

KEEPING UP WITH THE NEIGHBOURS? CANADIAN RESPONSES TO 9/11 IN HISTORICAL AND COMPARATIVE CONTEXT[©]

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The impact of 9/11 on Canada is assessed in historical context, in relation to the coming of the Cold War in the 1940s and the October 1970 Le Front de Liberation du Quebec terrorist crisis in Quebec. Canadian policy responses to 9/11 are then considered in the comparative context of responses from Canada's closest neighbours, the United States and the United Kingdom. Although to some degree, Canada can be seen to be trying to 'keep up with the neighbours', Canadian responses are more determined by specifically Canadian requirements, especially the need to protect Canadian sovereignty and economic security from the unintended consequences of American actions.

L'impact du 11 septembre sur le Canada est évalué dans le contexte historique, relativement à l'avènement de la Guerre froide dans les années 1940 et de la crise terroriste d'octobre 1970 du Front de Libération du Québec au Québec. Les réponses des politiques canadiennes au 11 septembre sont alors considérées dans le contexte comparatif des réponses des voisins les plus proches du Canada, les États-Unis et le Royaume-Uni. Même si jusqu'à un certain point, on peut percevoir que le Canada s'efforce de suivre ces voisins, les réponses canadiennes sont davantage déterminées par les contraintes particulières au Canada, surtout le besoin de protéger la souveraineté canadienne et la sécurité économique contre les conséquences fortuites des démarches américaines.

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To assess the impact of 9/11 on Canada, historical and comparative perspectives are helpful. This article offers two historical precedents in Canada, followed by some comparative context for Canada's post-9/11 actions in the experience of Canada's closest neighbours, the United States and the United Kingdom.¹

When Canada joined the war on terrorism after the attacks of September 11, 2001, the decision was not without historical precedents in the post-war

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world. The Cold War, especially in its initial stages from 1945 to the early 1950s, and the October 1970 Crisis in Quebec offer two intriguing parallels to the present situation, providing a number of useful lessons.

I. THE COLD WAR

In the late 1940s, Canada went to a so-called Cold War, against Soviet Communism. Just as Canadian troops have found themselves fighting terrorists on the front lines in Afghanistan, Canadian soldiers in the Cold War found themselves battling Communists in Korea. Both wars included a home front and the identification of enemies within. Both wars involved Canada in ever closer integration with the Americans, through the generals directing the conflicts. Both wars, especially in their initial, anxious stages, raise issues of individual and group rights in contrast to the demands of the community for security.

9/11 was, as many have pointed out, America's 21st century Pearl Harbor. As such, it has compelled an immediate and aggressive American response. The Cold War turned out to be an American-led and American-directed conflict, but in its earliest stages it did not follow the script of December 1941. In fact, the first public notice that the wartime alliance was about to break down into inter-bloc rivalry and hostility came in Ottawa. How this small, dull, rather provincial capital became the focal point for great power conflict in 1945-1946 is part of Canadian mythology. Igor Gouzenko, the first important Soviet defector, exposed a spy ring operated by Canada's ostensible wartime ally, the USSR, exploiting the willingness of Canadians sympathetic to Communism to betray their own country on behalf of a higher loyalty to the Socialist motherland. Canada, it was said, experienced a sudden wake-up call, communicated this to its allies, and then settled in for a prolonged struggle on many fronts with the new enemy once its senior partner, America, had taken overall charge.

The struggle lasted four decades and, for most of this time, Canada was a very junior partner. It toiled in alliance obscurity. It very occasionally raised a cautious criticism, only to be quickly cuffed for its temerity. But it is important to understand that when the Gouzenko spy scandal broke, first in secret in September 1945, and then publicly in February 1946, Canada was, in important ways, on its own, without clear models to guide it. It consulted and received advice from its close allies, but it had to work out the details for itself. Its response stamped a distinctive made-in-Canada look on Canadian Cold War security policy.²

² Reg Whitaker & Gary Marcuse, *Cold War Canada: the Making of a National Insecurity State, 1945-1957* (Toronto: University of Toronto Press, 1994) [*Cold War Canada*].

Once the extent of Soviet espionage and Canadian complicity had become apparent from the documents and information Gouzenko brought with him, the government of Canada acted with what might be called the firm smack of Prussian command. There was a secret Order in Council, known only to three Cabinet ministers, under the authority of the *War Measures Act*³, even though the war had been over a few weeks before Gouzenko defected; it empowered the government to act against the suspected spies with little or no regard for civil liberties, outside the normal processes of the legal system. Armed with this power, the government bided its time, consulted its allies, studied the evidence, watched the suspects, and waited for the right moment to strike in light of the international scene.

When it did strike, in mid-February 1946, it was with a series of dawn raids by black-leather-jacketed members of the drug squad of the Royal Canadian Mounted Police (RCMP), who entered Ottawa homes and apartments without specific warrants, detained a dozen people (more followed in the days and weeks ahead), and seized papers and documents. The detainees were transported to the RCMP barracks, where they were interrogated for weeks on end. The detainees were not arrested under criminal charges, and were unrepresented by counsel; *habeas corpus* was ignored. Then they were brought before a secret tribunal—a royal Commission of Inquiry, a formidable establishment body, headed by two Supreme Court justices—with Commission counsel being the President of the Canadian Bar Association. They were still without legal representation. They were told they had no choice but to answer all questions put to them, and they were deliberately not informed that they had the right of protection against self-incrimination; they were bullied and harried by the Commission counsel.

The Kakaesque overtones are captured in an exchange between one detainee, Israel Halperin (who was in fact almost certainly innocent of espionage) and the Commissioners. When brought into the hearing room and told he must be sworn in, he fired back: “Before you swear me, would you mind telling me who you are?” “Well,” answered one of the Commissioners, “we are the Royal Commission appointed by the government to investigate certain matters.” “Are you empowered to use physical intimidation?” he persisted. “Not physical intimidation, but we have the power to punish you if you do not answer.” The witness then turned and tried to leave the room, but was forcibly returned to the witness box.⁴

At the end of these proceedings, the Commission published a lengthy and widely read report in which it named some two dozen persons as spies and

³ Repealed, R.S.C., 1985, c. 22 (4th Supp.), s. 80.

⁴ *Supra* note 1.

traitors to their country.⁵ The detainees were then turned over to the courts. Charges were brought against them under various statutes, particularly the draconian *Official Secrets Act*,⁶ which made communication of classified information to a foreign power a serious offence, but did not distinguish between information that might be damaging and information that was harmless. This statute also laid the burden of proof upon the accused. Despite what appeared to be a stacked deck, only about half of the two dozen eventually charged with criminal offences as a result of the inquiry were ever convicted. Those who had incriminated themselves before the Commission were in all cases found guilty in court. Those who had resisted were mainly acquitted. Nevertheless, with one exception, all those acquitted were denied further employment with the government.

