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## BACKLASH

### Terrorism & civil liberties

- Jeunes et justice : enfin l'équilibre?
- Who can afford law school?
- Introducing GATS
- A patent revolution

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# BACKLASH

## Terrorism & civil liberties

The September 11 attacks on New York City and Washington changed North America and maybe the world, setting off countless chains of events that will take decades to sort through. But today, in Canada and the United States, lawyers see the potential for the war on terrorism to find an unintended target: our rights and freedoms.

**By Doug Small**  
*Illustration by Harvey Chan*

*"Our actions will be ruled by resolve, but not fear. If laws need to be changed, they will be. If security has to be increased to protect Canadians, it will be. We will remain vigilant. But we will not give in to the temptation, in a rush to increase security, to undermine values that we cherish, and which have made Canada a beacon of hope, freedom and tolerance in the world."*

- Prime Minister Jean Chrétien, House of Commons debate on terrorism, Sept. 17, 2001

**F**or refugees seeking safe haven in Canada, the crackdown came overnight. Before Sept. 11, an asylum-seeker could land at Toronto's Pearson Airport after flushing his documents down the airplane toilet, assure authorities he had no terrorist ties, claim he'd be persecuted if sent back home, then settle in with full benefits while his refugee claim was processed and reviewed.

Now, like as not, he would be trundled off to jail, particularly if he were a 25-year-old Arab from a country like Algeria, Iran or Iraq. "A person who would have some freedom and the ability to take advantage — and I mean that in a positive sense — of Canada's hospitality and compassion, is now taking advantage of the correctional center's hospitality and compassion," says Halifax immigration lawyer Scott Sterns of Jamieson Sterns. "That's a significant change."

It's one of many security-related changes that continue to raise fears in Canadian legal circles about a possible erosion of domestic rights and liberties in the aftermath of the Sept. 11 terrorist attacks on the United States.

Some worry that legislators might be using the threat of terrorism to tighten national security in ways that violate the Charter of Rights. Others warn that courts may react to public pressure for increased safety by revisiting rulings that limit police interrogation and wiretap powers. Still others have concerns about the hasty passage and minimal scrutiny of anti-terrorism bills in Parliament.

## Guerre au terrorisme : ressac contre les libertés fondamentales

Des droits et libertés gagnés de haute lutte pourraient tomber au champ d'honneur.

**B**ien des choses ont changé depuis le 11 septembre dernier. Au Canada, le gouvernement n'a pas tardé à annoncer des mesures énergiques pour contrer le terrorisme et renforcer la sécurité nationale.

Certains s'inquiètent que le législateur ne tire prétexte de la menace terroriste pour resserrer les contrôles au point d'enfreindre la *Charte des droits et libertés*. D'autres soutiennent que les tribunaux pourraient bien, sous la pression de l'opinion publique, reconsidérer l'effet de certaines décisions limitant les pouvoirs d'enquête de la police. D'autres encore s'inquiètent de l'adoption hâtive de la loi antiterroriste par le Parlement, sans qu'un examen approfondi ait pu en être fait.

« En un sens, il y a eu attaque contre notre mode de vie et contre la manière dont nous nous gouvernons », dit James Lebo, avocat chez McCarthy Tétrault à Calgary. « Nous craignons que les gens ne soient trop rapidement enclins à renoncer aux libertés pour lesquelles les Canadiens se sont battus pendant plus de cent ans, et qui plus récemment ont été enchâssées dans la *Charte*. »

### Une menace bien réelle

Ce qui ne veut pas dire que les juristes minimisent la menace terroriste. Au contraire, bon nombre d'entre eux estiment, par exemple, qu'un resserrement de l'immigration et un meilleur contrôle des réfugiés n'ont que trop tardé. « Nous affichons une attitude naïve à l'endroit de ceux qui se présentent sans papiers ou avec de faux papiers à nos frontières, dit l'avocat torontois Sergio Karas. Nous leur déroulons le tapis rouge, leur fournissons gratuitement l'aide juridique, nous leur donnons un permis de travail et les laissons aller dans le public sans savoir qui ils sont exactement. »

