered by constitutional protection because threats "take away free choice and undermine freedom of action".[166] "Advocacy" or the "promotion" of terrorism offences, does not undermine the freedom of action of exterior actors. Consequently, even such expressions should be granted constitutional protection. Also, as observed in *Khawaja*, for the *participation in a terrorist group* offence (83.18 Ccr), the court requires proof that the "accused was acting for the **purpose** of assisting a terrorist group". Although the court upheld the section 319 (2) Ccr *hate speech* offence in *Keegstra,*[167] it stressed that "the restrictions on freedom of expressions were reasonable and proportionate in large part because of the requirement of proof that the accused "willfully" promoted hatred. The new disposition being assessed, does not require any form of intent or "purpose". Precedents here, tend to convey that similar measures were less restrictive and required a higher element of *mens rea.*

For this part of the test, the presence of a precedent does not help validate the measure criminalizing *advocating or promoting terrorism offences in general*. The presence of similar dispositions within the Criminal code do not help qualify the new measure as likely to succeed in attaining its objectives seeing that the existing measures are sufficient and can achieve their

[166] *R v Khawaja,* [2012] 3 SCR 555, at para 32.
[167] *R v Keegstra,* [1990] 3 SCR 697.

desired purpose at lesser cost in terms of the impingement on rights that may result from the measure.

Revocability of the Initiative

The next step of the Ting test is to measure the revocability of the disposition. A law that impacts rights can more easily be justified if it is established for a set objective, temporarily. Such a law which sets a maximum duration for a given measure, can be excused constitutionally with greater facility.

Laws must be enacted in conformity with the Constitution and the Charter is considered to be the supreme law of Canada, however, the government can enact legislation disregarding a Charter right with the notwithstanding clause provided at article 33 of the Charter. The use of a sunset clause can favour justification of a measure. The government has chosen not to use any such mechanisms, esteeming that the disposition which criminalizes the promotion and advocacy of terrorism offences in general, will not breach freedom of expression as it only seeks to criminalize the "**active** encouragement of the commission of terrorism offences and **not mere expressions** of opinion about the acceptability of terrorism".[168]

It must be said that the measure, being a regular infraction provided in the Criminal code, is subject to judicial review. This means, any prosecution, can be appealed and is subject to being declared in violation of the Constitution.

Overall, because the government has chosen not to use the notwithstanding clause, or a sunset clause, the quantum of the rights impacted becomes greater than if it had. Since the revocability of the initiative is unplanned for, the disposition cannot be justified under this aspect of the Ting test.

[168] Department of Justice, *supra* note 149.

Location

The location of application of a measure can help justify a disposition that sets limits on a right. The disposition criminalizing the promotion or advocacy of terrorism offences in general, is not applied to any one given place. It can be applied online, in private conversations, in public, in classrooms, anywhere really. It applies, as previously stated, to gestures, spoken words, written statements, signs, etc. Because of the overbroad nature of the disposition, the concept of location fails to justify the validity of a measure. For instance, had the disposition been applied to a more restrained location, or limited platforms, it could have been easier to justify.

Nature of the Threat

The nature of the threat element can help determine whether a measure is valid. It measures the chances of success of a measure, as well as the cost of a measure. It is important to recall that under the terminology "nature of the threat", the gravity, probability, predictability as well as the nature (for instance, chemical versus cyber-attacks), are considered. A threat that is grave, probable, predictable and that can be easily perpetuated will allow for greater restrictions on rights.

A direct threat, as opposed to an indirect threat, will be considered as more serious and will weigh more in the Ting analysis. The criminalization of the promotion or advocacy of terrorism offences in general, addresses the encouragement of terrorism. It concerns the impact behaviours can have on individuals at risk of radicalization, where, promotion or advocacy of terrorism offences can influence such individuals to commit offences. It does not, when strictly interpreted, pertain to direct violent or threatening activity. The threat being considered, is influence. Negatively influencing vulnerable, unstable or radicalized individuals, is what the government seeks to limit. To consider actual terrorism activity as the threat being addressed by

this measure is valid, but it requires an extra leap. This means that actual terrorist activity is not the primary threat addressed with this disposition, but rather, what leads to this activity. The threat the measure seeks to limit, is negative influence (potentially leading to terrorist activity). This influence does not constitute a grave threat, not when compared to actual violent activity. A measure which addresses direct violent activity such as the **participation** in terrorism offences, would be validated with greater ease when a fundamental right such as freedom of expression is at stake, seeing that it is easily qualified as grave. Potentially influencing behaviour does not place the nation's security at immediate risk, as such, a measure seeking to limit the promotion of terrorism offences, a commendable objective, should see its justification threshold increased. The nature of the threat criterion does not help validate section 83.221 Ccr as the promotion or advocacy of terrorism offences, in general, do not place Canada in immediate danger.

Likelihood of Success in Advancing its Objective

The final portion of the Ting test consists in verifying whether the objective has a strong likelihood of success in advancing its objective. Let's first recall that the objective of section 83.221 Ccr is to criminalize the promotion and advocacy of terrorism offences in general. The objective is to limit influencing individuals from committing terrorism offences. As previously mentioned, it appears that the situations the disposition seeks to cover, would be covered by already existing measures. The new offence can deter the promotion and advocacy of terrorism offences, but it would bring nothing more in advancing its objective. It would act as a duplicate of sorts, but one that would place a chill on freedom of speech. In other words, the benefits of the measure have not been demonstrated, but the downside of the disposition is obvious.

It is worth noting that the measure can even have a contrary effect to its designed objective where, communication will be driven underground. Those determined to purposefully promote

or advocate terrorism offences, will continue to do so, but secretly. This can undermine the ability of law enforcement services to investigate, prevent and deter. Security experts also believe that this measure can undermine Canada's own prevention programs. For instance, the RCMP's CVE (counter violent extremism program) has for a purpose to dissuade individuals from extremism. This program relies on communications where for instance, the RCMP will ask that a group or organization host meetings where radical views are discussed and confronted. This helps deter individuals from extremism, but also allows for some individuals to be known to authorities. Now, with this new offence, the group, may esteem that statements made during these meetings, fall under this new criminal offence. Consequently, the groups may become hesitant to host these meetings, halting the RCMP's efforts. Considering these elements, the measure does not pass the *likelihood of success* criterion of the Ting test. Overall, the measure, does not pass the Ting efficiency standard.

Advocating or Promoting Terrorism Offences in General: Conclusion

The criminalization of speech that "advocates or promotes the commission of terrorism offences in general," does not strike an optimal balance as it is inefficient and unjustifiably limits freedom of expression guaranteed under section 2(b) of the Charter. Limits on freedom of expression has implications for any democracy, but further, it threatens national security where those at risk of radicalization and those already radicalized, will move these discussions "underground", rendering prevention nearly impossible.[168]

[168] *Ibid*

CHAPTER 6: CSIS THREAT DISRUPTION POWERS

Introductory remarks

Bill C-51 authorizes CSIS to take measures to reduce "threats to the security of Canada", even while violating rights protected under the *Charter,* as long as the measures are agreed to by means of a mandate issued by a judge prior to their occurrence. The new measures change the very nature of CSIS. Its powers to reduce threat is overly broad and points to a fundamental misunderstanding of Canada's constitutional system. In this chapter, it will be shown that the disruptive powers granted to CSIS would not pass a constitutional challenge, nor would it pass an efficiency examination. As a whole, such measures do not strike an optimal balance.

Prior to the creation of CSIS, the RCMP was responsible for Canada's security intelligence. Following the October 1970 crisis and the 1976 Summer Olympics, the RCMP's conduct was questioned as it had failed to provide accurate intelligence to prevent terrorist activity. It was revealed that "dirty tactics", such as the fraudulent use of funds, stealing the membership lists for the Bloc Québécois and the burning of a barn to prevent a party meeting, along with a number of other illegal actions, were measures used by RCMP members.[169] The McDonald Commission was instigated following the discovery of these actions. It was discovered that terrorist threats were usually handled by means of disruptive powers. The RCMP was able to break the law as matters rarely made it to court.[170] Following these discoveries, numerous recommendations were made within three reports.[171] The most important was the

[169] Reginald Whitaker, Gregory Kealey, Andrew Parnaby, *Secret Service: Political Policing in Canada: From the Fenians to Fortress America* (Toronto: University of Toronto Press 2012) at 39 [Whitaker et al].
[170] *Ibid.*
[171] Rosemary Way, "The Law of Police Authority: The McDonald Commission and the McLeod Report" (1985) 9:3 Dal LJ 683 at 689.

necessity to separate policing and intelligence powers, and that neither of these actors could break the law.[172] Ultimately, this resulted in the creation of the Canadian Security Intelligence Service. Since then, the powers to arrest and detain reside in the policing authorities' jurisdiction, alone. The new powers attributed to CSIS bring confusion within this understanding, as it appears, the service could potentially detain individuals.

It has been established that CSIS already possessed some disruptive powers prior to the adoption of Bill C-51.[173] Roach and Forcese opine that simply knowing that one is being watched by CSIS may be sufficient to change the path of the individual.[174] This technique has been called a "disruption technique" by the Security Intelligence Review Committee. The committee agrees that "whenever CSIS conducts investigations, an intended or unintended consequence can be to deter- or disrupt- a threat to national security" and that "[…] making it generally known to targets that their activities are being investigated can reduce the likelihood that the targets will continue with their plans."[175] This goes to show that disruption is not new per se for CSIS, only, the extent to which it is being expanded, uncertain as it may be, can appear to be a return to a situation we tried to depart from in the 1980's, that of a secret police. In other words, CSIS' new disruptive powers violate the principles of judicial independence, impartiality and the separation of powers.

