CHAPTER ONE

Introduction

I. THE ATTACKS AND THEIR AFTERMATH

The October 2014 Attacks

On 20 October 2014, Martin Couture-Rouleau drove his car into two uniformed members of the Canadian Armed Forces, killing Warrant Officer Patrice Vincent. Authorities had seized Couture-Rouleau's passport that summer, in order to stop the recent convert to Islam from leaving Canada to fight with the Islamic State of Iraq and Syria (ISIS). Nevertheless, he had not been arrested or charged under new terrorism offences that Canada enacted in 2013 to penalize those who attempted to leave Canada to participate in foreign terrorist groups. Nor did authorities restrict his liberties with an anti-terror peace bond (a form of restraining order).

Two days later, Michael Zehaf-Bibeau — whose passport application had also been delayed within the government for reasons that remain unclear — murdered Corporal Nathan Cirillo, a soldier who was standing ceremonial guard at the National War Memorial. Zehaf-Bibeau fired three shots from his long gun into the back of the defenseless Corporal Cirillo. Incredibly, and despite intelligence issued a few days before about increased threats of terrorism, Zehaf-Bibeau was then able to enter the Centre Block of the Parliament building where the prime minister, the leader of the opposition, and some 230 members of Parliament were in caucus meetings. He wounded the unarmed parliamentary guard who had tried to disarm him before he was killed by Sergeant-at-Arms Kevin Vickers and RCMP officers.[1]

Legislating in Fearful and Politicized Times

Canadians and their political representatives were united in their shock and grief at these attacks. But only for a time. Prime Minister Harper introduced Bill C-51 in an election-style rally on 30 January 2015. He defended the legislation on the basis that "violent jihadism is not a human right. It is an act of war, and our government's new legislation fully understands the difference."[2] The bill made the most far-reaching changes to Canadian security laws since 9/11. Bill C-51 was introduced not only in response to the October 2014 attacks, but also as a political reaction to terrorist attacks in January 2015 in Paris and Copenhagen. Those attacks targeted the Jewish community and those perceived to have insulted Islam, most famously the French satirical newspaper *Charlie Hebdo*.

The cold Canadian winter of 2015 was then beset by security fears. Police charged two people with conspiracy to commit murder on Valentine's Day and alleged that they had planned to shoot people in a Halifax mall. Minister of Justice Mackay stated that this was not an act of terrorism because of the absence of a "cultural" element, a peculiar turn of phrase given the absence of such a concept in the law. For some, it was a coded phrase suggesting a double standard for Islamic-related terrorism,[3] but the arrests aroused more fear. A week later, al-Shabaab, the al-Qaida-linked Somali terrorist group, issued threats to shopping malls, including the West Edmonton Mall. This led to thirty-five teams withdrawing from a cheerleading competition, one that was fortunately still held without incident and with 2,700 competitors.[4] This al-Shabaab threat was cited by government politicians as an indication of the need to enact Bill C-51 in a hurry, and was reproduced in part in a Conservative Party fundraising video.[5]

In March 2015, Jahanzeb Malik, a permanent resident, was arrested and held in immigration detention pending his subsequent deportation to Pakistan. He had allegedly told an undercover officer of plans to bomb the American consulate in Toronto and that he had trained in Libya and was interested in joining ISIS. He reportedly told the undercover officer that it was legitimate to attack taxpaying Canadians because of Canada's role in bombing ISIS.[6] Other developments included a mysterious tunnel near a Toronto Pan Am Games venue that turned out to be a "man cave" and a white powder sent to federal ministers from Quebec that turned out to be innocuous. Nevertheless, these incidents also raised the fear level. As a result, Bill C-51 was debated and enacted in a fearful and politicalized environment. Public opinion polls suggested that over 80 percent of Canadians supported Bill C-51 in February 2015. This support declined as Canadians debated the bill, with a slim majority of those who closely followed the debate actually opposing the bill.[7] But Canadians were scared and they wanted to be safe.

