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Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril

Stanley A. Cohen (Markham: LexisNexis Butterworths, 2005) 584 pp.

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It is now trite to say that the events of September 11, 2001 have had a profound impact on our national security, in terms of its institutional and normative dimensions, and also in terms of a more general public anxiety. The hastily enacted *Anti-terrorism Act*¹ of 2001 brought about significant changes to a wide range of statutes including, among others, the *Criminal Code*,² the *Official Secrets Act*,³ the *Canada Evidence Act*,⁴ and the *Proceeds of Crime (Money Laundering) Act*.⁵ An early conference and resultant book on the *Anti-terrorism Act* raised serious concerns about the potential impact of the changes on civil liberties.⁶ However, for the most part civil libertarian concerns were diluted by more widespread fears for personal and national security, and perhaps also by the sense that law abiding citizens would not, in any event, be affected. Several high profile cases⁷ and the Maher Arar Inquiry and Report⁸ have since drawn attention to both the civil liberties concerns, and the potential impact on ordinary citizens of intelligence-gathering and intelligence-sharing activities. In this context, Stanley Cohen's detailed and comprehensive book examining the privacy and security regime in Canada makes a very important contribution to the literature in this area. It lays a thoughtful and balanced foundation for ongoing debate over issues at the intersection of privacy, crime, and terror.

Stanley Cohen, a former law professor at McGill, is now Senior General Counsel in the Human Rights Law Section of the Department of Justice in Ottawa. His varied career, which includes working for the Law Reform Commission of Canada, and serving as secretary to the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, has allowed him to garner experience in the areas of civil liberties, criminal justice, and national security policy. Cohen's academic and practical experience shines through in this book. The text is comprehensive, detailed, and well structured. It con-

siders and evaluates relevant laws, policies, and cases, and offers insights into pragmatic realities of the operation of government bodies, as well as seasoned assessments of likely trends and developments.

While there have been many books written about the separate topics of privacy law, criminal law, and national security in Canada, Cohen's contribution in *Privacy, Crime and Terror*⁹ is unique and important. Cohen provides a comparative analysis of privacy issues in both the criminal law and national security contexts. In doing so, he is sensitive to the differences between the two contexts, and he explores the relevant institutional and administrative relationships between national security and law enforcement. The result is a rich consideration of key issues of citizen privacy *vis à vis* the state.

The book begins with a discussion of privacy — what it is, how it is protected under the *Canadian Charter of Rights and Freedoms* (Charter),¹⁰ and how privacy rights have been recognized and protected in the criminal law context. Cohen then goes on to discuss the relationship between crime and terror. In particular, he contrasts the differing needs of law enforcement and national security. While criminal law has, for the most part, been developed to respond to anti-social behaviour once it has occurred, national security requires that certain behaviour be anticipated and prevented from occurring. Cohen warns that “it is vitally important that a bright line be maintained between national security intelligence gathering activities and ordinary criminal investigation”.¹¹ Yet he expresses concern that the line is increasingly blurred. Where the focus of investigations becomes the prevention of crime, Cohen asks “to what extent society, in the name of the suppression of crime, should sanction the use and growth of extraordinary before-the-fact, preventive police powers”.¹² He argues that a strong separation between national security and

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policing functions allows for the development of safeguards and remedies appropriate to each context and prevents the “manipulation and abuse of lawful processes”¹³ through the blending of rules and practices from both contexts.

Cohen gives detailed consideration to the federal *Privacy Act*,¹⁴ which sets the boundaries for federal government collection, use, and disclosure of the personal information of individuals. He gives particular attention to the relationship of the *Privacy Act* to law enforcement agencies, and the manner in which the Act governs information-sharing between departments and agencies of government. He notes with concern that “[t]he emerging approach to information sharing initiatives in the wake of 9/11 and the *Anti-terrorism Act* (ATA) seems to run counter to the traditional attitude of restraint”.¹⁵ Cohen is sensitive to the pragmatic considerations of efficiency and public accountability, which favour information-sharing, yet he raises significant concerns about the impact of such practices on individual privacy. His chapter on the *Privacy Act* provides a detailed examination of the law surrounding access by law enforcement and other investigators to personal information in the hands of federal departments and agencies.