At the time, there was not a great deal of criticism of the government's methods. Public opinion (by and large) approved the actions taken. Important sections of elite opinion, especially within the legal community, seemed unperturbed. In retrospect, critics have described the treatment of the suspects as abusive of their rights and as a serious violation of liberal democratic norms. Some have even compared Canadian behaviour unfavourably with that of the United States. Even in the dark days of McCarthyism, the Americans did not round up suspects before dawn, hold and interrogate them incommunicado, and haul them before secret tribunals which would later officially name them as traitors without legal recourse.

These criticisms are important—I have made many of them myself—but they do not get at the rationale for the government's methods. Contextually, this was a pre-*Charter* (and pre-*Bill of Rights*) era, and it followed immediately upon a war in which extraordinary state action against dissidents—detention without trial, search and seizure, censorship, even the forcible relocation of the entire Japanese-Canadian community from the west coast to camps in the interior, and the confiscation of their property—had been not only tolerated, but sanctioned by the highest authorities in the land. It is not surprising that in this context, faced with clear evidence of espionage and betrayal of trust, the government should have reached for the most expedient administrative method for protecting national security. Not surprising, but unfortunate, in that a precedent was being set for a relatively low priority on civil liberties in peacetime, albeit the twilight peacetime of the Cold War.

There was more to the government's response than context alone. There was a consistent pattern that ran through all of its planning and execution with

⁵ *The Report of the Royal Commission Appointed Under Order in Council P.C. 411 of February 5, 1946* (Ottawa: King's Printer, 1946).

⁶ *Security of Information Act*, R.S.C., 1985, c. O-5, s. 1; 2001, c. 41, s. 25.

regard to how to handle the explosive spy affair. The government wished to maintain maximum control over the story—to frame it in the most appropriate manner—and its effects, both internal and external. In terms familiar to today's world, the government wanted to manage the spin. There were good reasons for this. Externally, Canada found itself in a highly exposed position *vis-à-vis* the spy affair. At a time when the wartime alliance had not yet broken down publicly, a wrong move by Canada might precipitate grave consequences for East-West relations. Prime Minister Mackenzie King wanted no part of such a critical international situation. That would be left to the big battalions of the Americans and the British. Thus the Soviet angle of the affair was systematically downplayed in the Commission report. Others might draw strongly anti-Soviet lessons, but Canada would not. (Ironically, and for similar reasons, the Soviets vented their wrath over the affair at Canada, an altogether safer target than the United States or the United Kingdom.)

The other reason for government control of spin was domestic, and here the wisdom of the government became apparent only later. In downplaying the Soviet role, the government also chose to highlight the role of Communism in subverting the loyalties of Canadians. There was genuine shock and dismay at the evidence that some Canadians held a higher loyalty to a foreign power, and were willing to serve that power, over their own country. The Commission report was an attempt at public education and public warning about the dangers of dabbling in extreme left-wing ideas. It could also be seen as an exercise in *political policing*, or setting authoritative boundaries on permissible limits of dissent. But this could itself be a dangerous process, spinning out of control as rivals to the party in power sought to exploit the politics of loyalty. Without strict limits, and outside direct supervision by the Crown, the politics of loyalty could become divisive and socially and politically destructive.

Indeed, shortly after the Gouzenko affair had been resolved, anti-Communism in the U.S. threatened just this sort of anarchy. In 1947, the House Committee on Un-American Activities began its Hollywood witch hunt, and by 1950 Senator Joe McCarthy was launching his demagogic anti-Communist smear campaign that gave the English language a dark epithet: 'McCarthyism.' Before McCarthyism had run its course by 1954, the integrity of such institutions as the U.S. Presidency and the Army was threatened. In 1946, the Canadian government did not foresee these developments, but by strictly controlling the Gouzenko story and its effects, they did pre-empt the emergence of potential Canadian McCarthys, one of whom was no less than the leader of the opposition by 1948, George Drew, who tried but failed to forge a demagogic anti-Communist role for himself.

There was a direct link between the Gouzenko affair and the government of Canada's Cold War internal security policies. In its aftermath, the security screening system was set in place for civil servants, immigrants,

refugees, and citizenship applicants. The screening system was also extended to defence industries and even to shipping on the Great Lakes. In all cases, the process was kept as secret as possible, with security never being advanced as a reason for limiting a person's employment or their admission to Canada or to citizenship. For many years, there was no appeal process for persons denied security clearance.

There were American pressures to step up security. The Americans were evangelical in their Cold War crusade, and from time to time thought it necessary to nudge, or push, their allies to shape up to appropriate (i.e., American) standards. Sometimes they were particularly insistent upon doing something that the Canadians deemed silly or excessive, and usually the Canadians complied, with weary resignation, on the principle that it would be more costly to provoke them. Yet, by and large, Cold War security policies were made in Canada. Canadians set their own rules for security screening and always sharply distinguished themselves from the United States by pointedly not referring to loyalty or disloyalty, but only to *risk*. What distinguished the two approaches was the secrecy in which the Canadian policy was administered, and its strict monopolization by the executive branch of the federal government. With the exception of Quebec under Maurice Duplessis—a distinct society before the phrase was invented, where provincial anti-Communist laws like the Padlock law, and provincial Red Squads operated outside federal control—it was Ottawa that prosecuted the Cold War on the home front, and Ottawa kept its cards well hidden. When opposition voices were raised to demand information, Ottawa tended to respond serenely (or smugly) that it was taking care of matters and that details were the business of the proper authorities. The operative principle was trust us.

Witch hunts wracked McCarthy-era America at all levels of government and throughout civil society. But not in Canada—at least, not publicly. In point of fact, there were purges and victims. There was a witch hunt at the National Film Board (NFB): scores of people lost their jobs and saw their careers suffer. But unlike the witch hunt in Hollywood, there were few headlines and no names bandied about in the media. The government even denied there was a purge, insisting officially that only three persons had been removed. Behind the scenes, they gave the Security Service and a new, purged, NFB management a blank cheque to remove persons on suspicion. By the end, some thirty-five permanent or contract employees were terminated or encouraged to depart before they were targeted, although the total number could only be confirmed by documents released under *Access to Information* requests many decades later. The position of Canadian officials was that the politicization of security issues inherently risked illiberalism, and they could point to the U.S. example as confirmation. Some of the victims of these silent purges have different views in retrospect. The Hollywood witch hunt resulted in blacklists and blighted careers, but

finally in the public vindication of those purged, who have been transformed from villains in the 1950s to virtual folk heroes decades later. The Canadian victims of the NFB purge received neither notoriety then nor public vindication later. For better or for worse, that was the Canadian way.

Security screening of immigrant/refugee and citizenship applicants involved Canada in extensive and persistent application of a double standard with regard to potential new Canadians.⁷ Applicants with left-wing backgrounds or associations were security risks, while those with right-wing backgrounds were generally welcomed as anti-Communists. This had unfortunate implications for lax treatment of Nazi war criminals and collaborators; this issue was later subject to a Royal Commission of Inquiry and a special section of the Justice department that was designated for retroactively tracking down war criminals and criminal collaborators who had passed through the security screen. It also meant that Canada put out the welcome mat for refugees from Communism (Hungary in 1956-1957; Southeast Asia in the late 1970s), while making it difficult for those fleeing right-wing violence (Chile in the 1970s, central America in the 1980s). Apart from double political standards, Cold War immigration security firmly established a precedent of highly state-centred procedures. Immigration was deemed a privilege, not a right. Risk was determined by the state, and doubt must be resolved in favour of the state, not the individual. Moreover, procedurally, the deck was highly stacked in favour of the Crown, with non-disclosure of evidence and *ex parte* proceedings the norm in deportation cases.

