Speaking Notes of Clayton Ruby

I am a lawyer who has spent many years fighting the government so you might not be surprised that the independence of the bar is a principle I hold close to my heart. That said, independence is not a given, it's not present in many countries around the world and it is not something any lawyer in Canada can take for granted.

This is never more clear than when law interacts with national security.

After 9/11 happened most of North America was scared. I was terrified. My daughter was going to school outside of New York City, my partner's sister lived blocks from the World Trade Center, even knowing someone who got on a commercial flight could make you nervous.

That fear made us stupid. We wanted to know that more was being done to protect us and so we allowed our government to pass legislation that threatened the basic civil rights of Canadians. At the time, it was sold as a trade-off – security in exchange for a little less opportunity to agitate for environmental causes, religious organizations, travel by air freely, talk privately by phone, use the internet without concern.

But some Canadians lost everything in that trade-off.

This was no small feat. Thousands – including a large number of white, rich Americans (people who looked like you and me) were dead and a few lawyers were attempting to undermine the legislation that was in place to prevent more deaths at the hands of some truly awful people. It took real courage to challenge this terrorism legislation, but it also took the freedom to act.

A little history:

- On December 18, 2001, Parliament integrated the Anti-Terrorism Act (a combination of Bills C-36 and C-42) into the Criminal Code (it also made changes to the Official Secrets Act, the Canada Evidence Act and the National Defence Act). Debate about the measure was curtailed and many clauses limiting civil liberties were included in the legislation.
- As passed, this legislation
    - gave the police wide, sweeping powers to act on suspected acts of terrorism.
    - allowed suspected terrorists to be detained without charge for up to three days.
    - made it easier for the police to use electronic surveillance, which used to be seen as a last resort.
    - allowed for preventive arrests.
    - allowed judges to compel witnesses to give evidence during an investigation.
    - This one most important - allowed for the designation of a group as a terrorist organization if that organization committed "an act or omission, in or outside Canada,… in whole or in part for a political, religious or ideological purpose, objective or cause, and in whole or in part with the intention 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, and that intentionally causes death or serious bodily harm to a person by the use of violence, endangers a person's life, causes a serious risk to the health or safety of the public or any segment of the public, causes substantial property damage, whether to public or private property, if causing such damage is likely to result in

the conduct or harm referred to in any of clauses (A) to (C), or causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission…"

- The language here applies to some of the people I represent – good people – like environmental organizations or animal rights organizations.
- The ATA was a step backwards. It reinstituted powers not seen in Canada since the use of the War Measures Act in 1970. This legislation presented, and still presents, serious threats to civil liberties.
- The ATA came with a sunset clause for its most restrictive measures – after 5 years the legislation would become inactive. This made sense because the theory behind the civil liberties restrictions was that it was necessary in a time of crisis and crisis don't usually last more than five years. Then they become full blown systemic problems and we need more permanent solutions
- The Senate reviewed the ATA in December of 2004 and the House in February 2005. Out of that extensive review we got two bills.
- The first, Bill C-3, altered the amendments to the Immigration Act pursuant to the ATA so that a special advocate would be appointed for those persons named in a security certificate. This was in response to a Supreme Court ruling that I'll discuss in a minute. But the point to remember is that the Court forced the government to make this change.

- The second bill, Bill S-3, basically extended the 5 year sunset clause in the original ATA another 5 years. Cowardice.

We shouldn't be surprised with the actions of our government here. Once power is taken, it's really hard for lawmakers to voluntarily give those powers up. We have to make them give them up. Sometimes this happens through public agitation, and I am always a fan of a good protest, but equally it can happen through litigation. Best….both together.

- In 2001 and early 2002 there was some "anti-terrorist" activity. Much of it, we now know from the Arar inquiry and other high profile cases, was and may still be secret. We know that Liban Hussein, a Somali native and Canadian citizen, was falsely accused of terrorist activity and arrested by Canada at the request of the United States. He was later cleared but not before he lost both of his businesses – effectively wiping out his livelihood.
- We know that Mohammed Mansour Jabarah was handed over to American authorities after only a few days of questioning by CSIS despite being a Canadian citizen.
- We know that Maher Arar and Abdullah Amalki were handed to Syrian officials and tortured. Some of the questions both men were asked during the torture were likely provided by CSIS.
- These cases have not yet been the source of much successful litigation. But other cases provided opportunities to curtail the powers taken by our government after 9/11.