Cohen next dedicates a chapter to exploring terrorism and national security. He considers the nature of each phenomenon, and provides insight into the operation of Canada’s national security establishment and how its operations have changed since 9/11. In this chapter, Cohen considers the delicate balance to be struck between civil liberties and national security. He is critical of militaristic metaphors such as “the war on terror”, and offers some cautions against overreactions to concerns about terrorism. He notes: “the intertwined history of Canada and the United States can be said, at too many junctures, to have shown a tendency toward overreaction to perceived threats to national security and the trampling of human or civil rights.”¹⁶ He also states that an important lesson from our history is that “embracing authoritarian measures too ardently can ultimately damage the fabric of the very society we wish to preserve”.¹⁷ Yet, while Cohen cautions against an overreaction that would lead to the contraction of civil liberties, his overall critique of the *Anti-terrorism Act* is quite measured. He is sensitive to Canada’s national security needs and objectives, and he takes a pragmatic approach to assessing the operational realities of government agencies and the national security infrastructure. Cohen is clear about the need to strike an appropriate balance; his sense of this balance is deeply influenced by his practical experience.

Cohen’s next chapter examines the relationship between national security legislation and privacy. He gives detailed consideration to issues of criminal procedure under the *Anti-terrorism Act*. He examines various tools of surveillance and investigation provided under the provisions of the Act including ministerial authoriza-

tions, preventive arrests, and the listing process under the money laundering provisions. He considers the new scope given by the *Anti-terrorism Act* to practices such as DNA sampling, criminal profiling, and biometric identity technology. He also offers an interesting discussion of the involvement of the Canadian Bar Association on behalf of Canadian lawyers who raised significant concerns about the impact of these provisions on their professional obligations towards their clients. Cohen’s analysis throughout is based on a detailed consideration of relevant case law. He offers his reasoned views on the constitutionality of various provisions of the *Anti-terrorism Act*.

The relationship of secrecy to national security is the topic of another chapter. Cohen considers the role of openness in government in a democracy (he describes it as the “oxygen sustaining democratic life”),¹⁸ and examines the legality of various measures to preserve secrecy and to limit government openness under the aegis of national security. Although official secrecy is not directly related to individual privacy, Cohen equates it to a privacy interest belonging to the state. Yet the state interest in secrecy has a bearing on individual privacy concerns to the extent that the ability to access information about oneself that is held by the state is at issue. In this chapter, Cohen considers case law in relation to the state’s right to deny access to personal information under the *Privacy Act*,¹⁹ and new provisions under the *Canada Evidence Act* regarding disclosure to those facing proceedings with national security dimensions. He also assesses the significant reforms to the *Security of Information Act*.²⁰

A very significant portion of the chapter on secrecy is given over to a consideration of the controversial security certificate process under the *Immigration and Refugee Protection Act*.²¹ Cohen notes that although the security certificate process is not new, recent cases have received a great deal of media attention. Cohen offers a thoughtful assessment of the Charter issues raised by the security certificate process. His consideration incorporates comparative perspectives. Cohen examines the judicial²² and legislative²³ responses to similar issues that arose in the United Kingdom in a notably different context — that of the indefinite detention of suspected terrorists. Cohen considers the possibility that a version of the security certificate process might be crafted to permit indefinite detention outside the immigration context in Canada. Within the immigration context, the scheme has largely withstood Charter challenges.²⁴ However, outside of that context Cohen opines that the Charter might have a dramatically different impact. For such a scheme to be justifiable, it would be necessary for the government to establish that “there is sufficient legislative restraint inherent in the scheme”.²⁵

Cohen also addresses the practice of information-sharing for national security purposes. Consistent with the structure of earlier chapters, he begins first by laying the groundwork for understanding how information-

sharing currently takes place in practice, both domestically and internationally. He considers the legal underpinnings of such information-sharing practices, ranging from statutes to multilateral assistance treaties (MLATs). He also discusses information-sharing practices between law enforcement agencies and the national security establishment. For Cohen, the main privacy concerns raised by these practices relate to the right under section 8 of the Charter to be free from unreasonable search and seizure, and the rights under the *Privacy Act* in relation to information held by government. He provides a detailed examination of the case law in relation to these issues.