The new disposition allows for CSIS to expand on its disruptive powers. The use of the term "take measures" broadens the scope, as to what CSIS can actually do, with few legislative

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[172] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (1981) ("McDonald Commission" or "McDonald Inquiry"), at paras 267, 271, 272, 275 and 353-358.
[173] Standing Senate Committee on National Defense and Security, 42st Parl, 2nd Sess, No 35 (20 April 2015) (Michel Coulombe) [Coloumbe].
[174] *False Security*, *supra* note 27 at 246.
[175] Security Intelligence Review Committee, "CSIS Use of Disruption to Counter National Security Threats" (SIRC Study 2009-05), File No 2800-150 (redacted version released under Access to Information).

limits. To be clear, the powers granted do not include any law enforcement powers.[176] The existing limits, mainly internal, convey that the measures must be "reasonable and proportional", and cannot include actions that would result in bodily harm, obstruct justice, or "violate the sexual integrity of an individual".[177] At face value, it would seem that anything else may be permissible, as long as the measures are reasonable and proportional. This is evaluated by a judge, where, one external limit included within the law, is the requirement that CSIS seek authorization from a federal judge when the measures it intends on taking might breach a Charter right. The warrant request is presented to a judge *in camera,* on an *ex-parte* basis, without the presence of the party the warrant is being issued against.[178] In other words, a judge may issue a warrant to breach a Charter right, without there ever being an adversarial counterpart. Seeing the unclear and broad nature of the disposition and the lack of limits imposed, it invites for constitutional challenge. Follows is the application of *Oakes* on this measure, illustrating that the measure would not pass a constitutional examination.

CSIS Disruptive Powers: *Oakes* Constitutional Standard Analysis

The *Oakes* test will be applied to measure the constitutionality of section 12.1 of the *Canadian Security Intelligence Service Act (CSIS Act)*. It will be shown that this measure unjustifiably limits freedom of expression and is unnecessary. The measure does not provide for the appointment of a special advocate or *amicus curiae.* It doesn't provide for any prospect of appeal. The *Act* constitutes an extraordinary inversion of the traditional role of the judiciary and violates the principles of fundamental justice.

[176] *CSIS Act*, *supra* note 13 at ss 12.1(2) and 12.1(4).
[177] *Ibid*, s 12.2(1).
[178] *Ibid,* ss 12.1(3), 21.1; *Ccr* ss 183.13; *False Security, supra* note 27.

Is the Limit Prescribed by Law?

The first step of the *Oakes* test is to validate whether the measure is prescribed by law. The disposition found in the *CSIS Act* reads as follows:

> **12.1 (1)** If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.
>
> **Limits**
>
> **(2)** The measures shall be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat.
>
> **Warrant**
>
> **(3)** The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1.
>
> **Clarification**
>
> **(4)** For greater certainty, nothing in subsection (1) confers on the Service any law enforcement power

Section 12.1(1) of the *CSIS Act* allows for CSIS to disrupt a threat, if on reasonable grounds it believes that an activity will constitute a threat to the security of Canada. It can do so, even if the disruption would have for effect to impinge on a right, as long as a judge authorizes the service to do so, by means of a mandate. The disposition authorizes the service to breach rights yet fails to detail which measures CSIS can actually take that can limit a Charter right. It also fails to detail which rights it can breach specifically. As it stands, every possible Charter right may be impinged on if it can disrupt a threat and if it is authorized by a warrant. Even the use of the Charter section 33 clause limits which rights can be impinged (2, 7-15). The courts usually take a flexible approach in considering the "prescribed by law" criteria during constitutional challenges, and this in regard to both the form and the articulation of a limit on a

Charter right. In this instance, the disposition breaches the doctrine of vagueness and would not meet the form, nor the intelligible articulation of a limit on Charter rights standards.[179]

The section 33 Charter notwithstanding clause is the mechanism to be used when the government wishes to exempt itself broadly from the Charter. If the government doesn't use the notwithstanding clause to excuse itself from a Charter right, the measure should pass a constitutional *Oakes* examination. Instead, here, a judge is placed in a position where he or she must determine in advance, whether an action which usually is considered to infringe on rights is reasonable, given the circumstances.

The government can bypass Charter rights, but this must be specifically prescribed by law, which as it stands, is not. the disposition lacks clarity and transparency. The process proposed by this disposition contemplates a case-by-case determination where the judge determines whether a given measure is reasonable, given the circumstances, as previously mentioned. Requiring that an infringement be authorized by a judicial warrant does not qualify as a limit prescribed by law, as detailed in this thesis' theoretical framework. In reality, CSIS actions that would be permitted would not be prescribed by law, but rather, be confined by a judge. Consequently, section 12.1 of the *CSIS ACT* does not meet this component of the *Oakes* test.

There is no need to complete an examination of the following components of the *Oakes* test since the first criteria is not met. Nevertheless, preliminary notes regarding the other components of the test are offered.

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[179] Craig Forcese, *Bill C-51: What Did We Learn About the Government's Intentions from the Clause-by-Clause*, (1 April 2015) online: National Security Law <http://craigforcese.squarespace.com/national-security-law-blog/2015/4/1/bill-c-51-what-did-we-learn-about-the-governments-intentions.html>; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76; *Ontario* v *Canadian Pacific Ltd.*, [1995] 2 SCR 1028; *R* v *Demers*, [2004] 2 SCR 489; *R.* v *Heywood*, [1994] 3 SCR 761; *R.* v *Hall*, [2002] 3 SCR 30; *R.* v *Morales* [1992] 3 SCR 711; *R* v *Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606; *R* v *Sharpe*, [2001] 1 SCR 45; Reference re *ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), [1990] 1 SCR 1123; *Suresh* v *Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR. 3; *Winko* v *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625.

It is worth mentioning that the dispositions objective is pressing and substantial. The goal is to prevent activities that can place Canada's security at risk from being committed. Such activities may include espionage, violent activities for political, religious or ideological objectives, or acts intended to destroy or overthrow the Canadian government. CSIS is well positioned to identify a potential threat, considering its intelligence gathering mandate. As such, it may be necessary, when urgency requires it, that it acts to prevent a threat from placing Canada's security at risk. A disposition allowing it to do so, is logically connected.

The problem with the disposition lies in that the outer limits of the actions CSIS can take, appear extreme. CSIS can "take measures", but which measures? Only some measures may aptly apply to the interruption of threat, whereas, many potential measures should not apply, yet could be, seeing the vagueness of the disposition. Without knowledge as to the specific rights that can be limited or by means of which action, it is impossible to gauge whether a measure is reasonable, or whether, the service could have utilized another measure that would impinge on rights to a lesser degree. At present state, it appears that CSIS could potentially infringe on *any* Charter right, as long as the measures taken are "reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat". This leaves a lot of margin for permissible actions. Further, the process to obtain a warrant is performed behind closed doors. He or she against whom a measure will be applied, may remain unaware that his or her rights are being or about to be breached. There is no one defending the interests of the person being surveilled or accused- no adversary to the government. To counter this argument, however, it is noteworthy to mention that knowledge of surveillance could drive the perpetrators of a threat, underground.

It is to be noted that many of the measures CSIS could decide on taking, are already authorized by law. For instance, speech crime laws already permit the removal of website content in a more transparent fashion, which is subject to oversight and review. CSIS can, however, use this disposition to remove content, once it obtains a warrant authorizing it to do so, but without the same accountability and review being implemented. During committee hearings on CSIS' disruptive powers, potential uses for CSIS warrants included the capacity to place individuals on *no-fly* lists.[177] However, there already exists a legal mechanism which allows CSIS to cancel a flight ticket, a method much less drastic, efficient, and more transparent. This renders the disposition as unnecessary as it duplicates existing legislation which can arrive at the same outcome, at times limiting rights to a lesser degree, or at least, while providing appropriate oversight and or review.

Section 12.1(1) of the *CSIS Act* does not meet this first component of the *Oakes* test, as it is not adequately prescribed by law. The measure would not pass a constitutional examination, were it to be subjected to one.

Bill C-59 has addressed some issues within the law, but the ability for CSIS to breach Charter rights, provided a warrant authorizes it to do so, is still present under the new proposed disposition. This will be discussed further in the Chapter treating on recommendations. At this time, C-51 would not pass a constitutional examination. To help demonstrate that the disposition does not strike an optimal balance, the Ting test will demonstrate that the measure is also inefficient.

CSIS Disruptive Powers: Efficiency Standard Analysis: Ting

[177] Andrew Seal, *A new national security act for Canada*, (11 April 2018) online: Open Canada https://www.opencanada.org/features/new-national-security-act-canada/>

The proposed Ting test will be applied to measure the efficiency of the disposition granting CSIS disruptive powers. It will be shown that this measure is inefficient.

Historical Precedent of the Provision

Once again, looking at what has been done in the past, or what is being done elsewhere, can help validate or invalidate a measure. The following precedents invoked have no or very limited disruptive powers. None are authorized to break the law or breach their constitution.

The government has claimed that with its threat disruption disposition, it is merely "catching up with its allies".[180] Currently, when looking at Canadian's closest allies, there does not seem to exist a parallel that compares to what CSIS can now do. Looking at Australia for example, the equivalent to CSIS, the Australian Security Intelligence Organization (AISO), has for a mandate, the collection of intelligence and the investigating of Australian citizens, as well as conducting security assessments and providing advice. As per its legislation, AISO does not conduct CSIS style disruptions.[181] AISO does have a minimal disruptive capacity where it can detain citizens to prevent alerting an accomplice as to the existence of an investigation, or in situations where a citizen is unlikely to appear before a prescribed authority.[182] This serves to preserve evidence, for the purposes of an investigation. A mandate is nevertheless required. Even so, this capacity of AISO has been criticized, where, it is esteemed that it lacks adequate oversight, especially in regard to its targeting non-suspect civilians.[183] It is criticized even though its legislative basis contains a sunset clause, unlike its CSIS equivalent. The New Zealand

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[180] "With C-51's new powers, is CSIS simply catching up to its allies?" *CBC NEWS* (16 July 2015), online: CBC NEWS <http://www.cbc.ca/news/politics/with-c-51-s-new-powers-is-csis-simply-catching-up-to-allies-1.3154490>.
[181] *Australian Security Intelligence Organization Act* (1979), s 17(2) [*AISO Act*]; David Hebb, "CSIS Threat Disruption in Context", (University of Ottawa, Faculty of Law 2015) online: <*http://osn.openum.ca/files/sites/34/2016/01/CSIS-Threat-Disruption-in-Context-Hebb.pdf*>, p 11.
[182] *AISO Act, supra* note 181 s 34F(4)(A-D).
[183] Lisa Burton, Nicola McGarrity, George Williams, "The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organization" (2015) 36 Melb U LR 415 at 417.

equivalent, the *New Zealand Security Intelligence Service* (NZSIS) is unauthorized to partake in disruptive activity as well.[184] In the United States, the Central Intelligence Agency (CIA) can, "pursuant to the *National Security Act,* conduct domestic threat disruption with an executive order". In Britain, MI5 can, pursuant to section 1 of the *Security Service Act,* "conduct any activity to protect national security".[185] Differently from CSIS however, the CIA could not breach American law or the American constitution, nor could Britain breach UK law. CSIS has been granted the unambiguous capacity to use its disruptive powers domestically, whereas foreign counterparts do not have this capacity. [186] Looking at foreign legislation, it appears that at the national level, intelligence services are not mandated to actively disrupt threat. As such, no precedent adequately serves to justify the measure as it is provided in Bill C-51. Consequently, this first portion of the Ting analysis is not helpful in validating the disposition examined.