In a transparent effort to capitalize on a "security bump" in public opinion and a cascade of foreign and domestic threats, government politicians legislated aggressively and quickly, deploying unusually heated terminology and rhetoric. They were not deterred by — and perhaps, they welcomed — criticisms that Bill C-51 violated the *Charter* — Canada's constitutionalized bill of rights — and transformed the role of the judiciary from a protector of *Charter* rights into a pre-authorizer of *Charter* violations. With the October 2015 election closing in, the debate about the law became partisan. At times, ministers and parliamentarians disparaged those who had concerns about the proposed law, implying that these people were uncommitted to security or even, in one egregious case, that they had ties with terrorists.[8]

Legislating without Evidence

The government made no transparent attempt to learn from the security failures that might have led to the two October 2014 attacks. In June 2015, it did eventually release narrowly framed police and parliamentary reports on the shootings and security responses at Parliament.[9] In contrast, the Australian government published a seventy-five-page report detailing all government dealings (and there were many) with a terrorist who launched an attack in Sydney in December 2014. The report was public one month after the attack.[10]

Nothing like this report has emerged in Canada. We still do not know the full story about why Couture-Rouleau's passport was seized in the summer of 2014 to stop him from leaving for Syria, but there was no subsequent peace bond or prosecution. Disturbing information emerged in June 2015 about how siloed security allowed Zehaf-Bibeau to enter the Parliament buildings, but none of the laws enacted as a result of the attacks were responsive to these security flaws, and many questions remain about how such a stunning security breach was possible in the face of previous recommendations and intelligence warnings.

When enacting its 2015 security laws, the government consistently rejected the outside policy advice it received, whether that advice related to rights or security. It radically ramped up information sharing about even marginal security threats, but disregarded advice it had received from the Privacy Commissioner and the judicial inquiry into Maher Arar's mistreatment that Canada's system of independent review was partial, stuck in siloes, and manifestly inadequate. The government also disregarded the advice it received from four former prime ministers and a score of other former officials urging that increased review and oversight of national security activities were necessary and could improve rather than detract from security.[11]

The new 2015 legislation ignored the Air India Commission's 2010 recommendations that CSIS be *obliged* to share intelligence about possible terrorism offences and that its human sources not be given a veto on whether they can be compelled to be witnesses in prosecutions, a recommendation that was echoed in a unanimous 2011 report of a Senate committee chaired by Senator Hugh Segal. In the final analysis, the 2015 "reforms" were long on rhetoric about a war against "violent jihadis" and attempts to secure partisan advantage, but woefully short on evidence and deliberation.

II. THE GOVERNMENT'S NEW TERROR LAWS

Used in relation to change, "radical" means "affecting the fundamental nature of something; far-reaching or thorough."[12] It is our contention that the government's response to the October 2014 terrorist attacks were radical in (1) changing CSIS's mandate to include illegal and *Charter*-violating disruptions; (2) reversing the judicial role from preventing violations of *Charter* rights to authorizing them; (3) going far beyond existing definitions of Canada's security interests in authorizing a massive new information sharing regime; and (4) creating a speech offence for advocacy or promotion of "terrorism offences in general" that has no defences designed to protect free speech.

The full extent of the government's radical overhaul of security laws is cumulative. Bills C-44 and C-51, along with the passport measures contained in the budget bill, Bill C-59, produced the most drastic amendments to the *CSIS Act*[13] since its creation in 1984. The government amended fifteen other laws and created three new security laws: *The Security of Canada Information Sharing Act*,[14] *The Secure Air Travel Act*,[15] and *The Prevention of Terrorist Travel Act*.[16] These new laws are difficult to read and even more difficult to understand. Even with a professional lifetime in this business, we found them mind numbingly complex and attempting to understand them to be a full-time occupation. Bill C-51 in particular was drafted in a novel and provocative manner that departed from long-standing definitions of "threats to the security of Canada" or the more *Charter*-compliant pattern of past, similar laws — such as hate speech laws, immigration security certificate provisions, and the 2001 *Anti-terrorism Act*.

The Existing Security Architecture

The new laws are difficult to understand because most of them are not free-standing; most amend existing laws with their own history and purposes. The most extensive amendments were made to the *CSIS Act*, originally enact-

ed in response to concerns about RCMP illegalities in the wake of the October Crisis. The 1984 *CSIS Act* created CSIS as a civilian and largely domestic intelligence agency that would obey the law and whose mandate was limited to intelligence collection. But in denial of this history, the new laws radically expand CSIS's role. They allow CSIS to be more muscular, breaking the law — Canadian, foreign, and international — and the *Charter* if necessary.

The new laws also changed the *Criminal Code*, an instrument that shortly after 9/11 was overhauled to create new terrorism offences and special powers such as "preventive" arrests and detention and peace bonds to restrain the actions of suspected terrorists. And the 2015 legislation amended, in a complex manner, Canada's immigration laws, which have often been used since 9/11 as a problematic form of anti-terrorism law. Also of note, the new laws established a statutory footing to facilitate no-fly lists and passport revocation without providing for adversarial challenge to the secret evidence used to justify these actions.