Mais il ne faudrait pas verser dans l'excès. « Nous devons être doublement vigilants justement parce que nous sommes tous maintenant un peu plus paranoïaques », croit Ritu Khullar, présidente de la Section

nationale du droit constitutionnel et des droits de la personne de l'ABC. « C'est facile de jouir de nos droits quand tout va bien. C'est dans des circonstances comme celles-ci qu'on teste vraiment les limites de notre démocratie et qu'on vérifie si nous croyons vraiment en tous ces droits dont nous jouissons. »

Au Canada, des défenseurs des libertés civiles se sont inquiétés des éditoriaux alarmistes, des demandes émotives d'intervention vigoureuse et de l'élargissement des pouvoirs de surveillance et de détention qui ont immédiatement suivi, aux États-Unis, les attaques du 11 septembre.

Bien qu'à l'instar des Américains, une forte majorité de Canadiens soient réticents à renoncer à leur droit à la vie privée pour combattre le terrorisme, d'autres sondages révèlent un son de cloche différent. Ainsi, pour deux répondants sur trois, la lutte au terrorisme l'emporte sur le besoin de protéger les droits individuels et les voies de droit régulières. Une proportion similaire laisserait la police procéder à des fouilles au hasard, tant des personnes que des véhicules. Étonnamment, quatre répondants sur cinq à un sondage *Globe and Mail/CTV/Ipsos-Reid* accepteraient même qu'on appose leurs empreintes digitales à une carte qu'ils devraient être prêts à montrer en tout temps sur demande des policiers.

### Davantage de ressources

Le professeur David Paciocco de l'Université d'Ottawa craint que le fort appui public à des mesures de restriction ne se solde par une diminution des libertés fondamentales et des droits que nous tenons pour acquis. Cela s'applique particulièrement en matière d'écoute électronique, de perquisition et de saisie et autres méthodes d'enquête envahissantes.

Le Comité de surveillance des activités de renseignement de sécurité (CSARS), qui contrôle les activités du Service canadien de renseignement de sécurité (SCRS), s'est empressé de dire qu'à son avis, le SCRS n'avait pas

besoin de nouveaux pouvoirs en vue de combattre le terrorisme et qu'il disposait déjà des outils utiles pour bien remplir son mandat.

Me Khullar croit que les mesures adoptées — comme l'élargissement des pouvoirs policiers en matière d'interception des communications, la création de nouvelles infractions au *Code criminel* et à la *Loi sur les secrets officiels* — imposent un lourd fardeau aux juristes qui doivent en examiner la pertinence et l'opportunité. La menace terroriste est bien réelle, dit-elle, mais « sacrifier des libertés fondamentales à l'autel de la sécurité équivaldrait à sacrifier ce que nous défendons justement au nom de la démocratie. »

Pour Gordon Maynard, avocat spécialisé en immigration de Vancouver, la législation existante suffit. « Il y a déjà bien assez de dispositions qui établissent que les terroristes ne sont pas bienvenus, qu'ils seront emprisonnés et déportés. Le problème repose dans la cueillette de renseignements et c'est probablement là que le bâi blesse. » Il fait remarquer que toutes sortes de renseignements existaient aux États-Unis sur les principaux acteurs des attaques terroristes du 11 septembre mais que l'information n'était ni coordonnée ni efficace.

De plus en plus d'avocats qui oeuvrent dans le domaine de l'immigration s'accordent à dire que les failles du système tiennent moins aux imperfections des lois qu'aux ressources humaines et financières qui déterminent leur application. Manifestement, plus d'argent est nécessaire pour voir à la déportation des nombreux étrangers dont la demande de statut de réfugié a été rejetée.