Revocability of the Initiative;

A measure that can be easily revoked, or that has a time limit will be easier to justify. Again, it is accepted that any disposition can be repealed or be subject to a constitutional examination, however, for the Ting analysis, dispositions within the law pertaining to a specified timeframe is what is evaluated. The government can use the section 33 Charter notwithstanding clause, for example. The government has chosen not to use a sunset or notwithstanding clause. The rights limited under section 12.1 of the *CSIS Act* are undetermined. At best, the measure provides time limits for the mandate authorizing disruptive action. Warrants allowing disruptive action are authorized for a maximum of 120 days, with the possibility for two renewals. The

[184] *New Zealand Security Intelligence Service Act 1969* (NZ) 1969/24 at s4(1) [NZSIS Act].
[185] *Security Service Act,* 1989, c 5.
[186] *Ibid*.

renewal cannot be for a period longer than what was originally allowed.[187] In any event, the disposition authorizing this scheme has an undetermined lifespan, which hinders its justification. Further, its questionable how the constitutionality as a whole could ever be weighed considering that judicial review is more difficult in this scheme, considering the secrecy of the requested and issued warrants, rendering an adversarial constitutional contest unlikely.[188]

Because there is a time limit only affecting the mandate validity, and because the measure is difficult to review considering the secrecy of the warrant granting procedures, the disposition would not pass this portion of the Ting test.

Location

Threat disruption capacities can be useful to bodies such as CSIS, in constrained, designated areas such as on the web. The location of application of a measure can help justify a disposition that sets limits on a right. The disposition granting CSIS powers to disrupt a threat that can place the security of Canada at risk, is not applied in any one given place. The threat that can be interrupted can be online, it can be in public, in private homes, in schools, in places of worship- it can be anywhere. Had the disposition provided for the application in more restrained locations, or limited platforms, it would be easier to validate actions that potentially infringe on rights. For instance, if the disposition identified areas where CSIS can act, for example, online on websites where it can remove content that can influence the perpetuation of an action that can threaten the security of Canada, the measure would more easily be justified when imposing a limit on section 2 b) freedom of speech rights.

[187] *CSIS Act, supra* note 13, s 22; *ibid.*
[188] Michael Nesbitt, *National Security, Bill C-59, and CSIS's Continuing Power to Act Disruptively in Violation of the Charter (23* June 2017), online: A Blawg < https://ablawg.ca/wp-content/uploads/2017/06/Blog_MN_BillC-59.pdf>.

Because of the overbroad nature of the disposition, the concept of location fails to justify the validity of the disposition.

Nature of the Threat

The evaluation of the nature, gravity, predictability and probability of a threat can warrant measures that impinge on rights. Because the new disposition does not characterize the threats CSIS can act on, there is always potential for a threat to be grave. The measure provides CSIS with a certain *carte blanche.* CSIS has the authority required to intervene when the security of Canada is at risk. Today, threats are not limited to bomb scares, or plane hijackings. Threats can be perpetuated online and be financial. For instance, a cyber-attack could render a financial institution vulnerable. It could render hospital monitors obsolete. Chemical weapons can be dispersed in the air, killing thousands in a matter of seconds. In essence, the actual nature of the threats the government wants to thwart through CSIS's disruptive powers can be manifold. Because the nature of the threat being considered with CSIS' new powers can be continuously evolving, the measure could be beneficial seeing that the threats can be grave. Considering this, the vast array of potential threats helps justify the measure. The extent of CSIS' powers, however, does not.

Under Bill C-51, CSIS was provided with the capacity to act on the intelligence it collects. There's no telling exactly what CSIS can do. The limits CSIS is subjected to are minimal. They cannot kill, obstruct or pervert the course of justice and they cannot violate a person's sexual integrity.[189] The measures CSIS can take (which may be extreme in some cases), can at times be legitimate considering the evolving nature of threats and their environment. The disposition provides CSIS with the ability to intervene directly in the event of a potential violent action.

[189] *CSIS Act, supra* note 12, s 12.2 (1).

Should a violent threat be probable, the direct intervention from the appropriate agents is, of course, desirable. The disposition as it stands, however, is too permissive seeing that a threat is improbable.

Since 2001, measures to counter terrorism have increased and nations are better equipped and prepared to respond to potential attacks. The fact remains, however, the probability of a terrorist attack is present in Canada, given the rise of religious extremism, considered the most prominent threat today. Indeed, threats can be perpetuated in an array of arenas. Even so, if attacks are *more* probable than they once were, they are not necessarily, generally speaking, probable to occur. The risk, having been evaluated as "medium", can justify some enhanced measures, however, it does not warrant giving CSIS *carte blanche*, potentially at the cost of rights, with vague, gross threat disruption powers. The threat level, which measures the probability of an attack, an underlying "nature of a threat" concept, does not justify this measure.

Overall, it is unclear whether the *nature of the threat* justifies a measure that would allow CSIS to interrupt a threat. Given the wide scope of potential attacks, the capacity of the service to act is desirable, but the unproven probability raises doubts as to whether the scope justifies the measure. For the purposes of this project, it will be considered that the nature of the threat could warrant a disruptive power authorizing CSIS to act, but this is advanced with some reservations.

Likelihood of Success in Advancing its Objective

A measure that has good chances of succeeding in attaining its objective, will be easier to justify, especially if it meets the proportionality examination of the *Oakes* test. The government's stated objective is simple. CSIS's disruptive powers exist to prevent or stop the commission of an activity that can be a threat to the security of Canada. It is manifest that CSIS may at times, be better situated than policing authorities to conduct a threat disruption,

considering the timely information they possess or their familiarity with a given threat.[190] Former Minister Blaney stated that CSIS and the RCMP have different mandates: While the RCMP's mandate is focused on criminal investigations that lead to prosecution, CSIS's mandate focuses rather at a pre-criminal stage of monitoring the threat.[191] Through monitoring, if the need for disruption manifests itself, the ability for CSIS to take a measure preventing an activity undermining Canada's security from occurring is a legitimate concern and objective. Disrupting a threat, rather than mounting a full investigation is also cost effective, where time and resources are spared.[192] This said, seeing that CSIS is required to obtain a mandate by an issuing judge before any action potentially breaching a Charter right is performed, and considering that the judge must be provided with at least 48 hours to consider the implications,[193] the argument that CSIS may be best placed to intercept a threat in urgent matters, is questionable since it is hamstrung by procedural requirements. For instance, the ministerial sign off requirements prior to an application being brought to the court, adds an added hoop to jump through for CSIS, rendering the argument of "the need to act urgently", less convincing. In the time it would take for CSIS to obtain the required warrant, it may be possible to transfer the intelligence to the RCMP to intercept and stop the threat. This idea raises concerns with the likelihood of success of this measure, seeing that an alternative could potentially be more efficient, for instance, by using the RCMP to intercept, where judicial oversight is a given. Nevertheless, this measure would allow CSIS to engage, for example, in a joint operation with a foreign country, preventing a shipment of dangerous chemicals from landing in the hands of terrorists, to state one example. In this light, CSIS' disruption capacity can be of interest, but again, the RCMP could very well

[190] Mike Duffy, *National Security* Law (Faculty of Law, University of Ottawa, 2015).
[191] Standing Senate Committee on National Defence and Security, 42st Parl, 2nd Sess, No 35 (2 April 2015) (John Ossoswki) [Ossowski].
[192] Hebb, *supra* note 182, at 10.
[193] *Ibid*.

complete such an operation instead of CSIS, without obscuring the roles of intelligence gathering services, with those of policing services. Albeit CSIS' disruption powers are not undesirable, without the implementation of safeguards and accountability similar to those governing RCMP disruptive activity,[194] they are not justified and would fail the "likelihood of success" standard.

It is interesting to note that CSIS' disruption powers could potentially render terrorism prosecutions more difficult. A criminal trial may be mired where a fair trial is not possible due to the conduct of CSIS. Investigations may be tainted where CSIS acts prior to a suspect committing any criminal activity. Or, evidence may be inadmissible, rendering prosecution impossible. This can subvert the government's anti-terrorism efforts where, suspects that cannot be prosecuted, are left free, placing the safety of Canada and Canadians at risk.

Overall, the threat disruption powers provided to CSIS would not pass an *Oakes* or Ting test successfully. During a normal warrant-granting process, the role of the magistrate is to ensure that the government or its agents uphold the law, not violate it in cases where an *Oakes* test is not applied. The measure, is not adequately prescribed by law, and its scope is too vast to minimally impair rights. Further, the likelihood of success of the measure is questionable, considering the obstacles included in the legislation (warrant delay, ministerial sign off).[195] Bill C-59, will provide the opportunity for the government to explain why it esteems these powers as necessary, and whether they can be considered to constitute a proportionate measure, following a cost-benefit examination.

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[194] *Ibid*.
[195] *CSIS Act, supra* note 13, ss 21, 21.1, 21.3.