The new laws are also notable for what they did not do. Indeed, our sternest indictment will come in examining the government's astonishing passivity, faced with real problems that make Canadians both less secure and less free. Here, we will point to the government's inaction on recommendations made by the Arar Commission about the need for enhanced review. Additionally, we will criticize its rejection of recommendations made by the Air India Commission about both the urgent need to repair Canada's dysfunctional system of converting intelligence into evidence for criminal prosecutions and the need for enhanced oversight and co-ordination of how Canada uses its growing anti-terrorism toolkit.

Bill C-44

The first piece of legislation (Bill C-44) was slated for introduction prior to the October events. Its tabling in Parliament was delayed, and the bill was introduced a month after the attacks, on the day that wreaths were laid at the War Memorial to honour the two murdered soldiers. The bill was almost entirely designed to roll back ground lost by the government in court contests over the past several years. The government defended the legislation as common sense, and gave it the reassuring name of the *Protection of Canada from Terrorists Act*.[17]

Bill C-44 gave CSIS statutory powers to conduct intelligence investigations outside of Canada, and now permits the Federal Court to issue warrants for such conduct even when such investigations violate foreign or international law. Contrary to the Air India Commission's warning that this would compromise terrorism prosecutions, it provided that those who provided CSIS

with information on the basis of a promise of confidentiality would not have any identifying information about them disclosed in court or other proceedings, unless the innocence of the accused in a criminal trial was at stake. The new law also sped along the implementation of the 2014 *Strengthening Canadian Citizenship Act*,[18] allowing dual citizens convicted of terrorism to be deprived of Canada citizenship. The government has subsequently started to use these provisions, producing the inevitable *Charter* challenges.

Bill C-51

Bill C-44 passed unnoticed by most Canadians, and was dispensed without much serious debate or scrutiny in Parliament. In contrast, Bill C-51, the *Anti-Terrorism Act, 2015*,[19] became a lighting rod for public dispute. It was significant, complex legislation that created two new security laws to facilitate information sharing and codify the no-fly list. It also amended fifteen other laws, including the *CSIS Act* and the *Criminal Code*. In some respects, it may have been an "omnibus too far" for a government particularly fond of bundling sweeping changes into massive bills that most people (including parliamentarians) do not have the time or inclination to pick apart thoroughly. In Bill C-51's many moving parts there was bound to be something that someone did not like, regardless of political orientation.

Bill C-51 fundamentally changed the role of CSIS by giving it a new mandate to take physical — or what we called "kinetic" steps — to reduce threats to the security of Canada, so long as it thinks the measures are proportional to the risk and do not intentionally or negligently cause bodily harm, invade sexual integrity, or obstruct justice. Moreover, CSIS can now break the law and violate *Charter* rights when taking these measures, so long as they obtain a warrant from a Federal Court judge in a secret, one-sided proceeding authorizing such measures as reasonable and proportionate. The idea that judges can authorize limits on *Charter* rights — as opposed to protecting *Charter* rights — is a radical change to the role of judges, one that ignited opposition from legal academics, practising lawyers, and organizations representing the legal profession, among others.

The *Criminal Code* amendments increased the maximum period for preventive detention under pre-existing rules from three to seven days, and made it easier for the police to resort to this tool and also impose peace bonds — restraining orders — on feared terrorists. The Bill C-51 amendments also created a fifteenth terrorism offence of "knowingly promoting or advocating terrorism offences in general," while (at a minimum), being reckless as to whether someone may commit a terrorism offence. We will suggest that this

offence goes beyond existing offences in the extent to which it criminalizes speech and it is vulnerable to *Charter* challenge.

The new *Security of Canada Information Sharing Act* enacted in Bill C-51 codified a radically expansive definition of national security, now billed as activities that "undermine the security of Canada." In enacting the broadest definition of security in Canada's statute book, the government urged that its reach was mitigated because "lawful" protest, advocacy, dissent, and artistic expression were exempted. In response to arguments that much protest can be technically unlawful under Canada's many municipal, provincial, and federal laws — even while being peaceful — the government simply deleted the word "lawful," one of a very few number of amendments made in a largely fruitless parliamentary vetting of the bill. The end result is an overbroad definition of national security countered with an overbroad exemption, one that on paper guts the purpose of the new law. After all, a lot of security risks are, in fact, a form of dissent. This may seem hypertechnical, but it also constituted a picture-perfect example of how Bill C-51, in many aspects, amounted to sloppy policy making on the fly. We may never know how each government department works around this unworkable exemption because of the absence of an adequate whole-of-government independent review of the information sharing done under the banner of Bill C-51.