Cohen notes that since 9/11, “the interest in and appetite for improved and enhanced transnational and international sharing of intelligence related to terrorism and national security has grown enormously”.²⁶ Cohen observes that there has been a proliferation of entities given a role in protecting Canada’s national security. He describes this modern intelligence community as including such departments as “Health Canada, the Canadian Food Inspection Agency, Fisheries and Oceans (DFO), the Canadian Nuclear Safety Commission (CNSC) and Canada’s new anti-money laundering and terrorist financing agency FINTRAC”.²⁷ In spite of this proliferation of players, Cohen provides examples of recent and substantial criticisms of Canada’s national security infrastructure, including an assessment by the Auditor General decrying the government’s failure “to achieve improvements in the ability of security information systems to communicate with each other”.²⁸

At the international level, Cohen describes a “murky world of transnational national security-related information sharing practices”.²⁹ Murky or not, Cohen provides an assessment of the existing legal basis for international information-sharing. Although his book predates the final report of the Maher Arar Inquiry, Cohen identifies that Inquiry as having the potential to shed some light on Canada’s international information-sharing practices. Indeed, in the final report of the Commission of Inquiry, Justice Dennis O’Connor stated:

... sharing information from investigations in Canada with other countries can have a “ripple effect” beyond Canada’s borders, with consequences that may not be controllable from within Canada. . . . Once a person or information moves outside of Canada, it becomes difficult to ensure treatment of that person or information in accordance with Canadian constitutional rights and values.³⁰

Cohen also addresses the issue of information-sharing between national security and law enforcement agencies. While accepting that such practices are often important and desirable, he warns against dismantling the wall that has traditionally existed between law enforcement and national security activities. Cohen pursues an important theme in his book: the need to recognize the essential difference between law enforcement and national security contexts. He warns that when discussing information-sharing between law enforcement

and national security agencies, “it is not too strong to suggest that the quality of life in a democratic society can be contingent upon the striking of an appropriate balance here”.³¹

Cohen devotes two chapters of his book to privacy issues related to burgeoning information technologies. In Chapter 9, he considers the creation and use of massive government databases, and in Chapter 10 he examines computer monitoring, Internet surveillance, and lawful access. Cohen observes that the rise of computing technology has not only provided new tools for aggregating, mining, and matching data, it generates new data in the form of electronic data trails and electronic communications. As well, he notes that while individual pieces of data may have relatively little privacy impact, the aggregation of a large volume of little pieces about individuals can have a significant impact on privacy.

Cohen provides a thoughtful analysis of the decision in *Smith v. Canada*,³² in which an employment insurance claimant challenged an initiative that matched her claimant status against travel records held by Canada Customs. The data-matching initiative was designed to catch claimants who received EI benefits while absent from Canada contrary to the *Unemployment Insurance Act*.³³ He also examines the notorious, and since discontinued, Total Information Awareness (TIA) data-mining program initiated in the United States following 9/11. TIA involved the collection and compiling of a huge volume of data on individual citizens, which could then be searched using computer algorithms to detect suspicious patterns of activity. While the example from *Smith v. Canada* and the TIA program are, in many ways, on the opposite ends of a continuum in terms of the potential impact on privacy, they are nonetheless on the same continuum. Cohen notes that although Canada has no equivalent to TIA, it does have numerous databases maintained through various departments, agencies, or services, which are for law enforcement purposes.³⁴ Cohen recommends the development of more effective database regulation, including not just normative controls over information collection, use, and disclosure, but also technical safeguards and design considerations.