CHAPTER 7: INFORMATION SHARING AND THE RIGHT TO PRIVACY

Introductory Remarks

The *Security of Canada Information Sharing Act [SoCIS Act)* in Bill C-51 does not strike an optimal balance. It declares that the government has a legitimate interest in sharing information about security threats across 143 organizations and its 17 institutions, and this "in respect of activities that undermine the security of Canada." Such activities include those that "undermine the security, territorial integrity of Canada or the lives or the security of the people of Canada", and include activities that "unduly influence" government and interfere with public safety or the "economic or financial stability of Canada", according to the Government's Green paper.[196] The impact of such vast information sharing is a potential direct breach on the right to privacy.[197] The only legislatively prescribed exceptions are those activities relating to "advocacy, protest, dissent, and artistic expression." All other information can be shared across institutions, without an individuals' prior consent, or knowledge even.

Further, there are no internal or external safeguards ensuring the reliability of the information being shared. Incorrect information can be considered as fact and place Canadians at risk. Shared information can be used to justify actions. For instance, in the case of Maher Arar, unreliable information shared by the RCMP to American authorities identified Arar as having ties with al-Qaeda. This information was responsible for his rendition to Syria, where he was tortured. This illustrates that the absence of safeguards and information sharing can lead to

[196]Canada, Public Safety Canada, *Our Security, Our Rights: National Security Green Paper*, (Ottawa 2016) online:< https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016/index-en.aspx>, [Green Paper].
[197] *Charter*, *supra* note 3, s 8.

CSIS's complicity in human rights violations, as was also the case with Omar Khadr[198] and others.[199] The need for proper safeguards to ensure the reliability of information shared is paramount. Otherwise, cases like Maher Arar or Omar Khadr will not the be the last of their kind.

The Arar Commission[200] recommended that information be centralized and regulated under clear policies which address the need for reliability, accuracy and relevance of the information being shared. The commission also recommended that integrated information sharing "be matched with integrated review by independent review bodies able to self-initiate their own investigations", as well as be limited in regard to who can access the information being shared, and how it can be further transmitted.[201] At present state, the *Information Sharing Act* has incorporated none of these recommendations.

Finally, the whole process of information sharing lacks an independent review entity. The risk of unrestrained information sharing is high due to the secrecy of the sharing process and because the government is offered civil liability immunity for any good faith information sharing.[202] Because individuals are unaware that their information is being assessed and shared, Charter rights will be difficult to enforce. Individuals impacted will have little or no recourse against the government, given its immunity.

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198 Omar Khadr is a Canadian that was detained in Guantanamo Bay for 10 years by the United States, for having allegedly thrown a grenade when he was 15, that subsequently killed an American sergeant. He had confessed to this under questionable circumstances (torture) and repealed his confession as he claimed he had confessed thinking that he would be returned to Canada. In 2003, CSIS agents were authorized to interview him. Three weeks prior to the interview, he was sleep deprived (accepted as a form of torture), to render him more "mendable" to talk. The information received was shared with US authorities. Their interview's purpose was to collect intelligence, which they did, while ignoring his human rights.

199 Ahmad Elmaati, Muayyed Nureddin, and Abdullaah Almalki. Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin*, Final Report* (Ottawa: Public Works and Government Services Canada, 2010) [Iacobucci Inquiry, Final Report],online: <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>.

200 Arar Commission of Inquiry, *supra* note 48.

201 Canadian Civil Liberties Association,"Understanding Bill C-51: the Anti-Terrorism Act, 2015" (May 19, 2015), online: CCLA <https://ccla.org/understanding-bill-c-51-the-anti-terrorism-act-2015/>.

202 *SoCIS Act*, s 9; Ibid.

Following an *Oakes* test, for the aforementioned reasons, it will be shown that this measure is unbalanced as it lacks in transparency and meaningful review. It will be found as well, that the measure is inefficient and as such, does not strike an optimal balance.

Information Sharing and the Right to Privacy: Constitutional Standard Analysis *Oakes*

The *Oakes* test will be applied to measure the constitutionality of the *Security of Canada Information Sharing Act*. It will be shown that this measure unjustifiably limits the right to privacy prescribed at section 8 of the Charter.

Is the Limit Prescribed by Law?

The limit on the right to privacy is publicly accessible and is provided within the *Security of Canada Information Sharing Act,*[203] at its articles 3 and 5 principally, included in *Bill C-51*:

> **Purpose**
>
> 3 The purpose of this Act is to encourage and facilitate the sharing of information among Government of Canada institutions in order to protect Canada against activities that undermine the security of Canada.
>
> **Disclosure of information**
>
> 5 (1) Subject to any provision of any other Act of Parliament, or of any regulation made under such an Act, that prohibits or restricts the disclosure of information, a Government of Canada institution may, on its own initiative or on request, disclose information to the head of a recipient Government of Canada institution whose title is listed in Schedule 3, or their delegate, if the information is relevant to the recipient institution's jurisdiction or responsibilities under an Act of Parliament or another lawful authority **in respect of activities that undermine the security of Canada**, including in respect of their detection, identification, analysis, prevention, investigation or disruption. [**emphasis added**]
>
> **Further disclosure under subsection (1)**
>
> (2) Information received under subsection (1) may be further disclosed under that subsection.

[203] Security of Canada Information Sharing Act, SC 2015, c 20 [SoCIS Act].

The wording of the measure, especially in reference to "activities that undermine the security of Canada", is particularly broad. Much of the commentary that applies to the scope of CSIS' threat disruption disposition in Chapter 6 could apply to this measure. However, seeing that the power given to CSIS being examined is limited to actions pertaining to information sharing, impacting limited rights, such as the right to privacy and the right to life, liberty and freedom, it will be considered as being sufficiently precise. A court could decide that the measure is constitutionally vague, however. For the purposes of this project, the analysis will be pursued, the measure being considered at least, loosely meeting the "prescribed by law" criteria.

Is the Measure Pressing and Substantial?

The governments' stated objective is "to encourage and facilitate the sharing of information among Government of Canada institutions in order to protect Canada against activities that undermine the security of Canada."[204] It creates "an explicit authority, which provides greater certainty about when institutions can share information for national security reasons."[205] It also "provide[s] flexibility to accommodate new forms of threats that may arise".[206] Reports point to the fact that the complexity of the information sharing laws in Canada slows the overall process of information sharing.[207] This hinders time-sensitive investigations. The government claims that the objective of easing information sharing capacities between its institutions is that improved information sharing is required to keep Canadians safe and protect national security. The government claims that without such information sharing, privacy rules

[204] *Ibid*, s 3.
[205] Craig Forcese, Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper* (2016) Ottawa Faculty of Law, Working Paper No. 2016-39, online: SSRN <https://ssrn.com/abstract=2849261 or http://dx.doi.org/10.2139/ssrn.2849261>, at 27. [*Green Paper Backgrounder*].
[206] *Ibid.*
[207] *Security of Canada Information Sharing Act*: Public Framework, online: Public Safety Canada <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/shrng-frmwrk-en.aspx> [PSC Public Framework].

can "prevent information from getting to the right institution on time".[208] With respect to this, Minister Blaney said during the 2nd reading in the House of Commons:

> Canadians legitimately expect that if one branch of government is aware of a threat to their security that this information would be shared with other branches of government to protect Canadians. This is not the case and we need to fix this with this bill.
>
> In many cases, barriers to effective information sharing are rampant across government, slowing the speed of this exchange to a crawl or acting as a total barrier. These barriers exist in the form of often well-intentioned legislation; however, in the national security context, they manifest themselves into unacceptable silos that put Canadians at risk. [209]

It is difficult to argue against the stated objective, which is commendable. For instance, adequate information sharing could have prevented the Air India tragedy. Justice John Mayor, the commissioner at the commission of inquiry that followed years after the incident, claimed that "there was enough information in the hands of various Canadian authorities to make it inexcusable that the system was unable to process that information correctly and ensure that there were adequate security measures in place to deal with the threat."[210] Adequate information sharing can prevent threats and keep Canadians safe. As such, the objective is pressing and substantial. Canadians have an interest in being kept safe, even if by means of personal information sharing across government entities.

Is the Measure Proportional?

The next step to validate the constitutionality of the information sharing measure is to assess whether it meets the proportionality standard. It will be shown that the measure does not limit rights as minimally as is reasonably possible.

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[208] *Green Paper Backgrounder, supra* note 196, at 27.
[209] Canada, House of Commons, Hansard, 41st Parl, 2nd Sess, No 174 (18 February 2015) (Hon. Steven Blaney) [*Blaney Second Reading*]. online: House of Commons <http://www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-174/hansard#8583504>, at 1535
[210] Air India Inquiry, *supra* note 28.

Is the Measure Fair and not Arbitrary? Is it Connected to the Objective and Designed to Achieve the Objective?

The measure in question is not adopted based on irrational considerations. The goal is to provide government institutions the tools required to enhance national security. It allows for over 143 "Government of Canada" institutions to disclose information. Sharing information across organizations, agencies and institutions can help authorities detect, identify, analyze, prevent, deter and investigate activities that undermine the security of Canada in a timely manner. By not requiring judicial authorization prior to the information sharing, the act favours the expedience of this sharing. Citing the Air India tragedy as an example again, enhanced information sharing could have prevented the attack. The measure is therefore rationally connected to the objective and appears designed to achieve its objective.

Does the Measure Impair the Rights as Minimally as is Reasonably Possible?

The measure does not impair the rights of individuals as minimally as is reasonably possible.