Bill C-51 also replaced a poorly defined law and practice relating to no-fly lists with a clearer and more transparent law — a welcome development. But the details matter, and the bill codified low evidentiary burdens on the state, increasing the potential scale and risk of false positives; that is, treating people as terrorists when they are not. And the new measure failed to incorporate past lessons about the importance of real, adversarial challenge when evidence is used to impose legal consequences on people from whom that evidence is kept secret.

Bill C-59

A quiet denouement to the Bill C-51 spectacle was the inclusion of the *Prevention of Terrorist Travel Act*[20] in the government's omnibus "Economic Action" budget bill. This new law, together with related amendments to the order governing passports, followed the approach taken to the no-fly list in Bill C-51: it made it easier to deny travel to terrorist suspects, but allowed the government to use secret evidence without authorizing an adversarial system for challenging the content of this information in court appeals.

III. OUR CONCERNS

We regard many features of these new laws as unwise, and some as unconstitutional. But in all the debate over these laws, we have never called for them to be abandoned. Our concerns revolved not around the ends, but rather, the means.

We accept the government's general objectives for legislating. ISIS is new terrorist threat, one that is somewhat different from al-Qaida. The UN Security Council has labelled the foreign terrorist fighting inspired by ISIS and others a threat to international peace.[21] We think government politicians have overstated (and probably inflated) the risk through their political rhetoric, but the government has a responsibility to protect Canadians from terrorism, and to stop Canadians from participating in terrorism in foreign lands.

We supported a 2013 law that added four new terrorism offences applicable to those who attempt to leave Canada to participate in foreign terrorist fights. We also accept that some speech related to terrorism and some material on the Internet can be criminalized — it already is and has been since 2001. Like the Arar Commission, we recognize that enhanced security information sharing is necessary and we agree with the Air India Commission that CSIS should share intelligence about possible terrorism acts and offences — in fact, we think it must share this information.

Our concerns are not with these objectives, but with how the new laws purport to achieve these important goals. The means matter; the details matter; proportionality matters. We are concerned that in their design and manner of addressing their legitimate objectives, the new laws make us less free, and will also likely fail to make us safer from real terrorist threats.

Our critique of Canada's new terror laws is not one that can easily be captured in a slogan or a catchphrase. Indeed our search for a title was one of the more difficult parts of writing this book. We are concerned that the new laws ignore the hard lessons of how Canada has both over- and underreacted to terrorism in the past, and also ignores the considerable informed advice the government has received about how to avoid these dangers in the future. We are concerned that under Bill C-51, Canada may be repeating past mistakes of institutionalized illegality in the name of security. We are also concerned that the new laws ignore warnings about dysfunctions in how Canada investigates and prosecutes terrorism. For these reasons, we think these 2015 laws make a false promise of security, even as they present a radical challenge to established rights and freedoms in a free and democratic society.

We briefly outline here themes that recur and will be developed throughout this book.

The Limits and Dangers of Disruption

As noted, Canada's radical new laws change the mandate of CSIS to include threat reduction measures capable of violating both the *Charter* and other laws. The police are also given enhanced powers to disrupt terrorists through preventive arrests and peace bonds. We will argue that these new powers of disruption are, at best, temporary and problematic solutions.

CSIS will act in secret, and its warrants (where actually required) will be obtained from the Federal Court in secret hearings that could be completely one-sided. Some might be willing to let CSIS engage in illegalities and dirty tricks if these acts were to make Canada safer. But we fear they won't — they may just disrupt other security agencies with the real power to put bad guys behind bars. As the new law itself confirms, CSIS is not a law enforcement agency that will arrest terrorists for criminal trials. Rather, the risk we spell out in this book is of sidelined or impaired police criminal investigations, as CSIS engages in perhaps endless surveillance and disruption of security threats — until its resources run out and a disrupted terrorist slips through the cracks.

Under their new Bill C-51 powers, the police must act more transparently than CSIS, but many suspected terrorism supporters have already agreed to peace bonds, in part to avoid additional adverse publicity. Peace bonds risk sacrificing the clear moral focus of criminal trials. They also risk posing a Goldilocks dilemma: too strong and perhaps counterproductive when applied to those who engage in mere threatening babble; too weak when applied to determined terrorists.

As a back-end and temporary solution to terrorist threats, CSIS and police disruptions are no substitute for efficient terrorism investigations and prosecutions leading to convictions and lengthy prison terms. They are also no substitute at the front end for multi-disciplinary and community-based programs attempting to curb radicalization to violent extremism. Indeed, to the extent that Bill C-51 sets us on the path of otherwise illegal, covert conduct by a secret security service, it risks creating communities of perpetual suspicion, surveillance, and disruption — a development that may well be counterproductive and likely to fuel the very extremism it seeks to stamp out.