In considering the integration and interoperability of government databases for law enforcement purposes, Cohen is sensitive to a history of failures that highlight the “systemic weaknesses and the inability of different law enforcement agencies to pool their information and cooperate effectively”.³⁵ In this light, he considers the Integrated Justice Information Initiative set in motion in the late 1990s. Cohen gives a detailed consideration of this Initiative and its progeny, the Canada Public Safety Information Network, and the National Criminal Justice Index. He discusses the privacy concerns raised by such initiatives, arguing that notwithstanding the public benefits to be achieved by such programs, “pure efficiency cannot be the goal in a society that stresses respect for individual autonomy and democratic values”.³⁶ Using

the example of the proposed Canada Revenue Agency (formerly the Canada Customs and Revenue Agency) Airline Passenger Database and Advance Passenger Information/Passenger Name Record (API/PNR) system, he explores the privacy and constitutional issues raised by such complex shared database initiatives. He writes:

The threat to privacy generated by the CCRA's proposed database is exacerbated by its constitution in digital form and by the concomitant ability to conduct automated algorithmic searches that may generate "hits" based on suspicious information profiles.³⁷

Cohen notes that there has been a great deal of activity in Canada in recent years in the development of computerized databases, and with movements towards their integration and interoperability. He warns that "in at least some circumstances, the policy and legal implications of these efforts do not seem to have been adequately examined".³⁸

Cohen's tenth chapter, which addresses computer monitoring, Internet surveillance, and lawful access, provides the same overview of the state of development of the technology and of government initiatives, combined with a thoughtful analysis of the privacy implications that must be considered. He notes that while the Internet has become a powerful tool of communication, it is also a tool of surveillance. In his words,

Across the globe, new laws and policies are evidence of the hunger for new surveillance technologies. These are the technologies in which governments are investing in the hope that they will prevent and deter terrorist ambitions or more effectively wage war on crime.³⁹

Cohen places computer monitoring at the forefront of these developments, which also include the use of a range of other high-tech devices for monitoring and tracking individual activity.

Cohen's chapter on computer monitoring and Internet surveillance is as broad-ranging as the technologies and techniques he discusses. He considers a wide spectrum of activity, from the interception of e-mail communications, to workplace computer monitoring, and security sweeps by employers. Although many of the issues he discusses are activities located in the private (non-governmental) sphere, he links them to the broader issues of state activity because of the growing tendency of such information to be provided to, and relied upon, by law enforcement agencies. In this vein, he also considers the thorny issue of the role of the Internet Service Provider (ISP). He considers the controversial Lawful Access Initiative, which would have required ISPs to collect and retain certain customer data in case it was sought by law

enforcement agents under a court order. Cohen gives thoughtful consideration to the privacy implications of lawful access, and offers both public and police perspectives on the issues.

Cohen's concluding chapter is titled "Liberty, Security and Privacy", and indeed this title identifies the three themes which he has woven throughout his text. Cohen sees our society as balancing on the horns of a dilemma: how to reconcile liberty and privacy with national security. For Cohen it is not an either/or situation. He recognizes the need to give attention to national security concerns, while at the same time urges care to ensure that the values of a free and democratic society are not sacrificed. He would place an "impressive burden"⁴⁰ on the state to justify any restrictions on civil liberties, and he argues that "the more deleterious the effect of a given measure is, the more important the national security objective must be shown to be".⁴¹ In Cohen's view, privacy in Canada has been considerably eroded. While he is open to the possibility that some erosion may be justifiable in the face of national security considerations, he is critical of government for failing to provide such justifications. He argues that "such accounts are few in number and sporadic, and developments in this field have been largely ad hoc and uncoordinated".⁴² Cohen argues in forceful terms for open, accountable institutions, combined with judicial and parliamentary oversight.

Privacy, Crime and Terror is a very important book. It brings together a wide range of issues pertaining to individual privacy at the hands of the state, and to law enforcement and national security initiatives. It is well-researched, well-reasoned, and thoroughly documented. The book is of an impressive scope, yet even more impressive is the careful and reasoned manner in which Stanley Cohen organizes, analyzes, and presents the material. This is a book that will be of interest and importance to lawyers, academics in a range of disciplines, students, and to citizens who seek some insight into the increasingly complex activities of government that impact on personal privacy. Cohen makes it clear that, in his view, as a society we have arrived at a crossroads: there are choices that have yet to be made that will have a very significant impact on our privacy, liberty, and security. *Privacy, Crime and Terror* offers a sobering look at this crossroads. Cohen's work offers an impressive body of information and analysis to help guide those choices.