First, the absence of caveats, or limitations on the extent of the information sharing, is not minimally impairing. *SoCIS* allows the disclosure of information protected under section 8 of the Charter. Section 8 of the Charter reads, "[e]veryone has the right to be secure against unreasonable search or seizure". It protects everyone, the public at large,[211] from unjustified state intrusion.[212] To benefit from the protections of section 8, a person must demonstrate that he or she has a reasonable expectation of privacy on a balance of probabilities.[213] Some elements are reasonably expected to be subject to disclosure and being shared. For instance, a person belonging to an identified radicalized group, or online activity that denotes potential risky

[211] *R v Edwards*, [1996] 1 SCR 119 at para 59 (per LaForest, dissenting) [*Edwards*].
[212] *Hunter v Southam*, [1984] 2 SCR 145 at 160.
[213] *Ibid*, at 159.

behaviour can reasonably be shared across agencies and institutions as a means of precaution. Sharing information that is necessary, although impinging on the right to privacy, could be considered to do so in a reasonably minimal way. Some information, however, is irrelevant to deterring threat, and should remain private. In *Cole*[214], the Court established that the closer the information "lies to the biographical core" of one's person, the more that information will warrant a reasonable expectation of privacy. This means, information directly relevant to one's personhood, that is, the more intimate the information, the closer it will be to the autobiographical core of the person and warrant a reasonable expectation of privacy. Information close to the autobiographical core of a person includes, but is not limited to, a person's gender, religion, relationship status, sexual preference, health, political affiliations, etc. Canadians have an interest in keeping such private information private. It's likely that the scope of the information sharing permitted can capture "autobiographical core" information of innocent people. Much of this information can be impertinent and unrelated to activities that undermine the security of Canada, and yet, according to the studied disposition, this information is subject to being shared across agencies. The absence of limits further raises concerns where, unconditional information sharing can lead to disastrous violations. The Maher Arar case is again used as an example, where, inaccurate, unverifiable and untested information can result in the torture of a man.[215] Consequently, the breadth of the information sharing regime, the absence of caveats and the resulting potential consequences, raise concerns as to the minimal impairment element.

To proceed with information sharing, judicial authorization is not required. Also, the threshold to share information is extremely low where, as long as it fits with the **relevance**

[214] *R v Cole*, 2012 SCC 53; [2012] 3 SCR 54 at para 46.
[215] *Supra* note 195, 196.

criteria of section 5 of the *SoCIS Act*, which reads, "[…]information is relevant to the recipient institution's jurisdiction or responsibilities under an Act of Parliament or another lawful authority[…]" then, information is disclosable. This opens the door to a floodgate of information. Experts suggest that the relevant criteria be changed to "necessary", making disclosure "needed", not simply "relevant".[216] Consequently, the relevance criteria does not help satisfy the minimally impairing factor, as information beyond what is required to deter threat can be shared, the limit on privacy extended beyond what is required, the right to privacy impinged more than it need be. This raises the concern on how agents authorized to disclose information, will conclude that information is indeed relevant.

The Green Paper[217] suggests that information can only be disclosed if it is actually relevant, and not if it appears to be, or if is potentially relevant. Agencies untrained in security matters cannot know for certain when information is "actually relevant". This poses a risk where information may be illegally transmitted. The subjective evaluation of valid information sharing by public servants may also lead to prematurely miscalculating the imminence of a threat, rendering the measure inefficient, and provoking the sharing of information unnecessarily. The information shared may be benign, yet, there is no telling how it can be used once it is under the government's control.

The new information sharing regime is not in accordance to principles of fundamental justice since it is unduly vague and can impact section 7 rights. The measure implicates section 7 of the Charter, due to the constitutional vagueness of the "activity that undermines the security of Canada" concept. This vagueness can be used to the government's benefit, where the information being shared remains secret outside of the realm of the concerned organizations or

[216] *Supra* note 27.
[217] *Supra* note 194.

institutions. There exists a risk that unreliable or faulty information crystallizes into intelligence, which can prejudicially impact the liberty and security of persons of interest. The Maher Arar case is a perfect example illustrating this risk, where erroneous information led to the torture of a man. This was not an isolated case either.[218]

Concerned individuals are unaware that their information is being shared. Some say that at the very least, they should be provided with notice. The information being shared, presumably, has to do with potential threats to Canada, or activities that may undermine the security of Canada. Presumably again, a person whose information is being shared, could be subject to accusations following certain disclosures. If a person were to be accused on a terrorism-related offence following a disclosure, this person's counsel would request that all disclosures be communicated to them, as they are necessary for a fair defence. Requesting this information would only be possible if the person is aware that his or her information was being shared to begin (by notice). The government entity could, of course, rely on section 38 of the *Canada Evidence Act*[219] to request privilege. The accused would then likely never see the requested disclosures.

Providing notice could potentially hinder investigations. There is merit to keeping secret information sharing as an individual aware that such information sharing could be driven 'underground', making interception and deterrence that much more complicated. To counter the argument that providing notice could hinder ongoing investigations, privilege can be claimed prior to notice being given. This would act as a safeguard against the sharing of information unlikely to pose a threat to Canada. Authorities would not prevail themselves of privilege if the

[218] *Supra* notes 194, 195

[219] *Canada Evidence Act,* RSC, 1985, c C-5 at ss 38, 38.02(1). Section 38.01(1) reads: "Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding."

information shared did not pose an obstacle to an investigation, but at least, in such benign situations, individuals would receive notice that their information is being shared. The decision to provide notice or not, is a clear illustration of the clash between rights and security. Although there is value in keeping certain investigations undercover, this should be allowed only in specifically identified situations. At current state, the absence of notice does not impair rights minimally as the information-sharing regime is too broad. Interested persons are unable to initiate court proceedings, even when information is shared erroneously. Further, even if they could initiate complaints, there exists no specialized national security review body that has the jurisdiction to oversee the majority of the organizations that can share and receive information.[220] Accordingly, in order to address the problematic secretive nature of the information sharing regime, a person could simply be provided with notice. Without, given the absence of proper oversight and review mechanisms, the disclosures permitted are unreasonable.

Further, the information-sharing regime can chill Section 2 freedom of expression and association Charter rights. Because "activity that undermines the security of Canada" is vague, individuals, unable to determine whether their activities may or may not "undermine the security of Canada", may adjust their behaviours, behaviours that may otherwise be perfectly constitutionally valid, in order to avoid unwanted surveillance and or information sharing and archiving.[221]

Furthermore, there exists an alternative to attaining the commendable objectives of the act. The use of the *Privacy Act [PA]*[222] authorizes investigative bodies to request disclosure of information "for the purpose of enforcing any law of Canada or a province carrying out a lawful

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[220] Ontario Superior Court of Justice, *Revised Notice of Application Re Bill C-51*(21 July 2015), online: Scribd <https://www.scribd.com/document/272126983/Revised-Notice-of-Application-Re-Bill-C-51>.
[221] *Ibid*, at para 3.
[222] *Privacy Act,* RSC 1985, c P-21.

investigation".[223] It grants disclosure permissions for lawful authority or public interest reasons. Because the *Privacy Act* will allow disclosures that are important, such as those relevant to activities that undermine the security of Canada, as these constitute matters that are of public interest, *SoCIS Act* becomes redundant and pointless, catching private information of innocent individuals, impinging on rights unnecessarily.

To warrant frustrating the right to privacy, there should exist adequate review mechanisms, and clear reasons for the infringement. At present state, the *SoCIS Act* provides for neither. It does not minimally impair rights as a whole.

Proportionate Effect

The final prong of the proportionality assessment consists of a cost-benefit evaluation. Asked is whether the benefits of the law outweigh the harms resulting from the law.

Previously, agencies juggled with the problem of information silos. This problem is now removed since everything can potentially be shared, creating a new problem. The magnitude of the information shared is deleterious. Again, in some circumstances, the data of innocent individuals will be captured and shared. "Information" is not defined in the act, and consequently, some institutions may generously, with discretion, interpret what is considered as necessary information to include intimate details of people's lives.

The storing of information is uncertain and unpredictable as well. For instance, CSIS uses the Operational Data Analysis Centre (ODAC) to store and analyze its data. Little is known about the ODAC. What is known is that it "exploits data banks" and "assumes numerous tasks".[224] Technologies storing bulk data use algorithms to target information in case-specific

[223] *Ibid*, s 8 (2)(e).
[224] *Re X*, 2016 FC 1105 at paras 12, 24, 37.

ways, using keywords and phrases to identify the data to collect.[225] This widens the net regarding how much and which information can be captured.

The act refers to the transmission of information to the "head of a recipient Government of Canada institution whose title is listed in Schedule 3, or their delegate". More likely than not, the decision to transmit information will be delegated to public servants within the organization[226] who will be required to determine what constitutes "activity undermining the security of Canada". The lack of objectivity and clarity within the law increases the complexity and increases the risks associated with information sharing. Once information is captured and deemed "relevant", by a public servant, the information is in the system, without the possibility of appeal. If an error occurs, there is no correcting it, seeing the lack of review mechanisms available. Only the RCMP, CSIS and CSEC are subject to review and oversight. This leaves 14 organizations without. The public will remain unaware of the interpretations given to *SoCIS*, given the secret nature of the information sharing regime.

On the contrary, *SoCIS* does have its benefits. It will increase the speed at which important information is shared between law enforcement and intelligence agencies, which will positively impact counter-terrorist measures, and the disruption of activities that pose a threat to the security of Canada.

The Act fills a legislative gap where it grants the authority for disclosure among Canada's security-related organizations.[227] Given the scope of the information sharing regime, doubts that may have existed previously as to whether specific pieces of information were subject to being

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[225] Reem Zaia, *Of Unreasonable Searches and Seizures: A Blueprint for a Constitutional Challenge to the Security of Canada Information Sharing Act* (LL.M Thesis, University of Toronto Faculty of Law, 2017) [unpublished] online: <https://tspace.library.utoronto.ca/bitstream/1807/79484/1/Zaia_Reem_201711_LLM_thesis.pdf>.
[226] *Ibid*, at 43.
[227] Zaia, *supra* note 225.

shared, are removed seeing that most information can be shared. This addresses the problem where information silos hindered the early detection of potential threats.

Nevertheless, the deleterious effects of this measure outweigh the salutary benefits. The measure frustrates the dignity of the person, and the potential for infringements on the rights to privacy, life, liberty and security, and expression, are too important to justify the absence of a review mechanism, or adequate safeguards. When individuals are required to communicate information to the State, there is an expectancy that the information will be kept confidential. With *SoCIS,* this is improbable.

This measure would likely not successfully pass the Oakes constitutional examination.

Information Sharing and the Right to Privacy: Efficiency Standard Analysis: Ting

The proposed Ting test will be applied to measure the efficiency of the *SoCIS Act* provisions that allow for expanded information sharing. It will be shown that this measure is inefficient.

Historical Precedent of the Provision

The historical precedent factor does help justify the legislative measure. Although historically, information could be transmitted across institutions, never was it possible to go as far as the proposed legislation allows. Such a regime could have prevented past attacks and so, it may be justified to implement today.