Déchirés entre leur désir de participer à un noble objectif national et leur devoir de défendre les principes auxquels ils croient, les juristes ont un rôle très important à jouer, estime Sylvain Lussier de Desjardins Ducharme Stein Monast à Montréal. « Nous devons être prudents et vigilants. Et nous devons aussi être prêts à être impopulaires. »

"In a sense, there has been an attack on our way of life and the way we govern ourselves," says litigator James Lebo of McCarthy Tétrault in Calgary. "Our concern is that people will too quickly be prepared to concede the liberties that Canadians have worked so hard to attain for over a century, and which have more recently been enshrined in our *Charter of Rights and Freedoms*."

"Lawyers in these times have a great, great role to play," says Sylvain Lussier of Desjardins Ducharme Stein Monast in Montreal. Past Chair of the CBA's Constitutional Law and

Human Rights Section. Not only do lawyers have a duty to defend victims of society's xenophobic impulses during times of danger, he says, they must be ready to fight unjustifiably harsh security measures adopted by governments hoping to boost their short-term political appeal.

### A real threat

That's not to say that lawyers are playing down the threat posed by terrorism. Most concede a need to make the country more



secure. In fact, some argue that moves to tighten immigration and refugee controls are long overdue.

"We have this namby-pamby, naive attitude towards those who show up undocumented or falsely documented at our borders," says Toronto immigration lawyer Sergio Karas. "We extend the red carpet, we provide legal aid courtesy of Canadian taxpayers, we give them a work permit, let them loose into the public, and we have no idea who they are...."

"We penalize skilled workers and admit those who will give Canada a bad reputation. It's a scandal."

But whatever differences they might have over specific measures, members of Canada's legal community all have been touched by the fallout from the attacks. Like the country's defence, security and police forces, legal practitioners, experts and activists have been on a higher state of alert since Sept. 11.

"This is the test," says Ritu Khullar, Chair of the CBA's Constitutional Law and Human Rights Section and a lawyer with Chivers, Greckol & Kane in Edmonton. "Because we're all a bit more paranoid, we have to be doubly vigilant about our rights. It's easy to have those rights when times are good. This is when we see what we're really made of as a democracy, and whether we really believe in those rights."

That need might have been greatest in the days immediately following the attacks, when public anxiety was at its peak.

"Canada is woefully unprepared for the sort of threat that we now face," wrote *The Globe and Mail* in a September call-to-arms editorial that demanded fast and sweeping improvements in security policing. "Our borders are porous, our airline security inadequate, our intelligence services neglected and our armed forces underfunded and ill-prepared."

Similar sentiment in the United States during the emotional early hours of the crisis brought cries for everything from the elimination of coolers and backpacks at baseball stadiums to close monitoring of anyone who "looked like an Arab." The Bush administration hastily weighed in with legislation to vastly expand federal surveillance and detention powers.

Worried civil libertarians recalled the dark days of Communist sweeps during the Red Scare of the 1920s, Japanese-American internments during the Second World War, and the 1996 passage of the *Anti-Terrorism and Effective Death Penalty Act* in the aftermath of the Oklahoma City bombing, which allows

the president to use "all necessary means" to destroy international terrorist infrastructure.

"Americans are angry," says Lebo, noting their historical inclination to clamp down when they feel threatened. "Get them mad, they go full force."

### Defending liberties

Within days, however, the rhetorical atmosphere had cooled. The president made a highly symbolic visit to a mosque, and a coalition that included everyone from law professors and left-leaning civil rights activists to the right-wing Gun Owners of America joined forces against the notion of trading fundamental freedoms for more personal safety and national security.

The popular American television program *The West Wing* ran a special episode extolling the virtues of American-style liberty. On the show, White House Communications Director Toby Ziegler quoted the words of Benjamin Franklin: "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety."

None of this was lost on U.S. Attorney General John Ashcroft, who

quickly moved to meet some of the objections to his initial surveillance-and-detention legislation that had been raised by the Senate judiciary committee and its chairman, Patrick Leahy.