Bill C-51's extreme whack-a-mole response may just produce more moles while managing to whack a lot of things that are not moles. It may also undermine what some call (often contemptuously) the "softer" side of anti-terrorism, a dimension that Canada has not seriously explored compared to other democracies, notably Australia, much of Europe, the United Kingdom, and even the United States.

"Less is More": The Distant and Dysfunctional CSIS-Police Relationship

Bill C-51's focus on disruption needs to be understood in the context of the troubled relationship between intelligence and evidence in Canadian anti-terrorism law and practice. It is first necessary to understand the imperfect CSIS-police relationship. The way this relationship has been described by insiders is summarized by the phrase "less is more." This term describes the standard information sharing arrangement from CSIS to the police.

CSIS is often the first agency investigating a threat — its mandate is broader and reaches pre-criminal conduct. When and if the matters it examines do cross the criminal boundary, Canadians might reasonably expect that CSIS will then share the full fruits of its investigations with police. This is not, however, Canadian practice. Rather than sharing full information, CSIS gives the police the bare bones — just enough to spark an independent police investigation of the matter. The "less is more" system is not about malice and jealous agencies, at least not any more. CSIS gives, and the police receive, sparse information so that CSIS may protect its sources and methods from disclosure under Canada's broad constitutional disclosure rules in criminal trials. Both CSIS and the police fear that if CSIS discloses more, prosecutions will be burdened with risky and perhaps unsuccessful attempts to keep the intelligence secret. And "less is more" is a rational, albeit bureaucratic, response to this secrecy preoccupation. It is, however, a dangerous security practice.

The government bills its "less is more" system of information sharing between CSIS and the RCMP as "One Vision."[22] We think it would be better labelled as "Blurred Vision." It is a system condemned in 2010 by the Air India inquiry, and it is one that knowledgeable security insiders consider reckless in a dynamic security environment, where Canadians might expect the state to deploy all the tools at its disposal. Bill C-51 makes no effort to cure this problem, and instead tempts CSIS to circumvent the dilemmas associated with keeping its secrets secret by charting its own course of disruption. Bill C-44 also enhances CSIS's abilities to keep secrets — in this case, the identity of any informer who the intelligence agency has promised confidentiality. CSIS is the big winner with these laws, but we fear this is occurring at the price of making terrorism trials even more infrequent and complex than they already are. This may mean that Canada will come to depend increasingly on the deeply imperfect whack-a-mole disruption strategies noted above.

Chilling Free Expression and Outreach

Another part of Bill C-51 that draws our gaze is an uncertain and broad new speech offence against advocating or promoting "terrorism offences in general." We are not free speech absolutists. As it is, our criminal law is replete with existing restrictions on speech sufficiently tied to violence or threats of violence — matters that the Supreme Court has ruled do not infringe freedom of expression.[23] But we fear that this new Bill C-51 offence is so carelessly and sweepingly drafted that it embraces all sorts of speech only very distantly linked to (and in no meaningful way correlated with) violence. We note later in this book how some of the passages we reproduce from radical (but very far from marginal) writers could run afoul of this new law, as might we for reproducing them.

All of these concerns would have been mitigated by careful wordsmithing attentive to the standards established in Canadian law and *Charter* jurisprudence, with no peril to the government's stated objectives. But the government chose a more radical and reckless course of action, one that will chill both freedom of expression, and the necessary efforts to engage with Muslim communities in an effort to counter the appeal of the brutal practices of ISIS to some Canadians. This new offence and other aspects of the new laws will be challenged under the *Charter* — most likely successfully. It is not clear how they fit into a balanced, evidence-based, and effective anti-terrorism strategy going forward. Instead, they simply constitute damaging anti-terror theatre, attractive only in a politically charged atmosphere, and make the mistake of equating radical and extreme ideas and ideology with violence.

Anti-Terror Overreach

Some of the 2015 laws concern us because they are not confined to anti-terrorism. Once limited to gathering information, CSIS now will be able to take physical or kinetic actions and violate laws and the *Charter* to reduce not only the terrorist threat, but also other threats CSIS has historically been authorized to investigate: espionage, sabotage, domestic sedition, and "foreign influenced" activities. Some of these broad concepts require no actual connection to violence, and can reach even lawful protest if carried out in conjunction with any of the investigated activities. This is exactly the sort of breadth that alarms environmental, Indigenous, diaspora, and other activists. The defenders of such overbreadth typically point to internal safeguards, a hard-pressed CSIS accountability regime, and resourcing limitations to suggest that we need not worry about overreaching formal legal powers. This is not, in our view, the appropriate approach to national security law, something

that should always be crafted to constrain the practices of its worst purveyors, not dependent on the endless good judgment of the virtuous.