The *SoCIS Act* fills legislative gaps by authorizing disclosures that were previously unauthorized. The opening of section 5 of the *SoCIS Act* utilises language such as "is subject to any provision of any other Act of Parliament", which defers to other acts treating on information sharing. Such an act is the *Privacy Act,* which protects information under government control.

preventing its disclosure without consent, safe for several exceptions.[228] The exceptions referred to in the *PA,* are in turn, also "subject to any other Act of Parliament". This suggests that both *SoCIS* and the *PA* defer to each other.[229] In its Green Paper, the government claims, however, that *SoCIS* "cannot be used to bypass other laws prohibiting or limiting disclosure",[230] which would mean that restrictions included in the *PA,* continue to apply in *SoCIS*. Consequently, *SoCIS* finds its reason in that it authorizes disclosures that were previously unauthorized, but not expanding beyond limits restricted by means of the *PA*.

A historical precedent for information sharing thus exists, however, not to the extent provided for in the *SoCIS Act.* Nevertheless, the fact that information sharing has never been so broad, does not limit the validity of the measure. Both the Arar and Air India commission inquiry reports stress the importance of information sharing to prevent national security threats.[231] The inability to adequately share information can have deleterious consequences, as observed in the Air India tragedy, where, inadequate information sharing processes resulted in the attack. The absence of an expansive information sharing regime, weighed against potential consequences (Air India case), does help validate *SoCIS'* expanded information sharing regime. This criterion of the Ting test is successfully passed.

Revocability of the Initiative;

Time limits or a sunset clause provided within a disposition that authorizes a measure that may impinge on rights, may ease justification of the limit. The government has chosen not to include a notwithstanding or sunset clause in its expansive information sharing *SoCIS Act.* The

[228] *Privacy Act*, *supra* note 222 s 7.
[229] Zaia, *supra* note 225.
[230] *Green Paper Backgrounder, supra* note 196, at 30
[231] *Ibid,* at 26.

information-sharing regime thus has free reign as to the duration for which data can be transmitted across Government of Canada bodies. This factor does not help justify the measure.

Because there is no review mechanism implemented for most institutions, the effects resulting from the transmission of information can last infinitely. Once the information is in the system, it is there to stay. Because oversight is also inexistent for the most part, unreliable, inaccurate information can be communicated, having lasting impacts on individuals affected. Sent back to his home country, Syria, Arar was tortured on the basis of information shared by the RCMP to United States actors. Once again, the Maher Arar example is used to illustrate the pernicious consequences unreliable information transmission can have.

Further, in instances where review would be possible (CSIS, CSE, RCMP), the fact that information transmission is secret makes upholding rights improbable and difficult. Additionally, even if one could initiate a court proceeding, the government and its actors benefit from immunity for good faith transmissions, meaning, little redress would be possible, in the event of an error that could make its way to the courts.

The criteria "revocability of the initiative" would not help justify the information-sharing regime as there are no time limits provided within the law, no review or oversight mechanisms for the most part, and the secretive nature of the regime does not lend itself to potential corrective actions when detrimental effects are possible.

Location

The lack of regulation regarding the information-sharing regime across the "Government of Canada" organizations and institutions renders the potential of transmission borderless. The absence of confined limits does not help validate this measure.

Data can be captured from multiple sources. Social media, tax forms, job applications, health records, bank statements, online footprints… these are all subject to transmission. Moreover, as previously discussed, concerns are raised as to the storing of centralized information. The storing, at best, is unpredictable. Again, CSIS uses the ODAC to store and analyze its data, which uses algorithms which employ terminology and phraseology to capture additional data.

The medium of exchange for information transmission is not documented in the *SoCIS Act.* Data can be transmitted via emails, paper mail, phone calls, etc. The medium used to share data is susceptible to loss or compromise. There are advantages and disadvantages to the various modes of transmission. Physical exchanges of documents can be reproduced, destroyed or lost, while electronic data transmission can be accidentally deleted, and is vulnerable to potential hackers. For instance, in 2017, public institutions such as hospitals were attacked by a melaware virus, where, the perpetrators requested a bitcoin ransom to salvage the data and access to the systems.[232] Hacking threats are cause for concern where data is stored indefinitely in multiple locations. The *SoCIS Act* does not provide meaningful limits.

Over 143 organizations can transmit data to 17 recipient institutions, such as the RCMP, CSE and CSIS. Once information is captured, there is no telling how it can be used, stored or retransmitted, or for which duration. Without any meaningful safeguards clearly regulating how information should be stored and transmitted, the dissent in *Wakeling*[233] hints at the potential for such legislation to be struck as unconstitutional. Because the information-sharing regime is unregulated and is not limited to a specific space, but rather, has an infinite scope, the location criteria cannot help justifying the measure.

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[232] "Cyber-attack: Europol says it was unprecedented in scale" *BBC News* (13 May 2017), online: BBC News: <http://www.bbc.com/news/world-europe-39907965>.
[233] *Wakeling v United States*, 2014 SCC 72.

Nature of the Threat

The nature of the threat, which encompasses the gravity, probability, actual nature and predictability of a threat, can help justify a measure that will impinge on rights. A measure that is too broad, cannot be assessed as grave, probable, predictable, etc., unless the lack of precision encompasses all levels of gravity for example, and the threat can be directly addressed by the measure. Consequently, the *SoCIS Act* cannot be justified using this factor as it is too imprecise and only addresses threats indirectly. *SoCIS* authorizes Government of Canada organizations and institutions to transmit information that is "relevant to the recipient institution's jurisdiction or responsibilities", and which may "undermine the security of Canada". Section 2 of the *SoCIS Act* defines "threats to the security of Canada" as:

> (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage; (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person; (c) activities within or relating to Canada directed toward or in support of threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and (d) activities directed toward undermining by cover unlawful acts, or directed toward or intended ultimately to read the destruction or overthrow by violence of, the constitutionally established system of government in Canada, but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d)."

These are the activities which may undermine the security of Canada. The scope of the term "activities" is not exhaustively defined. One cannot objectively ascertain which activities may or may not fall under this umbrella. This vagueness may serve to excuse the capturing and sharing of information beyond what is necessary to deter threat. Similar to CSIS's disruptive powers, the scope of potential threat and activities, poorly defined, expands the powers attributed to authorities. Differently, however, CSIS' disruptive powers allow it to directly intervene in

presence of a given (potentially violent) threat. Consequently, the broad scope of *imminent* threats actually helps justify the threat disruption measure. Seeing that no direct intervention will result from the information sharing measure, but rather, an intermediary action, that of communicating information, the lack of clear precision as to the nature of the threat being addressed precludes using this criterion to justify a limitation on privacy to the extent it is prescribed within the disposition. In other words, the ability to perform direct actions to deter an immediate threat (CSIS' disruptive powers), helps justify a broad measure that impinges on a right. In contrast, a measure that can help deter a threat (information sharing), but that doesn't do so directly, where, it requires another intervention to actually deter a threat, cannot justify such a broad measure as easily. Because the objective can only have indirect implications on terrorism, the inability to assess the threat in terms of its gravity, predictability, probability and nature does not justify the measure.

Likelihood of Success in Advancing its Objective

If a measure has a high likelihood of success in reaching its objective, it greatly helps justify a measure that may impinge on rights. The objectives considered are the primary objective of the law, but also, subsidiary objectives. Because the *SoCIS Act* inadequately regulates which information will be shared, how it will be transmitted and because public servants may be untrained to identify the relevant information to be shared, the information-sharing regime may not be successful in advancing its objective.

In order to detect, assess and deter potential threats to Canada, information that is necessary to identify perceivable threats must be shared with the appropriate organizations or institutions in a timely manner. This information sharing need does not, however, diminish the need to protect the privacy of Canadians. Consequently, information should only be shared if it is

reliable and relevant to the recipient's jurisdiction or responsibilities. Again, the data being shared should "actually" be relevant, and not only "potentially" be relevant.[234]

Information shared should be reliable. Reliable information can lead to significant enhancements in national security. The information should be efficient in that it will allow institutions to identify, prevent and investigate potential threats or activities that undermine the security of Canada. At present, there are no mechanisms in place to validate the accuracy of the information collected and transmitted to institutions. This negates the objective of enhancing national security, but rather, implicates potential disastrous effects for individuals targeted, where, incorrect information can cast a shadow on liberties, such as in the Arar case.

Information can only be shared if it is relevant to the recipient's jurisdiction and responsibilities. The public servant within the organization transmitting the data, will have to assess whether information detained, is relevant or not. It is difficult to conceive that public servants of over 143 organizations, will have the required training to identify which data "actually is" relevant, and which is not. It seems apparent that the recipient institution would be best placed to validate the relevancy of shared data and yet, the decision belongs to the transmitting body.[235] This raises concerns where, information that would normally not qualify as relevant, will be shared erroneously, having been identified as relevant by a misguided public servant. Further, once information is shared, there exists no oversight mechanism for the most part, controlling potential erroneous communications. This constitutes an obstacle to the success of the measure, where, data transmitted will impact the privacy of individuals, unnecessarily. Worse, information that should be shared, which is deemed irrelevant by an untrained eye, may go unassessed and become fatal to threat deterrence.

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[234] Green Paper Backgrounder, *supra* note 196 at 30.
[235] Zaia, *supra* note 225.

Further, information is at times not transmitted on a horizontal level, between some institutions. The measure lacks clear regulations that establish how information is to be transmitted, by whom it is to be assessed, and how it is to be stored. For example, it's possible that CSIS refuses to inform the RCMP of a potential threat. Roach and Forcese note in their report that

> [t]he Act allows for the government to share just about everything while it rejects the Air India commission's recommendation that CSIS **must** share intelligence about terrorist offences, if not to the police then to someone who is in charge and who can take responsibility for the proper use of the information.[236] [Emphasis added].