Security screening has been an important tool for the political policing of Canadian society. The Security Service, first the RCMP and later the Canadian Security Intelligence Service (CSIS), has routinely used screening as an effective instrument for establishing sources within suspect organizations: the threat of lost employment or, worse, of deportation is an effective persuader for cooperation. As an offshoot of this, and of its preparation of threat assessments for the government, the security service amassed a remarkable volume of dossiers on Canadians and Canadian civil society. When the McDonald Commission of Inquiry investigated RCMP wrongdoing in the late 1970s, it discovered that the security service held files on no less than 800,000 individuals and organizations—a proportion of the population watched by the secret police that would have done credit to some less savoury regimes abroad.⁸ This kind of

⁷ Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orpen Dennys, 1987).

⁸ Canada, *Commission of Inquiry Concerning Certain Activities of the RCMP, Second Report: Freedom and Security Under the Law*, vol.1 (Ottawa: Minister of Supply & Services, 1981) at 518. According to the 1971 census, the total population of Canada was 21,568,000: 800,000 files represent information on more than one out of every twenty-seven Canadians.

excess drew so much criticism that the government of Brian Mulroney in the late 1980s ordered the closure of the Counter Subversion branch of CSIS, with most of its files to be destroyed or transferred to the National Archives.

There are some general points to be made about Canada's Cold War experience. First, when directly provoked, Canada could act with impressive firmness and resolution. Second, while Americans might be leading the Cold War charge, Canada was quite capable of setting and enforcing its own stiff standards for security. Even when pushed further in particulars than they might prefer by the Americans, Canadian Cold War policy was essentially made-in-Canada, according to Canadian imperatives; in the end, it was not significantly different from the Americans in content, although it did differ in style. What was most distinctive about Canadian Cold War security policy was its strict control by the executive branch of the federal government, and the zeal with which the federal government guarded its prerogatives. The federal government had responsibility for external relations and for peace, order, and good government within Canada. The differential, and sometimes invidious, effects of national security on individuals and groups in Canadian society were unfortunate by-products, but the security of the state and order in the community normally took precedence over individual and group rights. Yet ironically, the long-term consequences were the strengthening of democratic accountability and greater concern for the protection of rights.

II. THE OCTOBER 1970 CRISIS

When Canada faced the aftermath of the horrific attacks of 9/11, and the requirement to join in a new global war on terrorism, it was not altogether lacking in historical experience in dealing with terrorists. In October 1970, Canada faced its worst internal security crisis, when cells of the violent separatist group, *Le Front de Libération du Québec* (FLQ) kidnapped the British Trade Commissioner, James Cross, and kidnapped and later murdered the Quebec Minister of Labour, Pierre Laporte. Canada was thrust at this time into a harsh global spotlight amid a rising tide of anxiety and uncertainty at home; there were conflicting calls for negotiating with the terrorists or for staring them down. To make matters more difficult for the federal government, this was primarily a domestic terrorist crisis (in spite of ineffectual attempts to link the FLQ to wider terrorist networks or even to Communism), with potentially serious consequences for Canada-Quebec relations. Faced with this mushrooming crisis, Canada acted swiftly and forcefully with no regard for civil liberties. Invoking the *War Measures Act* under a putative, and unproven,

apprehended insurrection, the federal government placed Quebec under what amounted to a state of martial law. Extensive use was made of the power to detain and interrogate without charge, without counsel, and without *habeas corpus*. The media were censored and the FLQ declared a banned organization, association with which could land someone in prison; further, association was considered retroactively. In the aftermath of the crisis proper, the resources of the RCMP Security Service and the Quebec and Montreal police were mobilized to counter and negate by virtually any means, fair or foul, the FLQ or its successors. In filling out the blank cheques issued them, the security and police forces so exceeded their lawful roles that their activities were subject to a series of federal and provincial Commissions of Inquiry.

However controversial the methods employed, the result was clear and unequivocal: the FLQ and, with it, the entire terrorist tendency of the sovereignty movement in Quebec, was eradicated. From the early 1970s onwards, the sovereignty field was left entirely to the legitimate, lawful, and peaceful form of the Parti Québécois (PQ), and the contestation of federalism to democratic elections and referenda. Indeed, in surveying the contemporary history of terrorist movements around the world, the Canadian experience in stopping terrorism dead in its tracks and diverting the political energies that had helped drive the movement into constitutional channels, stands out as a quite remarkable success story. Timing was obviously important: the terrorist movement was crushed at an early enough stage that its repression did not elicit any popular upsurge in support—as for instance with the Irish Republican Army (IRA) among the Catholic population of Northern Ireland. Maximum force can work at preliminary stages of the development of an insurrectionary terrorist movement; at later stages, it may well be counterproductive, as in the current morass of death and retribution in which Israel finds itself enmeshed with the Palestinians. The FLQ also self-destructed with its wanton murder of Laporte, a senseless act that disgusted Quebecers. Above all, there were alternative, peaceful means of expression available for sovereignist sentiment. The PQ had just entered the National Assembly in Quebec elections earlier the same year. Force could be used successfully against illegitimate force when legitimate channels existed.

Does the successful outcome of the affair offer retroactive justification to a government that in effect put liberal freedoms on hold and declared that the end justified the means? There are perhaps two answers to this question, and each has significance for how we understand the response of the government of Canada to 9/11.

First, it must be clearly stated that the Trudeau government during and after October 1970 was less than frank in its justification of its actions before

Parliament and the public.⁹ There was no apprehended insurrection: the failure of the government to follow up with supporting evidence for its claim in invoking wartime emergency powers was telling, for there was no such evidence, or at least nothing compelling. Moreover, the advice of the RCMP would have been against using emergency powers—if its officials had been consulted, which they were not. The government's retroactive justification leaned heavily on the alleged shortcomings of the intelligence on the terrorist groups provided by the security service that supposedly left them no choice but to round up all the usual suspects and sort them later. This official rationale was revealed to be seriously distorted when documents on intelligence reports on the FLQ and other separatist groups were declassified later.¹⁰ The distortions are unfair to the RCMP, which had in fact done a competent job of penetrating and reporting on violent separatist groups. They also constitute a reprehensible example of blaming the servants for the masters' misdeeds. The RCMP had even delivered a very clear warning in the summer of 1970 that the FLQ had adopted kidnappings as their priority tactic, and even specified diplomats and Cabinet ministers as their likely targets. Yet the warnings were ignored, and potential targets left unprotected at the tragic cost of Laporte's life. The lesson here is one often repeated in modern history: intelligence failures are as often failures of governments to listen to their intelligence as of intelligence professionals failing to provide.