"We can't allow terrorism to prevail by curtailing our constitutional democracy or restricting our freedoms," argued Senator Leahy. Ashcroft agreed, assuring the committee that any change in eavesdropping rules would meet constitutional privacy standards, and that new detention powers would merely allow authorities to jail aliens already facing deportation. "We are conducting this effort with a total commitment to protect the rights and privacy of all Americans," he said.

In Canada, meanwhile, opposition politicians were lambasting Prime Minister Jean Chrétien for what they saw as a tepid response to the crisis. Yet polls showed two-thirds of Canadians favored his cautious, determined approach.

Indeed, the government steadily stepped up airport security and border controls for refugees, added tighter anti-forgery features to passports, ordered photo ID cards for immigrants and authorized security-enhancing spending increases for the RCMP, the Canadian Security and Intelligence Service (CSIS), customs and immigration inspectors, and the military.


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nor safety."**

## ■ IMMIGRATION LAW ■

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Foreign Affairs Minister John Manley, declaring a shift "in favour of the duty to protect and away from individual liberty," saw his political star rise to new heights as he was picked to coordinate Ottawa's anti-terrorism campaign. The government, he said, is "intent upon taking decisive action," but would never go so far as to "take away the very essence of a free and democratic society."

Canadians, it seemed, weren't really troubled on that score. Polls showed us to be as leery as Americans about giving up privacy rights to help combat terrorism. A solid majority made clear we didn't want police sifting through our financial transactions or tapping our telephones and e-mail without warrants.

Yet nearly two out of three of us believed fighting terrorism outweighed the need to protect individual rights and the due process of law. And a similar number said we would willingly let police "randomly stop and search" people and vehicles.

Startlingly, an even higher four out of five respondents to the *Globe and Mail*/CTV/Ipsos-Reid poll said they would be willing to be fingerprinted for a security card, which they would have to carry at all times and show to police on request.

### Growing concerns

All this is a source of deep concern to legal experts like University of Ottawa law professor David Paciocco, who says such strong public support for security raises the risk that anti-terrorist measures taken by the government "are going to abridge civil liberties and a lot of the rights and freedoms we've come to take for granted."

This applies particularly to wiretap and other intrusive surveillance probes, as well as search-and-seizure strikes by intelligence agents. "In order to get information, you have to invariably violate someone's privacy rights," he says. "In a system where we typically require warrants and proof on reasonable and probable grounds, you might not be able to gather the kind of intelligence that, as a government or government agency, you might think you need."

The Security Intelligence Review Committee (SIRC), a high-profile agency (former premiers Bob Rae and Frank McKenna are among its members) that oversees the country's security agency, was quick to say it doesn't feel CSIS needs any new terrorism-fighting power.

CSIS already has the right to bug telephones, open mail and break into the homes and offices of people it suspects are threats to national security. The review committee's executive director, Susan Pollak, says an increase in resources will inevitably lead the agency to "become more active and take a more vigorous operational role."

While that would give CSIS overseers more work, Pollak says it has always been "front of mind that we are here to ensure that the service doesn't overstep the limits placed on it by law, ministerial direction or their own policies."

Despite that, political scientist Stuart Farson, an executive member of the Canadian Association for Security and Intelligence Studies who teaches national security at Simon Fraser University in Burnaby, B.C., says the time is ripe for a thorough outside review of the country's security and intelligence system.

Political oversight of CSIS has "gone off the horizon," he argues. There are even conflicting views of what constitutes a

terrorist organization. Two years ago, CSIS Director Ward Elcock told a Senate committee his agency was keeping tabs on roughly 50 terrorist groups.

Yet Farson notes the U.S. State Department has identified fewer than two dozen organizations it defines as "terrorist," and that's the list Canadian authorities opted to use in October when they issued initial legal restrictions that criminalized the provision of money to such groups.