If CSIS is not compelled to share intelligence about a terrorist offence for example, this not only negates the objectives sought by the measure, but even poses a potential risk to national security. This is completely opposite to the sought-after objective. [237]

The overbroad drafting of the measure permits the transmission of a vast amount of information, where, security intelligence risks getting dissolved in a mass of data. As Roach and Forcese correctly advance, *"SoCIS Act's* overbreadth threatens security by making it difficult to focus on terrorism". [238] The fact is, the risk of collecting and transmitting data unnecessarily is high. The Office of the Privacy Commissioner of Canada warns that

> [w]hile a preliminary view of the data suggests a limited use of [the SoCIS] ... the potential for sharing on a much larger scale combined with advances in technology allow for personal information to be analyzed algorithmically to spot trends, predict behaviour and potentially profile ordinary Canadians with a view to identifying security threats among them. [239]

Advancing this argument, according to a 2014 memo, CSIS esteemed that it was possible to improve on the national-security information sharing regime within the "existing legislative

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[236] Green Backgrounder, supra note 196, at 22.
[237] *Ibid*, at 22.
[238] *Ibid*, at 22.
[239] Office of the Privacy Commissioner of Canada, *Annual Report to Parliament on the Personal Information Protection and Electronic Documents Act and the Privacy Act: Time to Modernize 20th Century Tools* (Ottawa: Public Services and Procurement Canada 2016) at 16 [*Annual Report Privacy Commissioner*].

framework",[240] making the *SoCIS* measures unnecessary. Also, Privacy Commissioner Daniel Therrien, issued comments denouncing the scope of *SoCIS* as "clearly excessive".[241]

The aforementioned arguments all point to the fact that the expanded information sharing regime, although it has some salutary benefits, overall, is incapable of reaching its stated objective and rather immerses Canada in an Orwellian environment.[242] Consequently, it would fail the "likelihood of success" component of the Ting test.

In conclusion, the information sharing measure, does not pass the Ting test and is therefore inefficient. Because the measure has been deemed unconstitutional and is inefficient, the measure does not strike an optimal balance.

[240] "CSIS didn't need c-51 to improve information sharing, briefing suggests" (June 24, 2015), The Canadian Press online: CBC News <http://www.cbc.ca/news/politics/csis-didn-t-need-c-51-to-improve-information-sharing-briefing-suggests-1.3125611>.
[241] *Ibid*.
[242] George Orwell, *1984* (New York: Houghton Mifflin Harcourt Publishing Company, 1949), Zaia, *supra* note 225.

CHAPTER 8: COMPREHENSIVE ANALYSIS: BILL C-59 AND RECOMMENDATIONS

Three main controversial measures have been examined throughout the last three chapters: The criminalization of the promotion or advocacy of terrorism offences in general; the threat disruptive powers of CSIS; and the expanded information regime of the *SoCIS Act.* All have failed to be considered constitutional and efficient. Bill C-59 was drafted to address the problematic areas identified in Bill C-51. As a result, it has fixed some of the problematic areas, ignored others, and has created new issues.[243] Bill C-59 has improved the wording of the 'promotion or advocacy of terrorism offences in general' disposition, making it less vague. It has ignored problematic areas in the 'disruptive powers' disposition. Ministerial or court authorization is now required for the collection of some types of information. Also, collected data needs to be accompanied by information about the accuracy and reliability of the way it was acquired, and a new review body was created, improving oversight. The information sharing disposition was expanded to exempt freedom of expression activities unless the activity undermines the security of Canada. Overall, the efforts in C-59 are commendable, but insufficient. Incorporating the following recommendations could address the insufficiencies, paving the way to legislation that is closer to striking an optimal balance.

[243] "The Relationship Between Bill C59 and Bill C-51" (September 12, 2017), online: CCLA <https://ccla.org/relationship-bill-c-59-bill-c-51/>.

C-59 fixes the criminalization of the promotion or advocacy of terrorism offences in general

In Bill C-51, amendments made to the Criminal code[244] criminalized the promotion or advocacy of terrorism offences in general. The scope of this measure was vast, where it was unclear what was meant by "terrorism offences in general", or what constituted promotion or advocacy. It criminalized activity of individuals who had no intention that a terror act result from their communication. This placed a chill on freedom of expression and the CCLA launched a constitutional challenge attacking this measure. Section 143 of Bill C-59 removes the term "terrorism offences in general", so that the offence is limited to those individuals who specifically "counsel another person to commit a terrorism offence" instead.[245] This will satisfy much of the critique initially directed towards this measure.

CSIS' Disruptive Powers are Maintained

Bill C-51 authorizes CSIS to take measures to reduce "threats to the security of Canada".[246] Bill C-59 modifies sections 12.1(2) (3), adding that measures taken must be Charter compliant. However, section 12.1(3.2) still allows for rights to be curtailed as long as the measures taken are agreed to by means of a mandate issued by a judge prior to their occurrence.[247] Further, Bill C-59 is reducing the list of examples of activities that "undermine the security of Canada", but the list remains unrestricted. For the most part, Bill C-59 has ignored the problematic areas found in the bill.

[244] *Ccr, supra* note 155, s 83.21
[245] *Bill C-59, supra* note 45, s 143.
[246] *CSIS Act, supra* note 13, s 12.1(2) (3).
[247] *Ibid*.

Recommendations

Roach and Forcese bring forward the recommendation that to be Charter compliant, section 12.1 (3.2) of *CSIS Act* should remove mentions of "a threat reduction measure violating the Charter rights of the individual".[248] Otherwise, precise circumstances where CSIS may impinge on Charter rights and in what form it can do so, would need to be included in the disposition by means of a clear, restrictive definition of what it meant by "activities that undermine the security of Canada".[249] CSIS requires a warrant when it esteems on reasonable grounds that its actions will infringe on an individual's Charter right(s). It does not require a warrant to disrupt threats otherwise. CSIS agents are left to determine whether or not, their actions may or may not impinge on a right. This is unfair to them, as most may not be trained jurists, yet they are required to have "perfect judgment" in their interpretations.[250] A list of occasions where CSIS may act, and how it can limit a right, would be beneficial for this reason and also, would more aptly meet the constitutional "prescribed by law" standard.

CSIS should be compelled to evaluate whether other agencies, such as the RCMP or other police forces, are better positioned to reduce or deter a threat. This could potentially render the measure more successful. To identify the best suited acting agency, information obtained that can be used for an ulterior prosecution, should also be shared in accordance with the Air India Recommendation 10, to "relevant policing or prosecutorial authorities or to the National Security Advisor".[251]

Bill C-51 modifies the nature of CSIS where it departs it from its intelligence gathering mandate, to one actively involved in threat disruption. Incorporating the aforementioned

[248] Green Paper Backgrounder, *supra* note 196.
[249] Ibid.
[250] *Ibid*, at 25.
[251] Maher Arar Inquiry, *supra* note 48, recommendation 10.

recommendations can help render the disposition constitutional, but it is debatable whether it would be efficient, as CSIS's disruption powers, albeit potentially useful, may be unnecessary. A full examination would be required to evaluate whether it does reach an optimal balance. I suspect that it would not, but the measure would be less damaging than it is currently.

C-59 Continues to Allow Problematic Information Sharing

Within C-51, *SoCIS* allows for the bulk collection of data of Canadians, without any adequate safeguards or means of validating the reliability of the information.[252] The measure is overly broad, allowing for the collection of nearly limitless data. The extent of the information gathered and shared, risks posing a threat to Canada where it becomes difficult to focus on security data that could potentially enhance national security.

First, C-59 brings changes that pertain to information "disclosure" rather than information "sharing".[253] It claims that the government will not be collecting any new information (with some exceptions), but rather, that information previously collected can and will be disclosed for security purposes. The ambiguous issue regarding the retention of information has been addressed where the perpetual storage of information would now officially be legal under C-59.[254]

The changes within C-59 create a framework that adds some safeguards. For instance, ministerial and court approval is now required for the collection of some types of information.[255] However, C-59 also lowers the threshold for the collection, analysis and retention of data, which needs to be *relevant to the performance of CSIS' duties and functions*, instead of necessary.

[252] *CSIS Act, supra* note 13, s 2.
[253] *Bill C-59*, *supra* note 45, part 5 (a) of SoCIS : emphasize that the Act addresses only the disclosure of information and not its collection or use. *Bill C-59*; *supra* note 45, s 4.
[254] *CSIS Act, supra* note 13, s 11.01 ss.
[255] *Ibid*, s 11.05(1).

Sections 11.07 (1) (a) and 11.11 (1), also raise concerns, where, information that is "considered publicly available is fair game for collection without a warrant".[256] Information that can be transmitted still has to be in light of "activities that undermine the security of Canada", which remains overly broad and unclear.

Readily, Bill C-59 incorporates a recommendation from the Arar Commission by requiring that the information disclosed "be accompanied by information about the accuracy of the disclosed information and the reliability of the manner in which it was obtained",[257] which reassures some concerns. It also improves on accountability and oversight where the data transmitted must be "provided to the national security and intelligence review agency", a new verification body created by Bill C-59. Record keeping requirements are detailed in section 9 of the Act.

Section 5 of Bill C-59 names exceptions or activities exempt from "activities that undermine the security of Canada". They are advocacy, protest, dissent and artistic expression. The welcomed addition, is an exception to the exception where it adds precision following the listing of the exceptions: "unless any of these activities are carried out in conjunction with an activity that undermines the security of Canada". This allows for information sharing on matters relating to such freedom of expression activities, when they may very well pose a threat to Canada. The exceptions, as they were drafted in Bill C-51 originally, were drafted with the intention of easing dissent from human rights groups. The result, however, was to hinder potential communication of activities that could have posed a threat to Canada, on the premise of respect for freedom of expression activities. The addition "are carried out on in conjunction with

[256] *Mass Surveillance and Bulk Collection in Bill C-59*,(12 September 2017) online: CCLA https://ccla.org/mass-surveillance-bulk-collection-bill-c-59/; *CSIS Act, supra* note 13, ss 11.07 (1) (a), 11.11(1);
[257] *SoCIS Act supra*, note 15, part 5 (e).

an activity that undermines the security of Canada", improves the efficiency of the measure, where, it allows for useful communication that can impact national security positively.

Recommendations

Roach and Forcese advance that "the government could reduce the complexity (and subjectivity) of its information-sharing regime by standardizing national security information – sharing rules in the statute books.[258] This would leave less room for interpretation by public servants, who are not necessarily trained in deciphering material that is "relevant" or that can undermine the security of Canada.