The RCMP believed that the crisis was essentially a criminal matter, to be solved by good, careful, patient police work. That was how, in the end, James Cross was liberated, and it might have saved Laporte's life. Instead, the government, or at least the Prime Minister and his close Cabinet associates from Quebec (who in every instance of debate in Cabinet proved to be the hawks), disingenuously citing an exaggerated threat they knew to be false, chose to perform a *coup de théâtre*, a striking demonstration of the power of the federal government and the futility of violent resistance to it. From a liberal standpoint, the October Crisis offers a salutary warning about how the state can lie and use pretexts to aggrandize its power and crush opposition. From a Machiavellian standpoint, Trudeau skillfully manipulated a crisis not of his making to effect an end that was in the national interest.

⁹ Leading figures, even in retrospect, were evasive in their justifications. Immediately after the crisis, a prominent Quebec minister in the Trudeau government, Gérard Pelletier, published a memoir, *La Crise d'Octobre* (Montréal: Editions du Jour, 1971). In Mr. Trudeau's own memoirs, his account of the affair raises many questions of both fact and interpretation: Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1993) at 128-52.

¹⁰ Reg Whitaker, "Apprehended Insurrection? RCMP Intelligence and the October Crisis" (1993) 100:2 *Queen's Quarterly* 383.

Choosing between these alternative assessments is not easy. It is difficult to justify the Trudeau government's actions in misrepresenting facts and in shifting blame. On the other hand, a terrorist avenue that might have turned Quebec into an Ulster-style battleground was avoided and the constitutional avenue for the sovereignty movement opened. Moreover, despite dire predictions at the time that the fabric of liberal democracy had suffered irreparable harm from the arbitrary actions taken in 1970, the evidence suggests otherwise. As a long term result of the crisis and its aftermath, the *War Measures Act* was later repealed and replaced with an emergency powers statute¹¹ that is much more measured and balanced. As a direct consequence of the post-crisis countering of the violent separatists by unlawful and improper means, the McDonald Commission recommendations led to the removal of the Security Service from the RCMP and the creation of a civilian agency; CSIS has a specific legal mandate for what it is authorized and not authorized to do, and elaborate mechanisms of accountability, oversight, and review attached to its operations. These are very positive gains for liberal democracy, which derive, paradoxically, from the violations of liberal democracy practised during the crisis. History, it should be remembered, does not always move in straight lines.

III. KEEPING UP WITH THE NEIGHBOURS? AFTER 9/11

The war on terrorism differs from the two historical precedents in a number of particulars, despite certain *déjà vu* elements. Most significantly, 9/11 constituted a violent attack on American civil society, indeed the attacks appear to have been designed to spread fear throughout all levels of American life. Moreover, the targets have been publicly designated in Al-Qaeda pronouncements as *any* and *all* Americans, not limited to state officials, military/security personnel, or corporate executives, as was the case with some earlier terrorist groups. The Cold War was only weakly felt as constituting a threat to the personal security of ordinary North Americans in their homes and families. The *subversive* threat of the Communist enemy within was largely a constructed abstraction that waxed briefly in the early, anxious, days of the Cold War, and then waned by the middle of the 1950s, when an uneasy stability took hold in East-West relations. The material threat to ordinary people in the Cold War was the spectre of nuclear holocaust, but this actually turned out to be a powerful factor pushing governments toward negotiating differences with the enemy and reducing the possibility of war. The diffuse threat of post-9/11 terrorism, on the other hand, works decisively in the opposite direction, putting

¹¹ *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.).

popular pressure on government to defeat and eliminate the terrorists, at whatever cost.

The war on terrorism is thus a more populist struggle than the Cold War, which was always primarily a matter of concern to states and state elites. The danger of populist authoritarianism is very real to vulnerable minorities—in this case, the Muslim and Arab communities—and to the fabric of liberal democracy. States will no doubt always attempt to seize the opportunities offered by major security crises to enhance their coercive powers at the expense of individual and groups rights. When they have deep and enduring popular support in exploiting such opportunities, the long-term result promises to be bleaker from a civil libertarian point of view.

9/11 was, however, not just an attack on civil society, but in the first instance, an attack on *American* civil society. As a liberal, capitalist, ‘infidel’ democracy allied closely to the United States, Canada is obviously implicated as a target of radical Islamist terror. The apparently authentic statement issued by Osama bin Laden in the fall of 2002 specifically threatened Canada along with other Western states associated with the United States. As primary targets are hardened by tough security measures, it is always possible that softer targets will be sought by the terrorists, even in other countries. Nonetheless, it was evident from 9/11 that America is the primary focus of terrorist wrath, and Canada is at best a secondary, peripheral target. The attacks on the twin towers of global capitalism and the headquarters of U.S. military might were brilliantly chosen for the spectacular symbolism encoded in the acts. Attacks on the CN Tower and the Defence headquarters in Ottawa would send an indecipherable message to the world.

Canadians instinctively sympathized with Americans, shared their pain and anger, and continue to support the idea of a war on terrorism.¹² Despite the successful coalition-building activity of the U.S. administration around the invasion of Afghanistan, and the rather less enthusiastically received efforts around a projected war on Iraq, Canadians have tended to see the war on terrorism as primarily an American, rather than a multilateral, struggle. President Bush’s pointed omission of Canada from his otherwise exhaustive list

¹² There are a number of polls that have shown that Canadian support for the war on terrorism, and the Afghan intervention, has remained strong. For instance, EKOS reported in August 2002 that three out of five Canadians supported Canadian military participation in Afghanistan, while only one in five were opposed. See “September 11th in Hindsight, Recovery and Resolve” online: *EKOS Research Associates* <<http://www.ekos.com/admin/articles/9sept2002.pdf>> at 22, 23 (date accessed: 18 May 2003). Gallup reported in September 2002 that sixty-one per cent of Canadians approved of the U.S. conduct of the war on terrorism. An invasion of Iraq was received much less enthusiastically. In January 2003, Ipsos-Reid found that only fifteen per cent of Canadians would support Canadian participation in an Iraq war without UN sanction, less than the eighteen per cent who were opposed to any war, with or without UN sanction. See “A Special Report: Attacking Iraq” online: *Ipsos-Reid* <http://www.ipsos-reid.com/media/dsp_displaypr.prt.cfm?ID_to_view=1711> (date accessed: 18 May 2003).

of countries officially thanked, and his offhand dismissal of the need to offer any apology for the four Canadian soldiers killed by American friendly fire in Afghanistan, were widely perceived in Canada as insults. They also confirmed the specifically American nature of the war on terrorism, and Canada's distinctly auxiliary role in the conflict. Public opinion analysis suggests that Canadians, like much of the rest of the world, have actually grown more distant from the United States, and more critical of American leadership, since 9/11.¹³

Analysis of the policy response of the Canadian government to 9/11 suggests that Canada has actually been fighting a war on two fronts. One front is the public face of the war on terrorism: Canada fulfills its obligations as an ally in the broad coalition against terrorist movements and reassures its own citizens that it is doing what it can to protect their safety. The second front, less publicly acknowledged, is essentially damage limitation: not in relation to terrorist acts, but in relation to the potential collateral economic harm to Canadian interests caused by the U.S. interpretation of national security on its northern border. U.S. homeland security will be protected, either at the Canada-U.S. border or around a wider North American perimeter. If security is imposed along the border, it will be at an economic cost unacceptable to Canada, which sends more than eighty-five per cent of its exports to the United States. The costs would also be high to the United States, but loom proportionately less on the American side; moreover, the Bush administration is willing to pay very high economic costs for security, including the \$158 billion U.S. federal deficit incurred in 2002.