Khullar says all of this has put a heavy onus on lawyers to give close scrutiny to the government's hefty package of post-Sept. 11 anti-terrorist measures. The legislation included everything from an expansion of police powers to intercept messages to the creation of new *Criminal Code* and *Official Secrets Act* offences against people who target transport systems and public places with explosives, or who covertly gather intelligence about pipelines, hydro facilities and other essential infrastructure.

The terrorist threat is real, says Khullar, but "to sacrifice civil liberties for security concerns is to sacrifice exactly what it is that we stand for in terms of democracy." (See "The CBA & You," page 49).

### Target: immigration

That's an argument that Minister Elinor Caplan uses to reject the tightening of immigration rules by way of the "notwithstanding" clause of the Constitution to override rights guarantees in the charter. "This is not on," she says.

"We must strike back against terrorism, but in this difficult struggle, we must not abandon our values and who we are. The Charter expresses our values. It affirms who we are."

Better, she says, that Parliament pass simple legislative restrictions like those outlined in the controversial

Bill C-11, parts of which have long been opposed by the CBA and others, that would give broad new powers to immigration officers — including the right to detain, question and seize documents from people who have become permanent residents.

Immigration lawyer Gordon Maynard of McCrea and Associates in Vancouver says there is nothing in the terrorist attacks of Sept. 11 to justify passage of legislation like that. "There is more than enough law saying that terrorists are not welcome, will be incarcerated, and will be removed. The problem is that security intelligence is critical to the process, and is probably lacking."

Maynard notes that some of the terrorists involved in the attacks lived in the U.S. for years, traveled freely, used legitimate passports and might have held visas. "There was all sorts of intelligence, but it wasn't coordinated or effective," he says. "No amount of law, short of sealing the borders to all entries, can overcome that deficiency."

Scott Sterns agrees, and sees recent Canadian clampdowns on immigrants as a misguided move to placate Americans who have developed unwarranted worries about an alien flood across the "porous" northern border. It works the other way, says Sterns.

"Hundreds if not thousands of refugee claimants travel through the United States free and clear, and enter Canada at Fort Erie or Rainbow Bridge or whatever," he says. Until Sept. 11,

*Continued on page 24*

**"There is more than enough law saying that terrorists are not welcome, will be incarcerated, and will be removed."**



Floride admet ces procès après examen du dossier par un « grand jury », mais bon nombre de juridictions les autorisent sur simple demande du procureur, ou automatiquement, comme en Californie, lorsque le crime est un viol, un homicide volontaire ou un acte de violence perpétré lors d'un trafic de drogue.

La condamnation de Lionel Tate révèle également la dérive de la justice pour adultes : après le verdict de meurtre au premier degré, le juge était obligé de prononcer la sentence automatique correspondante. Le système des « minimums obligatoires légaux » réduit la marge d'appréciation des sentences par les juges. De plus, la loi dite « des trois coups », destinée à lutter contre la récidive, contraint les magistrats à infliger la détention à vie pour des infractions aussi mineures que des vols à l'étalage!

### De l'autre côté de l'Atlantique

Depuis les trois dernières années, le gouvernement de Tony Blair a, lentement mais sûrement, renforcé le dispositif contre la délinquance juvénile en Grande-Bretagne. Il a ainsi aboli la règle *Doli incapax*, qui dispose qu'un enfant de moins de 14 ans est automatiquement déclaré irresponsable de ses actes. De même, il a attribué de nouveaux pouvoirs aux tribunaux qui peuvent dorénavant imposer à l'enfant une « peine de réparation ». Enfin, il a prévu une batterie de sanctions contre les parents qui peuvent être déclarés responsables pour n'avoir pas assumé correctement leur rôle éducatif.