Suresh (2002) (SCC)

- Suresh was a Convention refugee from Sri Lanka who has applied for landed immigrant status. In 1995, the Canadian government detained him and commenced deportation proceedings on security grounds, based on the opinion of the Canadian Security

Intelligence Service that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka, and whose members are also subject to torture in Sri Lanka.

- Federal Court, Trial Division upheld as reasonable the deportation certificate under s. 40.1 of the *Immigration Act*. Suresh applied for judicial review, alleging that: (1) the Minister's decision was unreasonable; (2) the procedures under the Act were unfair; and (3) the Act infringed ss. 7, 2(*b*) and 2(*d*) of the *Canadian Charter of Rights and Freedoms.* The application for judicial review was dismissed on all grounds. The Federal Court of Appeal upheld that decision.
- Suresh argued that the terms "danger to the security of Canada" and "terrorism" were unconstitutionally vague. He also argued that the possibility that one might be deported to face torture in another country under the Immigration Act rendered that part of the Act unconstitutional
- The Court agreed with Suresh that deportation to torture violated S. 7 of the Charter and this was a big win.
- But the big win against the ATA was the court's adoption of a new definition of terrorism. It found, ""[F]ollowing the International Convention for the Suppression of the Financing of Terrorism, that "terrorism" in s. 19 of the Act includes any 'act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.' This definition catches

the essence of what the world understands by 'terrorism.' Particular cases on the fringes of terrorist activity will inevitably provoke disagreement."

- This narrows the definition of terrorism from the ATA. It also removes the requirement that there be proof of political or religious motive. Most importantly, activists who oppose the seal hunt who dismantle a boat or cause property damage, for example, aren't terrorists under this definition.

Khawaja

- Momin Khawaja was the second Canadian convicted under the ATA (interestingly, he was the first one charged under the ATA). Five associates of Khawaja, including bomb-plot ringleader Omar Khyam, were sentenced to prison in 2007 after being convicted in London of a foiled plot to target a nightclub, a construction firm, and gas, water and power utilities. Kwahaja was convicted of building the remote control device used.
- This case was significant because it was the first case where the person charged did not necessarily have full knowledge or details of the terrorist plot. This guy was the geek squad (granted, the device he built was likely used only for detonating bombs) and did not have knowledge of the details of the British bomb plot.
- Justice Rutherford, in Khawaja's case as a constitutional remedy called for the express deletion of the religious or political motivation requirement in ATA's definition of terrorism. But the offense was left standing. A "remedy" that is no remedy at all permits imprisonment and conviction on narrower grounds and relieves the Crown of an obligation. It does nothing for freedom.

Toronto Star v. Canada 2007 Federal Court

- In September 2004, Kassim Mohamed sued the Attorney General of Canada for damages and other relief, alleging that both the Royal Canadian Mounted Police and the Canadian Security Intelligence Service disclosed his personal information to foreign security agencies which resulted in his two-week detention by Egyptian authorities.
- During the discovery process in the civil action, the Attorney General of Canada invoked provisions that required an automatic publication ban or "confidentiality" for all information under the section involving "potentially injurious information" or "sensitive information" as defined in section 38 of the Canada Evidence Act. This is an ATA addition to the Evidence Act.
- In this case the Federal Court struck down the parts of s. 38 of the Canada Evidence Act that required all such applications for secrecy to be conducted in secrecy.
- What's important about this case is that it's not always the "terrorists" who lose freedoms during times of fear. The public loses as well. Secrecy provides government with the impunity to violate rights without criticism. Our media (another body of professionals who value their independence from government) are put in a position where they can fulfill their democratic role. But: see Editorial, Globe & Mail, February 23, 2009. We've learned nothing

None of these cases are big wins. There are few big wins in the legal business and especially few when the stakes are high. You have probably heard of a number of other cases like these, Charkaoui, for example, that successfully challenged the security certificate provisions in the Immigration and Refugee Protection Act. Also the Supreme Court case Re Section 83.28 which held that compelled evidence could not be used against the witness, not only in subsequent

criminal proceedings, but also in extradition and immigration hearings. But the lack of big successes does not mean that the challenges, themselves, are not crucial. Cf – South Africa during apartheid.

The independence of the bar enables people like me, and hopefully people like you, to "kick up a fuss". We learn to be advocates so that judges, no matter how much they may hate to do it, are forced to limit the powers of government over the freedoms of the people. Even when we fail to convince those judges – and I fail at that all the time - our challenge brings attention to the problem and reminds those in power that they are values that do not shift and change with the political brilliance of the government of day, and that lawyers as a profession cherish that as part of their immutable identify.