Faced with a formidable big business lobby insistent on reopening the border for unimpeded commerce, at whatever political cost,¹⁴ the Canadian government confronted an unsettling policy alternative: a North American security perimeter in which Canadian sovereignty would be seriously threatened by pressures to harmonize its rules on entry—given the balance of power between the two countries, this would inevitably mean wholesale adoption of American standards. The Canadian policy dilemma on the second front has been

¹³ A year after 9/11, CRIC (Centre for Research and Information on Canada) reported a dramatic turnaround: thirty-five per cent of the population wanted Canadian ties to the United States to be "more distant", an increase of twenty-two points over October 2001; twenty-eight per cent of the population wanted closer ties to the United States, a decrease of five points over October 2001. See "More Canadians Distance Themselves From U.S. Neighbours" online: *Centre for Research and Information on Canada* <http://www.cric.ca/pdf/cric_poll/borderlines_ca_us/borderlines_press_neighbours_sept2002.pdf> (date accessed: 18 May 2003).

¹⁴ Coalition for Secure & Trade-Efficient Borders, *Rethinking our Borders: a Plan for Action* (3 December 2001); Presentation of Thomas D'Aquino, President and Chief Executive (January 14, 2003) "Security and Prosperity: The Dynamics of a New Canada-United States Partnership in North America", to the Annual General Meeting of the Canadian Council of Chief Executives, Toronto, online: <<http://www.ceocouncil.ca/English/Publications/reports/jan14-03.pdf>> (date accessed: 18 May 2003).

how to reassure the United States sufficiently on border security so that commercial traffic can be maintained, while not surrendering a critical degree of Canadian sovereignty in the process.

The two fronts are interrelated. Everything that Canada contributes to the war on terrorism, and to maintain strong security against terrorism within Canada, tends to relieve U.S. pressure on the border. The Canadian first front response has involved: more resources for security and intelligence; a streamlined security decision-making structure within the federal government at both the political and bureaucratic levels; new and expanded legal powers for anti-terrorist law enforcement and investigation; and closer coordination and sharing of information with allies.¹⁵ All of these have helped maintain Canadian economic security by reassuring the U.S. that Canada is enforcing adequate security standards on its own. However, they have not been enough.

Parallel to this track, Canada has taken another series of initiatives under the rubric of the Smart Border agreements.¹⁶ These initiatives involve a series of ongoing negotiations with the United States on such matters as pre-clearance of container traffic at the point of origin; fast-tracking of safe persons and goods; collection and retention of a wide range of data on persons traveling by air across the border; the application of high-tech surveillance equipment along the border; expansion of Integrated Border Enforcement Teams; and, controversially, a “safe third country” agreement to reduce the flow of refugees across the border. Despite some inevitable glitches, these negotiations have so far been largely successful, in the view of U.S. Homeland Security secretary Tom Ridge, who has warmly stressed the usefulness of their further expansion. Critics in Canada, from those on the political right who have characterized these measures as too little, too late, to those on the nationalist left who have tended to see them as sellouts of sovereignty, have unanimously missed the point of the Canadian strategy. The Canadian government has tried to avoid being trapped into sweeping negotiations on a mega-agreement over a Fortress North America—such as the perimeter security project proffered by Paul Cellucci, the United States Ambassador to Canada, just after 9/11 (and endorsed by a number of provincial premiers, the Official Opposition in Ottawa, and the influential Council of Canadian Chief Executives). Instead, the Canadian government has engaged the Americans in a series of incremental negotiations, segmented but

¹⁵ Reg Whitaker, “More or Less Than Meets the Eye? The New National Security Agenda”, in Bruce Doern, ed., *How Ottawa Spends 2003/04* [forthcoming 2003].

¹⁶ Department of Foreign Affairs and International Trade (“dfait”), *The Canada-U.S. Smart Border Declaration*, online: DFAIT <<http://www.dfait-maeci.gc.ca/anti-terrorism/declaration-e.asp>> (date accessed: 18 May 2003) . DFAIT News Release, “Manley and Ridge Release Progress Report on the Smart Border Declaration and Action Plan” (28 June 2002), online: DFAIT <http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105343.htm&bPrint=False&Year> (date accessed: 18 May 2003).

linked, the successful outcome of which have had the cumulative effect of mollifying American security concerns, while keeping the flow of cross-border commerce more or less intact. Absorbed in the specifics, the U.S. negotiators have lost sight of the larger picture, which is exactly to the taste of the Canadian negotiators who wished to minimize the larger loss of sovereignty necessarily entailed in any grander, macro-level integration and harmonization project.

Although the Canadian federal government has shown considerable skill and adroitness in managing the second front of this two-front war, it is a volatile process subject to unpredictable upsets. Certain politicians and journalists in the United States allude frequently to the alleged security risk to America posed by lax Canadian security policies and a lamentably undefended northern border. An imagined Canadian connection to 9/11 was doggedly investigated, but all leads came up empty. In fact, the U.S. State Department in its official report tracking global terrorist trends for the year 2001 explicitly denied any Canadian connection and went on to describe Canadian co-operation in anti-terrorism as a model the U.S. would like to see practised with its other allies.¹⁷ Yet as late as January 2003, five mysterious “Arabs” who had allegedly entered the United States from Canada were the subject of an all-points terrorist alarm, endorsed by no less than President Bush. Within a few days, the story collapsed, revealed as a hoax. Nonetheless, despite an angry demand from Canadian Immigration minister Denis Coderre, New York Senator Hilary Clinton refused to apologize for her claim that the non-existent suspects had entered the United States via Canada.¹⁸ The Canadian connection stories have proved to have about the same credibility as the episode of the TV series *The West Wing*, in which the White House was alerted to a terrorist who had infiltrated across the Ontario-Vermont border. Although no responsible official of the U.S. government has ever given credence to this mythology, anti-Canadian suspicions form a political background to American perceptions of Canada that Canadian officials are persistently forced to confront.