Depuis le 1<sup>er</sup> août 2001, une nouvelle mesure autorise même l'ensemble des districts de Grande-Bretagne à mettre en place, sous le contrôle des tribunaux, des « couvre-feux » pour les jeunes de 10 à 16 ans soupçonnés d'avoir commis des délits. Les délinquants doivent rester chez eux pendant douze heures,

en général de 18 heures à 6 heures et un bracelet électronique signale à la centrale informatique du commissariat chaque fois que le jeune quitte son domicile.

Cette initiative s'inscrit dans la campagne du gouvernement Blair contre la *yob culture* (la culture de voyou). Mais cette approche répressive est loin de faire l'unanimité : « Cette loi ne fait pas la différence entre des jeunes trop exubérants et des délinquants violents et multirécidivistes. En pratique, ce dispositif ne peut qu'accentuer les tensions entre les jeunes et la police », explique le Nacro, l'association chargée de la réinsertion des délinquants. De même, pour Simon Hughes, porte-parole du Parti libéral-démocrate pour les affaires intérieures : « Les couvre-feux sont traditionnellement réservés aux périodes de guerre ou d'urgence nationale et doivent le rester dans les sociétés civilisées. Cela revient à punir en bloc les adolescents au lieu de cibler les casseurs. »

### Difficile équilibre

Alors, la nouvelle LSJPA est-elle trop répressive? Trop indulgente? Trop peu soucieuse de la protection du public contre la violence des jeunes? Ou pas assez préoccupée par les intérêts des jeunes contrevenants? Il semble que le débat qui entoure son adoption soit technique et que les polémiques proviennent de divergences d'interprétation.

Quoiqu'il en soit, si on la compare aux législations d'autres pays, force est de reconnaître que la LSJPA s'efforce d'établir un juste équilibre entre la protection du public et celle des droits des adolescents. Reste à voir l'application et l'interprétation qu'en feront les juges. •

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## BACKLASH: Terrorism & civil liberties

*Continued from page 18*

they were allowed to stay in Canada while their claims were processed. Now they are being forced to stay in the U.S. while they are checked out. "It's the hugest irony I can imagine," says Sterns.

All of this has led to a growing consensus among immigration lawyers that any faults in the system have less to do with the laws themselves than with the personal and financial resources that determine how those laws are implemented.

The government can entertain all the suggestions to bolster security it wants, says Maynard. Wider visa restrictions. Closer security checks on so-called "profiled" visitors. Wholesale detention of refugee applicants pending security reviews. "All of this is helpful, but not necessarily practical or economically viable, unless the U.S. funds our contribution to creating Fortress North America."

Despite his criticism of the current regime and his interest in tighter refugee and visitor rules, Karas agrees that stricter immigration controls are meaningless without the money to make them work. Without an increase in the number of trained security personnel, closer scrutiny could leave legitimate immigrants waiting for up to a year or two for security clearances. "Things would grind to a halt."

More money is clearly also needed to ensure the physical removal of foreigners whose refugee claims have been rejected. The immigration department says it has some 27,000 outstanding deportation orders from the last five years, and has no idea

whether the rejected claimants are gone or living underground with phony documents somewhere in the country.

Canadian Alliance critic Paul Forseth notes that two deportees with terrorist connections — Ahmed Ressam and Nabil Al-Marabh — were "wandering loose in space" until they were finally arrested by American, not Canadian, authorities. "Once someone has been granted due process of law, once their legal options are exhausted, they should no longer be welcome in this nation," says Karas. "We should ensure that those who need to be expelled get expelled."

### Lawyers on the line

The liberty and security debates triggered by the horrors of Sept. 11 rage on, each of them of consequence to the world of law and justice. Lawyers have already found themselves caught in the middle, torn between a desire to help an important national cause and the need to defend the principles they swore to uphold when they were called to the Bar.

The price of liberty, Thomas Jefferson once said, is eternal vigilance — but those who maintain the vigil might also pay a price. "We have to be very careful, very watchful and very wary," Sylvain Lussier says, adding: "We [also] have to be ready to be unpopular." •

*Doug Small is an Ottawa-based freelance journalist.*