Further, the privacy commissioner also recommends that all disclosed information be "necessary" and not purely "relevant". This would limit the quantity of information being disclosed, which at present state, likely hinders the objective of enhancing national security. Reduced disclosures will likely lead to better targeted information disclosures, which then can possibly lead to profitable intelligence, bettering security for Canadians. Necessary information would be easier to interpret and to standardize in statute books. Changing the term within the disposition to "necessary" would also help safeguard the expectation of privacy of individuals, thus impinging on rights to a lesser degree.

Individuals targeted by disclosure, should be given notice. In matters where such notice could potentially hinder operations, the government could prevail itself of the section 38 privilege clause in the *Canada Evidence Act.*

As per Recommendation 10 of the Air India inquiry,[259] CSIS should "report information that may be used in an investigation prosecution of an offence either to the relevant policing or

[258] Green Paper Backgrounder, supra note 196, at 25.
[259] Maher Arar Inquiry, *supra* note 48, Recommendation 10.

prosecutorial authorities or to the National Security Advisor". This will prevent hindering criminal prosecutions in the future.

The new national security and intelligence review agency (NSIRA) is a welcome addition to the information sharing framework, improving on oversight. It will replace the Security Intelligence Review Committee (SIRC), which itself claims to be unable to fulfill its mandate adequately. The NSIRA will take on the review of RCMP activity. It will be enabled to scrutinize all national security intelligence activities across "Government of Canada" organizations and institutions. The NSIRA will verify that Canada's security agencies comply with the law and that it has discretion as to which activities it reviews. This implies that not *all* activity would be subjected to review, which is disappointing, yet understandable, considering the magnitude of the information collected. It would be beneficial, however, if its powers were expanded to allow it to delete unreliable information across all Government of Canada bodies,[260] making it have jurisdiction over all institutions, ensuring appropriate oversight, and limiting the risk of dire consequences following the collection of potentially unreliable information, as was the case in the Maher Arar case.

It would be ideal if the Act's operations be reviewed every 3 to 5 years. The Trudeau government said it would bring mandatory review every three years.[261] Bill C-59 mandates the government to complete a comprehensive review of the Act "in the sixth year after the Bill comes into force.[262] Such review would need to be completed by an independent investigatory board, as well as by a parliamentary committee. The methods by which information sharing practices are authorized and effectuated, their impacts on individual's rights, and the benefits to

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[260] *Ibid*.
[261] "Interview: Trudeau defends his Anti-Terrorism Act stance". Macleans (18 June 2010), online: <http://www.macleans.ca/politics/ottawa/interview-trudeau-defends-his-anti-terrorism-act-stance/>.
[262] *Bill C-59, supra* note 45, s 168.

security should be assessed to determine whether the measures remain necessary and relevant to the context and environment of Canada's national security. Persuant to section 5 (1), Section 9 of *CSIS Act* should include a requirement to "document how security interests are being weighed against privacy interests".[263]

Bill C-59 can be commended for some of the changes it brings to the information-sharing regime, but overall, the measures would still be overbroad. Incorporating the suggested recommendations would help render the disposition as striking an optimal balance as it would ease constitutional concerns, whilst proving to be a more efficient measure, with greater chances of reaching its objective.

Remarks

The changes C-59 brings, are partially commendable, but grossly insufficient. Were the recommendations to be incorporated, Canada's main anti-terror legislation would be much closer to striking an optimal balance. Much of Canada's counterterrorist efforts seek to identify, deter, and prevent an actual threat from occurring, which would impede on Canada's national security and the safety of Canadians. Focus is also directed at criminalization and prosecution, but little time or effort is consecrated to deterring the radicalization of individuals in the first place. This has been pointed out in a brief by the Canadian Network for Research on Terrorism, Security and Society.[264] This consideration is significant, where, were proper resources (human, educative, and financial) be designated to the cause of deterring radicalization, security could potentially be less of a pressing, controversial and rights-limiting issue today. Parliamentarians should heed to this

[263] Green Paper Backgrounder, *Supra,* note 195.
[264] "Can Canada Strike a Proper Balance on Rights and Security", The Star (25 April 2015),online: The Star <https://www.thestar.com/opinion/commentary/2016/04/25/can-canada-strike-proper-balance-on-rights-and-security.html>.

opinion and seek to fill the gap by implementing and directing the appropriate resources to the objective of deterring radicalization.

CHAPTER 9: CONCLUSION

Summary:

Rights and security are Canadian values that often clash. At the outset of this thesis, I set out to demonstrate that Canada's main anti-terror legislation does not strike an optimal balance as a whole, as it does not meet both a constitutional and efficiency standard. Canada, a country which prides itself on values such as respect for the rule of law, has interest in enacting laws that are constitutional. This is a given, but even in a liberal democracy such as Canada, individual freedoms are far from absolute. Restrictions on liberty and procedural fairness and other rights are permitted in certain circumstances. To excuse itself from Charter rights, the government has to either use the section 33 notwithstanding clause, otherwise, potentially face a constitutional challenge where its law or provision will have to successfully meet the *Oakes* examination analysis. To be considered constitutional is the minimal acceptable standard for a law. I suggest that legislators strive to enact security laws that are both constitutional and efficient, where, the law not only meets an acceptable standard, but rather, a desirable one. A law that meets both of these standards, will be considered as striking an optimal balance.

As noted above, in addition to being constitutional, in order to be optimal, a law must also be efficient. Again, to be efficient, maximum benefit at the lowest cost must be achieved. To measure efficiency, I proposed using what I call the Ting test, which uses a set of criteria first suggested in the United States by Jan C Ting. The Ting test is innovative, where, in addition to calculating the proportionality of a measure, as most constitutional/ validation tests set out to measure, it validates whether a measure has a good chance of reaching its objective. A measure that is likely to be successful, will more likely be accepted by the public.

A law can be deemed constitutional, yet still spur controversy. This is often the case when legislation concerns national security, where security seems to outweigh civil liberties and rights. A law that appears controversial which has little or no chance of fulfilling its objective will always remain controversial. Whereas, a law that would pass a constitutional examination, and where good chances of success in achieving its designated objective can also be demonstrated, will more convincingly be justified, diminishing its controversial character. This can help protect the government or policy makers from inflated public scrutiny, where, not having to fight off exaggerated dissenting opinions, its policies can be implemented with greater ease, potentially enhancing national security more aptly.

After evaluating certain problematic measures enacted in Bill C-51, namely, measures that criminalize the promotion or advocacy of terrorism offences in general, CSIS's disruptive powers and the enhanced information sharing regime across "Government of Canada" organizations, the conclusion arrived at is that Canada does not strike an optimal balance between rights and security in its anti-terror legislation as these main measures would not pass a constitutional (*Oakes*) examination, nor pass an efficiency (Ting) examination. There are many more measures that could be subject to a constitutional challenge, such as those pertaining to the detention of individuals where the peace bond-issuing process is facilitated, or measures that violate freedom of movement, such as no-fly lists, however, for the purpose of this thesis, the three measures examined, considering the importance of their reach, are sufficient to establish that at present state, Canada's main anti-terror legislation is not as optimal as it could be.

There is no arguing the virtue of enhancing national security. Security is also a shared Canadian value. It must, however, be provided, at lesser cost to the rights of Canadians. There are many solutions that can improve the quality of the laws. Bill C-59 proposes amendments that

address, to some degree, some problematic areas in Bill C-51. For example, it fixes the advocating or promoting terrorism offences in general measure, where it removes "terrorism offences in general" from the disposition, replacing it with "counsels another person to commit a terrorism offence". C-59 establishes a National Security and Intelligence Review Agency, improving oversight. It also adds in the *SoCIS Act,* the need for the transmitting organization to disclose where the information was obtained, and how its reliability has been ascertained. These are commendable improvements if the Bill is adopted. Yet, they remain insufficient, as the volume of information sharing is still overbroad, and CSIS' disruptive powers still problematic.

Recommendations the Act could include for instance, is a comprehensive listing of all the specific measures CSIS can take to disrupt a threat. The Charter infringement authority given to CSIS should also be repealed. It is also desirable to direct resources to soft-prevention measures that would deter the radicalization of individuals. Time, expertise and funding are the required resources that should be directed to this objective, which in the long run, can have a significant impact on the security of Canada. This starts with education…education in schools, educating, parents, and youth.

Research Limitations

This research focused on demonstrating the inadequacies of Canada's anti-terror policies. It does not consider statistical information regarding the potential for radicalization in Canada. Should research demonstrate unexpectedly that there exists an important risk for mass radicalization, the rights restricting measures within C-51, currently criticized, could be warranted. At this time, however, the government has not demonstrated that there exists such a risk. It also has not satisfactorily explained why some of the examined measures are necessary.

This research sought to answer the question of whether Canada strikes an optimal balance in its anti-terror legislation. It does not. As such, this project communicates to policy makers that work is still required to improve the quality of our existing legislation. Finally, it must be stated: the important sacrifice of rights and freedoms in the name of a security agenda that has not proven to be as efficient as it can be, can be considered, at least to some extent, as waiving a symbolic white flag before terrorists and ultimately confirming to those who perpetrate acts of terror that we *are* indeed afraid, that their threats *are* successful, and that we are on the losing end to this war on terror. If some of the terms generally accepted to describe terrorism are considered, notably "to scare", "to limit" and "to intimidate", then the reactive adoption of laws at the expense of rights must also be, to some extent, considered as the successful fulfillment of the goals set out by terrorists. The fact is, democratic and liberal nations are willing to forego some of the very civil rights and freedoms on which they were built - and this - in the name of a *war on terror*. But unless it can be objectively demonstrated that anti-terror legislation is or can be efficient in attaining its objectives, criticism towards the sacrificing of rights directed towards governments will and should stay front and centre in this debate!

The struggle for the law is unceasing. The need to watch over the rule of law exists at all times. Trees that we have nurtured for many years may be uprooted with one stroke of the axe. We must never relax the protection of the rule of law- All of us, all branches of government, all parties and factions, all institutions- must protect our young democracy...

Aharon Barak- president of the Supreme Court of Israel

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