In fact, there is very little evidence that Canadian security is any less vigilant than that of America. Canadian and American authorities share common databases on the bad guys; exchange intelligence on a regular, indeed institutionalized, basis; and cooperate closely on cross-border enforcement.¹⁹ If

¹⁷ The pre-9/11 case most cited by critics is that of Ahmed Ressam, apprehended in late 1999 attempting to enter the United States at Port Angeles, Washington, on his way to play a part in a planned millennium terror attack on the L.A. Airport. Yet in 2001, U.S. Attorney General John Ashcroft brushed off critics of Canadian security by insisting that in this case the United States had acted on information provided by Canadian authorities, with whom cooperation was “outstanding”; interview of John Ashcroft (4 December 2001) on *CTV News*, CTV Television.

¹⁸ Sheldon Alberts, “Clinton refuses Ottawa’s call for apology” *The National Post*, January 10, 2003.

¹⁹ Reg Whitaker, “Refugee Policy After September 11: Not Much New” (2001) 20:4 *Refugee* 29.

there was any performance gap in the past, it was in enforcement and was attributable not to lower Canadian standards, but simply to fewer resources available to the Canadians relative to their U.S. counterparts. That gap was closing even prior to 9/11. Certainly, it has been reduced since the national security budget in early 2002, which allocated \$49 million of new funding to immigration and border enforcement and over \$110 million to security and intelligence agencies.

Despite these facts, there are influential forces in Canada always ready to reinforce American suspicions: the Canadian Alliance and its successive leaders; some provincial ministers; the *National Post*, Southam Press, Global and CTV News; and certain so-called terrorist experts. They have all relentlessly endorsed the idea that Canada is a haven for terrorists, where feeble security enforcement and loose social liberalism combine to provide a haven and base for terrorists threatening the United States. The existence of a cadre of serial confessors eager to assert Canadian responsibility for American security and intelligence failures is a curious feature of the Canadian political culture, even a subject for satire by a columnist in the principal offending newspaper, the *National Post*.²⁰ It has not made the task of the government any easier in managing an already delicate two-front campaign.

A more serious challenge to Canadian sovereignty is the widespread and influential support voiced by business lobbies, think tanks, and even the parliamentary committee on foreign affairs and international trade,²¹ that Canada should seize the opportunity offered by 9/11 to think big and negotiate a much wider ranging arrangement for North American economic integration (including all, or some, of a customs union, a common labour market, adoption of the American currency). Opinion on this is divided between advocates who see a window of opportunity in the 9/11 security crisis, and opponents, some of whom are opposed in principle to integration, but all of whom see more dangers than opportunities in any deals made with an American administration in a highly unilateralist and nationalistic mood post 9/11. For a Liberal government preoccupied with managing Canadian-American relations on a range of touchy security issues, including military contributions to a war with Iraq, the prospect of entering onto the mine-laden field of comprehensive negotiations for a NAFTA Plus, can hardly seem appealing. Whether it can be avoided is another matter.

The prospect is mentioned here only to demonstrate that 9/11's impact on Canada is by no means straightforward. Nor was the impact of the Cold War.

²⁰ Paul Wells, "Thousands die – blame Canada" *The National Post* (18 December, 2001) A6.

²¹ House of Commons, *Partners in North America: Advancing Canada's Relations with the United States and Mexico*, Report of the Standing Committee on Foreign Affairs and International Trade (December 2002), online: <<http://www.parl.gc.ca/InfoComDoc/37/2/FAIT/PressReleases/FAITpr2-e.htm>> (date accessed: 18 May 2003).

Indeed, on the matter of Canadian sovereignty in North America, there is considerable continuity between the Cold War and the war on terrorism. Both crises extended quickly from the security sphere to the economic sphere, and from there to the political and cultural dimensions of Canadian nationhood. In neither case, however, does a purely nationalist reading make much sense. It is not a question of U.S. hegemony versus Canadian resistance. Rather, the lines are drawn within Canada, as they were during the Cold War, between those advocating greater integration with the United States and greater support for the American international position, and those wishing to limit that support and insisting on skepticism toward greater integration as a by-product of security co-operation. The latter camp must come to terms with the reality that there is underlying public support for the general stance of Canadian-American co-operation. During the Cold War, Canadians generally agreed that the Communist bloc represented the chief security threat and accepted American leadership in contesting Communism as appropriate. In the current crisis, Canadian opinion accepts that terrorism is the major security threat and supports Canadian participation, under American leadership, in confronting terrorism. Neither then nor now does this mean Canadian support for all aspects of American leadership, or a willingness to follow the United States down any path—especially one entered upon in a unilateral fashion that ignores the United Nations and multilateral relationships. Yet underlying support, along with the inescapable economic realities of the existing degree of economic integration, limits the scope of open criticism of U.S. leadership and places Canadian governments in the position of negotiating degrees of integration, rather than allowing the liberty of asking whether greater integration ought to take place.

In 1965, George Grant published *Lament for a Nation*, in which he blamed the Liberal elites of the day for the demise of Canada, while nonetheless insisting on the inevitability of the end of nationhood. In the early 21st century, with another war replacing the Cold War that was Grant's despair, the role of the Liberal elites remains ambiguous and subject to varying interpretations, although this time there is more criticism of them as anti-American than as pro-American. The contradiction in Grant points to a paradox in both instances: in the face of powerful structural forces favouring integration and the decline of sovereignty, the Liberal elites are neither integrationist nor nationalist, rather they are negotiators of a persistently difficult passageway between pressures to go too far and pressures to go not far enough.

Critics of government security policy after 9/11 have charged that the anti-terrorist legislative changes brought before Parliament are largely a result of pressures to keep up with the neighbours. Indeed, among these critics is the

former Director of CSIS, Reid Morden.²² Yet on closer examination, there is rather less than meets the eye in this charge. Canada was indeed forced to legislate specifically in response to an American policy decision, in the case of federal aviation regulations demanding advance production of a range of personal data on passengers arriving from abroad at U.S. airports. Canada had no choice in this matter, short of losing landing rights for Canadian carriers, even though this American policy did necessitate overriding Canadian privacy law.

Beyond this instance, direct response to American pressure is more difficult to pin down. Certainly some indirect pressure may have been applied on Canada to comply with a generally more stringent anti-terrorist regime that was falling into place after 9/11. In its centerpiece *Anti-Terrorism Act*,²³ Canada felt compelled to join in the multilateral anti-terrorist campaign by, for instance, developing a legal definition of terrorism that conformed to definitions in various international texts, and in defining terrorist entities under Canadian law and listing them for the purposes of blocking the financing of terrorism, in conformity with international efforts sanctioned by the UN. With regard to stepped-up electronic surveillance powers—a key feature of American anti-terrorist legislation—the *Anti-Terrorism Act* is silent, except for an accompanying promise that Canada would develop legislation in conformity with the *European Convention on Cyber Crime*.²⁴ This promise is now in the process of enactment with the Justice Department's public consultation on lawful access.²⁵ Analysis of the *Anti-Terrorism Act*, as well as the proposed *Public Safety Act*, discloses little that can be seen as directly responding to specifically American demands, as such, or reflecting American provisions and practices.

Upon reflection, it is not difficult to discern why the relationship between American and Canadian legislative initiatives is relatively weak. While the terrorist threat may be similar in all Western countries, each country has its own unique set of political institutions and processes, its own legal traditions, and its own specific political forces in play.