Notes:

¹ S.C. 2001, c. 41.

² R.S.C. 1985, c. C-46.

³ R.S.C. 1985, c. O-5, as amended by S.C. 2001, c. 41, s. 25 (Retitled the *Security of Information Act*).

⁴ R.S.C. 1985, c. C-5.

⁵ S.C. 2000, c. 17, as amended by S.C. 2001, c. 41, s. 48 (Retitled the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*).

⁶ 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).

- ⁷ *Application under section 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248; *R. v. Khawaja*, [2006] O.J. No. 4245 (Ont. Sup. Ct. J.); *O'Neill v. Canada (Attorney-General)*, [2006] O.J. No. 4189 (Ont. Sup. Ct. J.).
- ⁸ *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Queen's Printer, 2006), Online: Arar Commission <http://www.ararcommission.ca/eng/AR_English.pdf>.
- ⁹ Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (Markham: LexisNexis Butterworths, 2005).
- ¹⁰ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11 [Charter].
- ¹¹ Cohen, *supra* note 9 at 54.
- ¹² *Ibid.* at 60.
- ¹³ *Ibid.* at 89.
- ¹⁴ R.S.C. 1985, c. P-21.
- ¹⁵ Cohen, *supra* note 9 at 103.
- ¹⁶ *Ibid.* at 193.
- ¹⁷ *Ibid.* at 193-194.
- ¹⁸ *Ibid.* at 289.
- ¹⁹ *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3.
- ²⁰ *Supra*, note 3 (formerly titled the *Official Secrets Act*).
- ²¹ S.C. 2001, c. 27.
- ²² *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56. In this case, the House of Lords ruled that it was discriminatory, under the European Convention on Human Rights, to provide for the indefinite detention of foreign nationals suspected of terrorist activity when the same form of detention was not provided for U.K. nationals.
- ²³ *Prevention of Terrorism Act 2005 (U.K.)*, 2005, c. 2. This statute repealed the provisions that were found by the House of Lords to violate the European Convention. Instead, it provided for a system of "control orders" applicable to all suspected terrorists regardless of nationality.
- ²⁴ *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421, 247 D.L.R. (4th) 405.
- ²⁵ Cohen, *supra* note 9 at 351.
- ²⁶ *Ibid.* at 371.
- ²⁷ *Ibid.* at 375.
- ²⁸ Office of the Auditor General of Canada, *2004 Report of the Auditor General of Canada: Chapter 3: National Security in Canada — The 2001 Anti-Terrorism Initiative* (Ottawa: Minister of Public Works and Government Services, 2004) at 1-2.
- ²⁹ Cohen, *supra* note 9 at 389.
- ³⁰ Arar Inquiry, *supra* note 8 at 431.
- ³¹ Cohen, *supra* note 9 at 397.
- ³² [2001] 3 S.C.R. 902.
- ³³ R.S.C. 1985, c. U-1, as rep. by S.C. 1996, c. 23, s. 155.
- ³⁴ Examples include the Canadian Police Information Centre, the DNA Convicted Offender Databank & DNA Crime Scene Index, the Canadian Firearms Information System, FINTRAC, the Offender Reintegration Management System, the Integrated Police Information Reporting System, the Pardon Application Decision System, the Integrated Customs Enforcement System, the Global Case Management System, the Sexual Offender Information Registry, the Automated Fingerprint Identification System, the Violent Crime Linkage Analysis System, and the Field Operations System.
- ³⁵ Cohen, *supra* note 9 at 440.
- ³⁶ *Ibid.* at 452.
- ³⁷ Cohen, *supra* note 9 at 466.
- ³⁸ *Ibid.* at 479.
- ³⁹ *Ibid.* at 488.
- ⁴⁰ *Ibid.* at 555.
- ⁴¹ *Ibid.*
- ⁴² *Ibid.* at 556.