The government has similarly used the October terrorist incidents and the threat presented by ISIS to justify information sharing within government about almost anything. To be sure, there are the exemptions for protest, but as we imply above, these exemptions are themselves unworkable. In any event, they will not be policed by an adequate whole-of-government accountability review system.

Despite its title, much of the *Antiterrorism Act 2015* reflects a new visioning of national security, one that depends on fear generated by terrorism to justify a march toward vaguer and broader "security" where more and more people can be defined as security risks and threats. Pursuing this sweeping and radical new concept of security will chill our democracy. It may also come with a price in the courts. The Supreme Court has been relatively deferential to anti-terrorism law because of concrete concerns about terrorism, but it should be less deferential to broader, vaguer security objectives, especially given its post-9/11 warnings against falling "prey to the rhetorical urgency of a perceived emergency or an altered security paradigm."[24]

A Large, Unfinished Reform Agenda

In 2015, the government grew its arsenal of anti-terrorism and security tools, but a bevy of tactics do not equal an anti-terror strategy. In this book, we lay out concerns that several key pieces of such a strategy are still missing and that existing pieces may not fit together in a co-ordinated manner.

The most obvious missing piece is the lack of an effective and multidisciplinary program to prevent radicalization to violent extremism. Canada appears to be inching toward a counter–violent extremism program, with the RCMP and now perhaps CSIS in the vanguard. In other countries, teachers, social workers, health care professionals, and community leaders are playing a more significant role.

A structural challenge for Canada is that coherent counter–violent extremism requires co-operation and co-ordination between federal and provincial levels of government. It is not clear to us that this is happening, as Quebec embarks on its own controversial path and other provinces seem to have demonstrated little movement. Another challenge is that the government seems not to regard "soft" or "sociological" pre-emption tools to be a priority. Indeed, such tools are sometimes treated as a form of appeasement. The government has insisted on hardnosed but short-sighted political rhetoric and actions that have strained its relations with segments of Canada's diverse Muslim communities.

Even more critically, the government has yet to demonstrate much commitment to ensuring that whatever strategy it has is subject to effective oversight and review to ensure it works properly. Here the government demonstrates a disturbing complacency in light of the security failures that allowed a terrorist so close to the seat of power. The government has insisted that existing mechanisms are more than adequate. And yet, an unedifying aspect of the Bill C-51 debate was the failure to engage this issue with attention to proper understandings or existing but unimplemented reform proposals. The term "oversight" refers to advance or real-time command and control of agencies. It is the province of the executive government, through ministers, and ultimately, the prime minister.

But in Canada, it is not clear who is in charge of the anti-terror arsenal in performing an overarching oversight function. The traditional answer has been the responsible minister. The minister of public safety already has a vast ministry but has assumed new duties under the 2015 legislation. Ministers of public safety in the past have failed to co-ordinate CSIS and the RCMP, let alone a much vaster array of anti-terrorism tools, including no-fly listings and passport revocation. The public safety department is ill-positioned to make the call on all of Canadian anti-terrorism. We will return again to one of the clear calls of the Air India Commission: someone at the centre of government — most plausibly, the prime minister's national security advisor — needs to have clear responsibilities (and not just discretionary and undefined influence) to perform a centralized anti-terror role that other democracies are finding to be necessary.

But even with enhanced oversight — that is, better command, control, and co-ordination of security agencies — the other side of the unfinished reform agendas is modernizing our antiquated and weak review system. Review, in Canadian practice, is after-the-fact auditing of agency performance. The government's repeated description during the Bill C-51 debate of Canada's existing review structure as the "envy of the world" is astonishing. For almost a decade, the government has ignored the Arar Commission's warnings that Canada's review structure was inadequate and the many candid statements by reviewers that they do not have the necessary information, powers, and resources to do their jobs properly.

IV. THE OUTLINE OF THE BOOK

Our chapters go well beyond the mostly legal analysis we prepared and posted online during the Bill C-51 debate. We include a detailed account of the history of Canadian anti-terrorism, starting with another October Crisis — the one in 1970. We mine the Air India debacle to better understand how

the new powers will affect terrorism investigations and prosecutions. We lay out more information about the evolving and serious threat of al-Qaida and ISIS-inspired terrorism, and devote a chapter to examining how Canada is lagging behind other democracies in responding to the challenge of violent extremism.