²² Reid Morden, "Finding the right balance" (2002) 23:06 Policy Options 45-8.

²³ S.C. 2001, c. 41. Even before its final passage, this legislative package received extraordinary academic attention in a book of essays, most of which were critical: Ronald J. Daniels, Patrick Macklem, & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001). See also Erroll P. Mendes & Debra M. McAllister, eds., *Between Crime and War: Terrorism, Democracy and the Constitution*, (2002) 14:1 N.J.C.L.

²⁴ ETS No. 185, Budapest, November 23, 2001.

²⁵ Department of Justice Canada, Lawful Access – Consultation Document (25 August 2002): online: *Department of Justice Canada* <http://www.canada.justice.gc.ca/en/cons/la_al/> (date accessed: 18 May 2003).

The United Kingdom, with a long history of confronting Irish Republican terrorism in Britain, already had a very strong, in cases draconian, security legislation in place, in the form of successive *Prevention of Terrorism* Acts. Interestingly, one new power sought by the UK government was the deportation of persons suspected of terrorist associations to their places of origin, even in cases where this might entail returning a refugee to the country of their persecution, thus violating the un Convention on Refugees.²⁶ This power was not sought by the Canadian government, and was specifically brought into question post-9/11 by the Supreme Court in the case of *Suresh*.²⁷

The most striking divergence in practice, although not clearly in law, between Canada and the United States and United Kingdom post-9/11, has been the indefinite detention in the latter two countries of non-citizens on suspicion of terrorist associations. The Court of Appeal in the United Kingdom has agreed that foreign terror suspects can be held in United Kingdom jails indefinitely without trial. There was an initial round of detentions in the United States just after 9/11, numbering somewhat over 1,000 (the exact figures have never been released), and sporadic detentions have taken place subsequently. The *USA PATRIOT Act*²⁸ as drafted by the Justice Department originally called for the power of indefinite detention of non-citizens on suspicion. This power proved controversial, however, and Congress insisted upon time limits on detention of seven days before cause had to be shown. The executive, relying on loopholes in the legislation, has detained non-citizens indefinitely, without legal representation. Various devices have been invoked, including the holding of suspects as material witnesses, normally used with regard to grand jury investigations, but in these cases leaving the question “material witnesses to *what?*” unanswered. This behaviour appears to demonstrate contempt for Congress, yet has elicited remarkably little criticism from that body. Nor has the issue of the constitutionality of the executive’s actions been effectively challenged in the courts, although various challenges have yet to arrive at the final level of appeal in the Supreme Court. The issue of the treatment of non-citizens in the United States has been skewed by the administration’s decision to treat foreign terrorists as enemy combatants, subject to military law outside the normal Geneva Convention rules for the treatment of prisoners of war. In two cases, the same treatment has been accorded U.S. citizens suspected of Al-Qaeda activities. To this point, the courts have upheld the administration’s right to hold citizens indefinitely without legal representation and without judicial

²⁶ *Anti-Terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24, ss. 21-22.

²⁷ Audrey Macklin, “Mr. Suresh and the Evil Twin” (2002) 20:4 *Refuge* 15.

²⁸ Pub. L. No. 107-56, 115 Stat. 272 (2001). *Uniting and Strengthening America by Providing Appropriate Tools required to Intercept and Obstruct Terrorism (USA PATRIOT Act)*.

review.²⁹ In this latter instance, there are grave consequences for the constitutional rights of American citizens, a situation that has drawn strong criticism from at least some legal and journalistic quarters.

In Canada, indefinite detention on suspicion is not practised. Non-citizens subject to removal on security grounds are sometimes detained, a practice that predates 9/11. However, these persons are not denied representation and the Crown must show cause in court. The 1984 Supreme Court of Canada decision in the case of *Singh* would appear to raise an effective barrier against a general practice of differential treatment of non-citizens as falling outside the protection of the *Charter*.³⁰ If the United States had been insistent upon harmonization of North American immigration security rules, or if Canada had believed it necessary to conform to American practice on detentions in order to keep cross-border commerce flowing, the federal government might have been faced with having to invoke the notwithstanding clause to override the effect of *Singh*. Although such an action would no doubt have been approved by the same lobby that has been pushing in Canada for a more integrated perimeter security arrangement, the government has never even hinted that such an action was being contemplated. In short, U.S. pressure has been negligible on this issue.

During the passage of the *Anti-Terrorism Act*, considerable controversy was generated by provisions for preventive arrest and investigative hearings; both were ultimately subjected to a sunset clause. Preventive arrest is strictly limited to forty-eight hours, although refusal to comply with terms of recognizance could result in imprisonment. At all times, however, a person held under preventive arrest is fully represented. Investigative hearings appear to be modeled to a degree on the U.S. grand jury system, but even where a person brought before such a hearing could be compelled to testify against others, *Charter* protection against self-incrimination is explicitly recognized. Under questioning by a parliamentary committee in June, 2002, a senior Justice Department official acknowledged that neither of these extraordinary powers

²⁹ These are the cases of Yasser Esam Hamdi, one of the enemy combatants captured in Afghanistan who turned out to have been American-born, and José Padilla, the so-called dirty bomb suspect. Both cases continue through the legal appeal process, but in the case of Hamdi a federal appeals court ruled in early 2003 that in wartime the state can indefinitely detain a United States citizen captured as an enemy combatant on the battlefield and deny that person access to a lawyer: Neil A. Lewis, "US Is Allowed to Hold Citizen as Combatant" *New York Times* (January 9, 2003).

³⁰ *Singh et al v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

had by that date actually been invoked,³¹ and there have been no subsequent reports of their use.

If this pattern persists, it will echo a precedent set in during the early Cold War, when a series of amendments were made adding offences and stiffening penalties in the *Criminal Code* for treason, sabotage, and sedition—all of which are linked to the Cold War threat of Communism. Critics at the time suggested, without evidence, that these changes had been initiated by American pressures. If so, pressure had been fruitless: no Communist or Communist sympathizer was ever charged under the amended provisions, which lay dormant for almost two decades, until the October 1970 Crisis, when a seditious conspiracy provision was dusted off and used against five people accused of being associated with the FLQ, newly banned under the *War Measures Act*. All such charges failed in court.³² There is thus some precedent for tough sounding legislative actions that prove to be more symbolic than substantive in intention.

The main reason for downplaying American pressures as a basis of Canadian legislation is that a great deal of the *Anti-Terrorism Act* is not directly related to 9/11 at all, but answers to wider and deeper issues surrounding the legal and institutional framework for national security policy. Among the non-9/11 related elements of the *Anti-Terrorism Act*:

- The *Official Secrets Act* is replaced by a new *Security of Information Act*, including new offences, such as economic espionage;
- The Communications Security Establishment (CSE), the electronic eavesdropping agency, is for the first time given a statutory mandate, with its powers and limitations spelled out, and with an important additional power to retain Canadian communications related to terrorism (this is 9/11 related);
- Serious limitations are imposed on the *Access to Information, Privacy, and Personal Information Protection and Electronic Documents Acts* with regard to disclosure and retention of information relating to national security; and
- Provisions regarding non-disclosure of sensitive national security evidence serve mainly to *Charter*-proof existing

³¹ Testimony of Richard Mosley, Assistant Deputy Minister, Criminal Law Policy, Department of Justice (June 10, 2002), to the House of Commons Sub-Committee on National Security, online: <<http://www.parl.gc.ca/InfoComDoc/37/1/SNAS/Meetings/Evidence/snasev05-e.htm#Int-278274>> (date accessed: 18 May 2003).