Basic Constitutional Law Terminology 101

We also do not ignore the law. Non-legal readers may wish simply to skim our more detailed constitutional law analysis. But for those who wish to join us in the legal weeds, we flag here basic terminology. We speak often of *Charter* rights, in reference to the many codified rights appearing in the *Canadian Charter of Rights and Freedoms*. Rights that figure prominently in our analysis are:

- section 2 (and especially its promise of freedom of expression);
- section 6 ("Every citizen of Canada has the right to enter, remain in and leave Canada");
- section 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"); and
- section 8 ("Everyone has the right to be secure against unreasonable search or seizure").

We also mention, from time to time, section 9's guarantee against arbitrary detention and section 15's guarantee of equality before and under the law, without discrimination.

Superimposed over these rights is the *Charter*'s section 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This clause amounts to a caveat on *Charter* rights, permitting constraints on them in limited circumstances.

Exactly what the words of these sections mean and how they apply is a matter decided, in practice, by the courts though their cases. In this book, we do not spend a great deal of time teasing out all of the nuance in this caselaw. From time to time we do, however, spell out significant legal holdings and conclusions, and also offer our views on whether the government's new laws meet the standards set out in them.

There are also occasions where we use other important legal phrases in describing the 2015 laws and their impact. To ease the reader's task in navigating these concepts, we include definitions of five recurring legal concepts in Table 1.1, appended as an annex to this chapter.

The Order of Our Chapters

Chapter 2 sets our stage. In it, we examine how Canadian history has been marred by the extremes of over- and underreacting to terrorism. We have devoted considerable effort and space to telling this history of repeated mistakes. We do so not so much for its own sake, but because we believe that it is highly relevant and was too often ignored in the Bill C-51 debate (including in our initial "real-time" analysis crafted during the debate). One pointed lesson of history is the harmful effects of state illegalities and "noble cause corruption" in the aftermath of the October Crisis. This led to the creation of CSIS, but that history is apparently only dimly remembered today. Some may be tempted to dismiss this legacy as ancient and quaint storytelling in the face of greater security threats, but we also trace a trail of CSIS post-9/11 illegalities and *Charter* violations that may help explain why someone, somewhere in government (most likely in CSIS) concluded that CSIS required the cover of warrants that purport to authorize it to violate *Charter* rights, even if this required a radical inversion of the judicial role in protecting such rights.

The other concern expressed in Chapter 2 focuses on underreaction, and specifically the continued failure to deal with the legacy of the botched Air India bombing investigation. Again, the government will claim this is ancient history. The 2010 Air India Commission did not agree, and neither do we.

Chapter 3 examines the evolving terrorist threat to which the government is responding. We begin by situating that inquiry in a broader study of national security and terrorism relating to Canada, warning about the dangers of ignoring political terrorism that is not perpetuated by Muslims. But we also note that ISIS and the challenges posed by the broader, related concept of foreign terrorist fighting were the concerns animating the politics of Bill C-51. And they run deep in the preoccupations of the security services. They deserve, therefore, especially close examination. ISIS is, in fact, a different kind of threat even from al-Qaida because it aims at mass mobilization, targets the young, has a geographic base, and has pretensions of statehood. Its challenge should not be ignored, and we trace its footprint through the data available to us.

Chapter 3 also introduces the concept of a "threat escalator," one that attempts to match different types of threats with the appropriate policy instrument. The threat escalator is particularly relevant to the ISIS threat, especially to the extent that it targets recruitment and attempts to interdict people from travelling to join ISIS or from returning to Canada. The threat escalator also analytically breaks down the broad range of "disruption" measures authorized in the new laws. Each of these policy tools is affixed with a label that then guides the name (and mostly the logical and temporal order) of the chapters that follow. We then begin to examine the new instruments

that were added to the government's anti-terrorist toolkit in 2015, in light of what is known about the past experience and current practice.

Chapter 4 examines the use of surveillance as an anti-terror tool, while Chapter 5 examines the state's swelling ability to share information, including the new *Security of Canada Information Sharing Act* enacted under Bill C-51.

We then examine an escalating series of interventions that involve restrictions of movement through interdiction (Chapter 6), including new provisions for passport denial and being placed on the no-fly list; restraining terrorist threats (Chapter 7), including easier access to peace bonds and analogues of peace bonds under immigration law; and interruption when all else fails (Chapter 8), including preventive arrest. In Chapter 8, we also closely scrutinize the new CSIS "threat reduction" powers and query how and if they can be constitutionally deployed as an effective tool in our anti-terror strategy.

We question, in particular, whether these new CSIS tools may undermine prosecutions, the core criminal law device that we explore in considerable detail in Chapter 9. In that chapter we review statistical data on Canada's prosecution record and point to the structural aspects of our law and "less is more" practice of CSIS-police co-operation that make prosecutions less effective as an anti-terror tool — a problem we fear Bill C-51 will acerbate.