³² M.L. Friedland, *National Security: the Legal Dimensions*, study prepared for the Royal Commission of Inquiry Concerning Certain Activities of the RCMP (Ottawa: 1979) 22-30; *Cold War Canada*, *supra* note 2 at 197-204.

evidence provisions following the *Stinchcombe* decision of the Supreme Court of Canada.³³

Taken together with the *Canadian Security Intelligence Service Act*³⁴ and the *Security Offences Act*³⁵ of 1984 (the latter now augmented by *An Act to Amend the Foreign Missions and International Organizations Act*)³⁶ and the *Immigration and Refugee Protection Act*,³⁷ the last two passed just prior to 9/11 and the latter itself amended by C-36, the *Anti-Terrorism Act* constitutes the basis for comprehensive Canadian national security legislation, which will be further augmented when the *Public Safety Act* finally becomes law. The opportunity offered by 9/11 was alertly seized by the Canadian security and intelligence community, which has ended up with much more than it would likely have achieved had 9/11 not happened. But most of these ideas for change were already in the pipeline in Ottawa, sometimes for years, awaiting the political push that would bring them to the front of the policy agenda. The push came from Al-Qaeda, not from the United States. The specifics of Canada's national security policy regime owes little to the model of the U.S. system; indeed, on many important points, it differs sharply from their American neighbours.³⁸

Nor does Canada show enthusiasm for emulating the Americans in another particular: the targeting of the Muslim minority as a threat to security. Both governments began shortly after 9/11 by saying all the right things that would steer the majority away from the kind of ethnic victimization of the Japanese communities that occurred in both countries during World War II. In both countries, the objective effect of security policies has amounted to ethnic profiling of Muslims in practice. From a policing and security perspective, the targeting of high risk people simply represents the effective direction of resources; from the perspective of those flagged for particular attention, the policy represents ethnic and religious victimization. In the us, apparent anti-Muslim bias in government policy is becoming increasingly public. Although

³³ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, ordered the production in court of criminal intelligence relevant to the defence. *Stinchcombe* was a criminal case and its relevance to national security cases was unclear. The evidence provisions in C-36 are in the spirit of better safe than sorry.

³⁴ R.S.C. 1985, c. 23 (note: pending amendment not in force, S.C. 2001, c.27, ss.223-226).

³⁵ R.S.C. 1985, s. S-7.

³⁶ S.C. 2002, c. 12.

³⁷ S.C. 2002, c. 27.

³⁸ A notable example of institutional difference is the debate that has opened in Washington since 9/11 about the desirability of splitting the fbi into a counter-terrorist intelligence agency and an institutionally separate criminal law enforcement body. In Canada, this was done in 1984 with the CSIS Act separating the security service from the RCMP.

targeting has focused on non-citizens, the line between aliens and Muslim-Americans is increasingly blurred, or so it is perceived to be by Muslim-Americans. The requirement for all aliens from listed Muslim countries to register with the Immigration and Naturalization Service has sent a deep chill through the entire Muslim-American community.³⁹

The targeting of people born in certain so-called high-risk Muslim countries attempting to enter the United States—and their subsequent special treatment, including interrogation and fingerprinting—has raised official protests from Canada regarding Canadian citizens whose treatment on arrival at American entry points seems to be discrimination on the basis of their country of birth.⁴⁰ Canada does practise effective ethnic profiling in its own anti-terrorist security measures, but it typically does so in a more guarded, less public manner than the Americans. This is a parallel to the McCarthy era in the United States during the early Cold War, when Canadians somewhat smugly congratulated themselves on avoiding the excesses of Communist witch hunting in the United States, while at the same time doing some of the same things behind closed doors. Yet it is the very public singling out of Muslims that sets off alarm bells among minority communities at risk in the United States, while these same groups tend to feel less threatened in Canada. In an eerie parallel to the Cold War, when threatened leftists, especially in academe, fled across the border to find safer havens in Canada, there were reports in early 2003 of Muslims from the United States seeking refuge in Canada.⁴¹

IV. CONCLUDING REFLECTIONS

Canada's response to 9/11 does indicate that keeping up with the neighbours is, to a degree, an important guide to public policy. Like the Cold War, the war on terrorism is a multilateral effort under American leadership. As a participant in the alliance, Canada has to do many things to keep up its part. However, most of these things it would have done on its own, both to assure an anxious public concerned about threats to their security, and to pre-empt the Americans from taking more drastic measures that would directly threaten Canadian sovereignty. Ottawa recognizes that important, and influential, sections of the Canadian business, political, and media elites constantly push for greater integration with the United States and greater harmonization of Canadian policies with U.S. policies, and that these pressures are more

³⁹ American Civil Liberties Union, Press release: "Immigrant Registration Program Pretext for Mass Detentions" (December 19, 2002).

⁴⁰ David Ljunggren, "Upset Canada Issues Rare Caution on Travel to U.S." *Reuters* (October 30, 2002).

⁴¹ Michael Powell, "Pakistanis Flee to Canada and Uncertainty: Families Uprooted by INS Deadline" *The Washington Post* (January 18, 2003) A01.

influential than usual during times of international crisis and high insecurity. At the same time, Canadian public opinion demands some distance from the appearance that Canadian policy is being dictated from Washington. This latter tendency is heightened when the U.S. leadership is perceived by many in Canada as immoderate and potentially dangerous, which seems to be the case today.

As historical precedents, the Cold War and the October 1970 Crisis demonstrate that Canada is capable of acting forcefully, and with relatively few restraints, in dealing with a perceived threat from within linked to a threat from without. The anti-terrorism legislation and the shift in resources towards national security enforcement in the wake of 9/11 come as no surprise. Yet the historical precedents are double-edged. If they suggest a capacity for repressive and illiberal actions in the name of national security, it is also the case that the long-term result of both of these crises was to strengthen liberal democracy and the protection of civil liberties, as a direct consequence of revulsion generated by repressive and unaccountable state actions. This too is part of the historical background to the present crisis. Canadians have learned from experience about the consequences of overreaction. There is a space between the Canadian and American responses, partly generated by the direction of the terrorist threat primarily against the United States, and partly generated by differences in the political cultures. This space allows Canadians some critical distance, some room to develop made-in-Canada policies, and some capacity to resist American pressures—especially when these pressures come in the form of unilateralist, America First, imperatives. Canada is always more comfortable keeping up with the neighbours when this is a multilateral enterprise.