In Chapter 10, we look at a criminal law that has gone too far: Bill C-51's new speech offence, which is also coupled with new powers that allow "terrorist propaganda" to be deleted from the Internet. We predict that prosecutions for violating the new speech offence and related deletion orders will be rare, but that they will still have counter-productive effects both for free expression and for outreach involving Muslim communities (or any other in the speech crime's obvious crosshairs) in counter–violent extremism programs.

We have been critical of the new laws since they were introduced, but we have always intended to be constructive. In the last three chapters, we make concrete suggestions on how to improve Canadian anti-terrorism law and policy. In doing so, we draw extensively on existing research and reform proposals.

In Chapter 11, we suggest that better oversight of security activities within government is essential and that much of the Bill C-51 debate misconceived this critical issue. In this chapter, we stress that someone needs to be in charge of the growing anti-terrorist toolkit to avoid the type of inadequate and siloed response that characterized the Air India bombing investigation, and may also have allowed an armed terrorist to enter the Parliament buildings on 22 October 2014.

The better understood topic of "review" is discussed in Chapter 12 in terms of the role of parliamentary committees, independent executive watchdog reviewers, and the courts. Review is conceptually distinct from oversight because it only produces retrospective findings and recommendations and does not intrude into command, control, and co-ordination. That said, both processes are challenged by the reality of increasingly integrated whole-of-government security responses and both can contribute to more effective and balanced security responses in the future.

Finally, in Chapter 13, we examine a key tool that we think is underdeveloped in Canada's growing anti-terrorist toolkit: multi-disciplinary and community-based programs designed to dissuade people from being radicalized to violent extremism. We lay out many of the challenges that stand in the way of such an approach. Some, such as the constitutional division of powers between federal and provincial governments, cannot be changed; others, such as messaging and outreach to affected communities, can be.

In our conclusion, we suggest that Canada cannot rely on its new and problematic terror laws to accomplish the difficult task of responding to the new ISIS threat, or indeed, most other terrorist concerns. We lay out a specific action plan for Canada to improve its security game and to stop falling behind responses in other democracies. We think such a plan can better prevent terrorism while avoiding some of excesses and possible *Charter* violations in the 2015 laws.

Despite the two terrorist attacks in 2014, Canada has been comparatively lucky since the 1985 Air India attacks. We cannot continue to rely on that luck. We need a new approach, one that rejects the radicalism of the 2015 laws, learns from past mistakes, and ultimately, makes Canada both more secure and more free.

Table 1.1: Legal Concepts

Concept	Legal Meaning
"Believe on reasonable grounds"	Sometimes called "reasonable and probable grounds" in the constitutional caselaw, this standard of proof is much lower than the criminal trial standard of "beyond a reasonable doubt." Instead, it is defined as a "credibly-based probability" or "reasonable probability." *R v Debot*, [1989] 2 SCR 1140. In the administrative law context, courts have described it as a bona fide belief of a serious possibility, based on credible evidence. *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA).
"Suspects on reasonable grounds"	A lower standard that "believe on reasonable grounds," "suspects on reasonable grounds" is a suspicion based on objectively articulable grounds that may be lower in quantity or content than the requirement of reasonable belief, but must be more than a subjective hunch. *R v Kang-Brown*, 2008 SCC 18. Put another way, "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime." *R v Chehil*, 2013 SCC 49 at para 27.
"Terrorist activity"	A defined concept found in s 83.01 of the *Criminal Code* and which includes listed acts — such as several terrorist crimes (e.g., hostage taking) — but also has a more open-ended definition: enumerated physical acts, usually of violence, committed "in whole or in part for a political, religious or ideological purpose, objective or cause," for the purpose of "intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada." Also includes a conspiracy; attempt or threatening to do one of these acts; or counselling or inciting such an act.

Concept	Legal Meaning
"Terrorist group"	A defined concept found in s 83.01 of the *Criminal Code* and which means "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity" *or* an entity listed by the government under s 83.05 because there are reasonable grounds to believe that "the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity" (or acted in association with an entity that has done these things).
"Terrorism offence"	A defined concept found in s 2 of the *Criminal Code* and which means one of the special terrorist crimes such as facilitation, participation, terrorist travel, or terrorism financing. It also includes any "indictable" (generally, serious) offence committed "for the benefit of, at the direction of or in association with a terrorist group." It also includes indictable offences "where the act or omission constituting the offence also constitutes a terrorist activity." Finally, it includes "a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to" any of these things.

Forcese, Craig & Kent Roach. False Security: The Radicalization of Canadian Anti-terrorism. (Toronto: Irwin Law, 2015).